

**BAD FAITH IN CYBERSPACE: GROUNDING DOMAIN NAME
THEORY IN TRADEMARK, PROPERTY, AND RESTITUTION**

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I. INTRODUCTION

Think back, if you can, to the early days of the new frontier — not the Western frontier, but the virtual frontier. Like the Western frontier, the early Internet was largely barren space awaiting cultivation. Virtual prospectors never knew if they would strike it rich or die trying. However, some clever prospectors managed to secure some-

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thing that their real-world counterparts never imagined possible — a guarantee of striking gold if they moved quickly. Enter the cybersquatter.

In the early- to mid-1990s, a handful of tech-savvy virtual prospectors realized the value of trademarks in the online domain space long before many mark holders did. These prospectors registered multiple domain names corresponding with trademarks very inexpensively.¹ They offered to sell them back to the trademark holders for a handsome profit.² Today, this practice is old news and infrequent in practice. Quick to react to the cybersquatting threat, judges held early cybersquatters liable for trademark infringement and dilution.³ The United States Congress soon followed with the Anti-Cybersquatting Consumer Protection Act⁴ (“ACPA”), while the Internet Corporation for Assigned Names and Numbers⁵ (“ICANN”) adopted the Uniform Domain Name Dispute Resolution Policy⁶ (“UDRP”). These measures more than met the challenges posed by cybersquatting.

However, the application of these rules left a confused pastiche of domain name policy in its wake. Since the rules were narrowly targeted to protect trademarks against cybersquatting, they did not provide a coherent theoretical basis for domain name regulation that might apply more generally. Part of the reason for the narrowness in focus relates to the question of who, if anyone, has constitutional power to make general policy for the domain space. While ICANN administers the technical side of the domain name system, its bylaws limit its policy-making role to “policy development reasonably and

1. See, e.g., *Cybersquatters: Invading Big Names' Domains*, CNN.COM, Sept. 25, 2000, <http://archives.cnn.com/2000/TECH/computing/09/06/internet.domains/index.html>; Dennis Toeppen's Home Page, <http://www.toeppen.com/> (last visited May 8, 2010) (describing the early cybersquatting of the famous cybersquatter).

2. DAVID KESMODEL, *THE DOMAIN GAME: HOW PEOPLE GET RICH FROM INTERNET DOMAIN NAMES* 20 (2008) (“The classic tactic was to register a domain, do nothing with it (create no Web site), wait to hear from the trademark holder, and then offer to sell it for a high price. The practice came to be known as cybersquatting.”).

3. *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1327 (9th Cir. 1998) (finding cybersquatter liable for trademark dilution); *Planned Parenthood Fed'n of Am. Inc. v. Bucci*, 42 U.S.P.Q.2d 1430, 1433–41 (S.D.N.Y. 1997) (finding infringement and dilution liability of registrant atypical cybersquatting case where there was no sale motive on the part of the registrant).

4. Pub. L. No. 106-113, 113 Stat. 1536 (codified at 15 U.S.C. § 1125(d) (2006)).

5. MILTON MUELLER, *RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE* 3 (2004) (describing the development of ICANN as the body to administer the domain name system); Christine Haight Farley, *Convergence and Incongruence: Trademark Law and ICANN's Introduction of New Generic Top-Level Domains*, 25 J. MARSHALL J. COMPUTER & INFO. L. 625, 626 (2008) (“The Internet Corporation for Assigned Names and Numbers or ICANN, is the body that governs the Internet's infrastructure.”); Internet Corp. for Assigned Names & Numbers, *About ICANN*, <http://www.icann.org/en/about/> (last visited May 8, 2010).

6. INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, *UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY* (1999) [hereinafter UDRP], <http://www.icann.org/udrp/udrp-policy-24oct99.htm>.

appropriately related to [its] technical functions.”⁷ Domestic legislatures and courts can only reach disputes within their jurisdictional competence.

In the absence of a central policy-making body, each entity dealing with domain name conflicts can only address a small piece of a much larger puzzle. This results in a domain name market that is regulated inconsistently, often leading to wasteful uses of potentially valuable online assets. The domain space becomes clogged with registrations of multiple domain names by speculators who, more often than not, will park websites under the names and fail to use them for any particularly useful purpose, in the hope that someday they may sell the names for a profit.⁸ In the meantime, they may derive revenue from click-through advertising.⁹ Domain name speculators now typically rely on registrations of personal names, geographical and cultural indicators, and generic words and phrases in the domain space.¹⁰

Thus, the practice of domain name speculating has moved away from trademark policy, while the regulatory system has not. This creates an inconsistency between the robust regulation of trademarks in the domain space and the lack of regulation over any other conduct. There is a glaring need to develop a coherent theory of domain name regulation. Domain name conflicts are not likely to subside any time soon.¹¹ Additionally, the development of a more robust domain name theory may facilitate policy developments in the emerging area of search engine law.¹² Domain name regulation will be an important aspect of search engine law because of the pivotal role played by do-

7. INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS, BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS art. I § 1(3) (2009), <http://www.icann.org/en/general/bylaws.htm>.

8. KESMODEL, *supra* note 2, at 136–38 (2008) (describing the practice of domain name “parking”).

9. *Id.* at 68–73 (describing the development of pay-per-click advertising systems).

10. *Id.* at 24–33 (noting use of generic and other terms in the domain space by domain name speculators).

11. See Press Release, World Intellectual Prop. Org., Record Number of Cybersquatting Cases in 2008, WIPO Proposes Paperless UDRP (Mar. 16, 2009), http://www.wipo.int/pressroom/en/articles/2009/article_0005.html.

12. See generally *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123 (2d Cir. 2009); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Playboy Enters., Inc. v. Netscape Comm’ns Corp.*, 354 F.3d 1020 (9th Cir. 2004); Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008); Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 YALE J.L. & TECH. 201 (2006); Eric Goldman, *Search Engine Bias and the Rise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188 (2006); James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1 (2007); Greg Lastowka, *Google’s Law*, 73 BROOK. L. REV. 1327 (2008); Viva R. Moffat, *Regulating Search*, 22 HARV. J.L. & TECH. 475 (2009).

main names in search algorithms.¹³ Domain name theory may also assist search engines in developing policies about their own uses of trademarks, personal names, cultural and geographic indicators, and generic words in search engine algorithms and keyword advertising programs.

The creation of a coherent theory for domain name regulation may also play an important role in the new generic Top Level Domain (“gTLD”) application process soon to be rolled out by ICANN.¹⁴ The identification of coherent theoretical principles governing the domain space will be imperative for the release of new gTLDs.¹⁵ The fact that ICANN may not have the constitutional power to implement all relevant policies itself — and that implementation may ultimately fall to a combination of domestic courts, legislators, and private arbitrators — means that relatively quick work is needed to create the theoretical groundwork. Appropriate policies should be identified as early as possible to allow multiple bodies ample time to work together to create a workable regulatory matrix.

This Article is a preliminary foray into largely unexplored territory. As such, it is somewhat tentative and general in its conclusions. Importantly, there are three pressing, and often overlapping, challenges facing today’s domain name regulation system, none of which have received much attention in existing scholarship. The challenges are: (a) to develop an appropriate theoretical framework for future regulation; (b) to identify an entity, or set of entities, with sufficient constitutional competence to implement regulations based on that framework; and (c) to ensure that any regulations can be meaningfully enforced by private individuals or other institutions with sufficient standing or power to enforce them. This Article focuses predominantly on the development of an appropriate theoretical framework but hopefully will serve as a useful starting point for debates that cover all of these aspects of domain name governance, as well as the interplay between them.

Part II of this Article extrapolates from past practice three theoretical justifications for domain name regulation: property theory, trademark policy, and restitution or unjust enrichment. These three justifications may have to be developed simultaneously to create a useful framework for domain name regulation. Part III identifies regu-

13. See Search Engine Roundtable, *Is Bing’s Algorithm Domain Name Heavy?*, <http://www.seroundtable.com/archives/020382.html> (July 13, 2009) (discussing criticism of Microsoft’s new search engine, Bing) (last visited May 8, 2010).

14. Farley, *supra* note 5, at 625–26 (describing gTLDs as “generic top-level domains”; noting that ICANN has accredited fifteen gTLDs to date, including .com, .net, and .edu, and noting that ICANN is now considering a new system to approve new gTLDs in the hundreds or thousands annually).

15. *Id.* at 625–28 (describing the mismatch between trademark policy and domain name regulation and the implications of the current inconsistencies for the proposed new gTLD process).

latory inconsistencies in the domain space. It suggests ways in which the theoretical models identified in Part II may assist in the development of more robust and consistent policy determinations going forward. Part IV considers the position of domain name registrars in terms of potential liability for bad faith activities of their registrants. Part V concludes by making suggestions for future directions in domain name regulation.

II. THREE THEORIES OF DOMAIN NAME REGULATION

A. Extrapolating Theory from Practice

This Part extrapolates from past practice the implicit theoretical impulses that appear to have guided courts, legislatures, and ICANN in regulating the domain space to date. Courts in early cybersquatting cases tended to focus on existing trademark policy to regulate the domain space. They found that cybersquatting constituted either trademark infringement or dilution, depending on the circumstances.¹⁶ Infringement requires the trademark holder to establish a likelihood of consumer confusion as to the source of products or services.¹⁷ Dilution has no consumer confusion requirement and is limited to the protection of famous marks.¹⁸ The dilution action comes in two forms — blurring and tarnishment.¹⁹ Blurring “is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.”²⁰ Tarnishment “is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.”²¹

Despite the early focus on trademark policy, the basis for applying trademark doctrines to cybersquatting was sometimes unclear. This lack of clarity suggested that a pure trademark-based policy model was insufficient for the domain space. For example, the Ninth Circuit failed to explain why a cybersquatter who conducted no commercial activities on his website was acting *in commerce*, as required by the Lanham Act.²² A trial judge in the Southern District of New York likewise neglected to explain why a domain name registrant who was not conducting any significant commercial activities on his website was nevertheless potentially confusing consumers in com-

16. KESMODEL, *supra* note 2, at 23–24 (noting how early trademark law dealt effectively with cybersquatters).

17. 15 U.S.C. §§ 1114(a)(1), 1125(a)(1) (2006).

18. 15 U.S.C. §§ 1125(c)(1), (c)(2)(A).

19. 15 U.S.C. § 1125(c)(1).

20. 15 U.S.C. § 1125(c)(2)(B).

21. 15 U.S.C. § 1125(c)(2)(C).

22. *See Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1324–26 (9th Cir. 1998) (focusing on the defendant’s overall business plan rather than his use of the domain name alone).

merce, as required for a successful infringement action.²³ While traditional trademark policy had its uses, the awkwardness of applying existing trademark doctrines to cybersquatting soon prompted action by Congress and ICANN. They adopted the ACPA and the UDRP, respectively.

While still expressly based on trademark policy, the new regulations were focused narrowly on specific domain name conduct: cybersquatting. Both the ACPA and the UDRP address registration with a bad faith profit motive²⁴ of a domain name corresponding with someone else's trademark.²⁵ Both contain non-exhaustive lists of bad faith factors to guide courts and arbitrators.²⁶ Both contain defenses for a person who has registered a domain name for a legitimate purpose.²⁷ Neither specifically contemplates conflicts in the domain space outside of cybersquatting on other people's trademarks. The ACPA is a little broader in scope than the UDRP in that it contains an additional sui generis protection for personal names regardless of their trademark status.²⁸ The fact that the ACPA extends protections to non-trademarked personal names suggests a broader regulatory impulse than one that stems solely from trademark policy. Although trademark policy is a large part of the ACPA, the statute also protects non-trademarked personal names, indicating the existence of other regulatory justifications. The statutory concern with bad faith intent to profit suggests an unjust enrichment — or restitutionary — rationale as an alternative policy basis for the legislation.

Despite concerns about the scope of their underlying theoretical justifications, the ACPA and the UDRP have been effective in practice in the context of traditional cybersquatting on trademarks. The UDRP, in particular, is inexpensive, accessible, and efficient;²⁹ it also does not raise the jurisdictional concerns inherent in litigation.³⁰ The UDRP is incorporated by reference into registration agreements for all

23. *Planned Parenthood Fed'n of Am. Inc. v. Bucci*, 42 U.S.P.Q.2d 1430, 1435 (S.D.N.Y. 1997) (relying on the "well settled" expansive scope of the Lanham Act instead of addressing the practical effects of the defendant's activities).

24. 15 U.S.C. § 1125(d)(1)(A)(i); UDRP, *supra* note 6, ¶ 4(a)(ii).

25. Note that neither set of rules expressly requires the mark to be registered; thus each will protect unregistered marks.

26. 15 U.S.C. § 1125(d)(1)(B)(i); UDRP, *supra* note 6, ¶ 4(b).

27. 15 U.S.C. § 1125(d)(1)(B)(ii); UDRP, *supra* note 6, ¶ 4(c).

28. 15 U.S.C.A. § 8131 (West Supp. 2010) (originally classified as 15 U.S.C. § 1129 (2006) (within the Trademark chapter)).

29. Jacqueline D. Lipton, *Celebrity in Cyberspace: A Personality Rights Paradigm for Personal Domain Name Disputes*, 65 WASH. & LEE L. REV. 1445, 1448–49 (2008) ("The advantages of the UDRP over litigation are that it is inexpensive and fast compared to litigation, and its reach is effectively global because relevant parties are bound to it by contract, wherever they may physically reside.").

30. *See, e.g., id.* at 1474 ("The actor Kevin Spacey . . . failed to establish personal jurisdiction over a defendant in litigation for control of the domain name <kevinspacey.com>. He then went on to successfully obtain control of the name in a UDRP proceeding.").

domain names utilizing gTLDs such as “.com,” “.org,” and “.net.”³¹ The major limitation of the UDRP today is that most modern disputes do not involve traditional trademark cybersquatting. More recent conflicts raise issues not so neatly resolved by trademark policy. Thus, there is a need to find other theoretical explanations for domain name policy that could work alongside the existing, but limited, trademark policy justifications. As suggested in the previous paragraph, existing practice suggests at least two distinct, but sometimes overlapping, policy justifications for domain name regulation: trademark policy and restitution or unjust enrichment. To this, we might add a property rights justification for regulation in some more unusual circumstances involving bad faith conduct in the domain space.³²

B. A Tripartite Theoretical Model: Property Theory, Restitution, and Trademark Policy

Of the three theoretical justifications for domain name regulation, a property rights justification may at first glance appear to be the most intuitively appealing. The domain name market involves routine trading of domain name assets.³³ Since the early days of the commercial Internet, domain names have been equated with property rights in a variety of contexts.³⁴ Real world property analogies can be easily made with domain names, although each analogy has limitations. It is easy to think about bad faith conduct involving domain names in terms of trespass or conversion.³⁵ One might describe cybersquatting as a form of trespassing — or squatting — on someone else’s virtual property. Generally, a property holder in the real world can remove a trespasser if the trespasser has not used the property for long enough to raise a plausible adverse possession claim.³⁶

Trespass is not the only property analogy that can be made with cybersquatting. Early cybersquatters did not regard themselves as trespassers. Some thought of themselves as property speculators.³⁷

31. See UDRP, *supra* note 6, n.2.

32. See discussion *infra* Part II.B.

33. For a general discussion of modern domain name markets, see KESMODEL, *supra* note 2.

34. See *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003) (finding domain name to be property for the purposes of the California statutory tort of conversion).

35. See *id.*

36. JESSE DUKENMINIER & JAMES E. KRIER, PROPERTY 126–27 (5th ed. 2002) (quoting Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918)); Walter Quentin Impert, *Whose Land is it Anyway?: It's Time To Reconsider Sovereign Immunity from Adverse Possession*, 49 UCLA L. REV. 447, 448 (2001) (“People are often surprised to learn that a trespasser may take title to land from a true owner under certain conditions and that such theft is authorized by the government under laws of adverse possession.”).

37. An early cybersquatter, Dennis Toeppen, characterized his efforts to register domain names as akin to real estate speculation:

They took a gamble that certain pieces of virtual property — domain names corresponding with other people’s trademarks — would be more valuable to the mark holders than to anyone else. Thus, a cybersquatter who could beat a mark holder to registration could make a handsome profit. In the real world, there is nothing wrong with this entrepreneurial impulse. If I buy property adjacent to your land in the hope of selling it to you for a profit because I have speculated that you might want to expand your business onto the land, I am within my rights to charge whatever price I want for it.

The problem is that real property analogies do not perfectly fit the virtual world. The speculating analogy ultimately falls short because a trademark holder has some rights in a domain name corresponding with her mark as a matter of trademark policy.³⁸ A real property holder, on the other hand, has no pre-existing rights in adjacent land. The trespass analogy is also problematic because it is only possible in the real world to trespass on land that another person legally owns. Even though a trademark holder may have some interest in a domain name corresponding with her mark, she does not own the domain name unless she has registered it.

Under current regulations like the ACPA and the UDRP, there is an implicit assumption that a trademark holder has property rights in corresponding domain names. However, the full extent of those rights is unclear. Some judges and arbitrators have suggested that those rights might extend to “trademark.com” domain names but not necessarily to other iterations of the trademark in the domain space.³⁹ Nevertheless, this view is not universally accepted.⁴⁰ Thus, while a property rights rationale for domain name regulation is useful, what is currently missing is guidance as to the nature and scope of any property rights that may be protected in the domain space. This question becomes even more complex when one departs from the more familiar trademark territory and turns to consideration of property rights in

It was clear to me at the time that domain names were valuable, undeveloped virtual real estate. There was absolutely no statutory or case law regarding trademarks in the context of Internet domain names at the time. It seemed to be an excellent opportunity to do the virtual equivalent of buying up property around a factory — eventually the factory owner would realize that he needed the scarce resource which I possessed.

See Dennis Toeppen’s Home Page, <http://www.toeppen.com> (last visited May 8, 2010).

38. This is evidenced by the availability of trademark infringement and dilution actions in early cybersquatting cases. See KESMODEL, *supra* note 2, at 23–24.

39. See Jacqueline D. Lipton, *Commerce Versus Commentary: Gripe Sites, Parody, and the First Amendment in Cyberspace*, 84 WASH. U. L. REV. 1327, 1359–61 (2006).

40. See *e.g.*, *Springsteen v. Burgar*, WIPO Case No. D2000-1532 (Jan. 25, 2001), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1532.html> (last visited May 8, 2010) (The majority panelists were prepared to allow an unauthorized use of the “brucespringsteen.com” domain name by a fan who had registered it, on the basis that Bruce Springsteen had his own web presence under “brucespringsteen.net.”).

personal names, geographic and cultural indicators, and generic terms in the domain space. Applying the property rights rationale, we might argue that a person has property rights in her name that could be protected against those seeking to profit from the name in the domain space. However, many commentators reject property rights in a personal name.⁴¹ The same problems arise in attempts to apply a property rights framework to geographic and cultural indicators.

The property rights rationale for domain name regulation may nevertheless be useful in some admittedly limited circumstances involving generic domain names. There have been a few cases where a domain name “thief” has fraudulently secured a transfer of a generic domain name initially registered to another person.⁴² The obtaining of the fraudulent transfer by the wrongdoer has been likened by some commentators to theft or conversion of physical property.⁴³ The willingness to attach a property label to the virtual property in these cases has enabled at least one court to attach secondary liability to a domain name registrar where the fraudulent transferee could not be located.⁴⁴ Thus, the property rights rationale for domain name regulation may have a place in a broader theoretical justification for domain name law.

The trademark policy rationale has a more pronounced place in the regulatory matrix. While the UDRP in particular has become the most popular avenue for cybersquatting disputes, some trademark-based actions still filter through domestic courts to protect trademark rights in the domain space.⁴⁵ The trademark policy rationale breaks down into at least two, and possibly three, distinct elements. The two most obvious subsets of trademark policy relate to the protection of trademark holders against infringement and dilution respectively. The ACPA may ground a third trademark-policy rationale for domain name regulation, if bad faith cybersquatting on trademarks is regarded as a separate head of trademark policy distinct from the infringement

41. As Mark McKenna noted:

It might be true that identity is sufficiently similar to other objects the law regards as property and therefore deserves at least some of the sticks in the traditional bundle of property rights. But far too few courts and commentators have offered a theory as to why any of the traditional property justifications lead to that conclusion.

Mark McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 247 (2005).

42. See *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003) (involving “sex.com”); see also Purva Patel, *Not Masters of Their (Web) Domains After All: Stolen Internet Names Difficult To Track*, HOUSTON CHRONICLE, Aug. 5, 2009, <http://www.chron.com/disp/story.mpl/tech/news/6560302.html> (involving “p2p.com”).

43. *Kremen*, 337 F.3d at 1030–34 (holding fraudulently obtained transfer of “sex.com” domain name to be conversion under California tort law).

44. *Id.* at 1030.

45. See e.g., *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672 (9th Cir. 2005); *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359 (4th Cir. 2001).

and dilution impulses.⁴⁶ Trademark policy can justify the UDRP because of its focus on trademark protection and the tracking of trademark doctrine in its drafting.⁴⁷ However, recent UDRP arbitrations suggest some straying from this theoretical underpinning to the extent that arbitrators have been prepared to grant protection for less obviously trademarked terms like personal names.⁴⁸

A third policy rationale for domain name regulation that may explain the bleeding of UDRP policy outside of clear trademark doctrine may be found in restitution, or unjust enrichment.⁴⁹ The basic premise of U.S. law on restitution is that a defendant who has been unjustly enriched at the expense of a complainant is then entitled to a remedy.⁵⁰ The advantage of restitution theory is that it does not require a property right in the hands of the complainant.⁵¹ Thus, restitution theory might explain domain name conflicts in which a domain name registrant has taken advantage of the goodwill that a complainant has built up in a word or phrase, regardless of whether the complainant has a property or trademark right in that word or phrase.

Such scenarios might involve personal names that have not acquired trademark status. Another example can be found in the context of geographical terms, where a local tourist board has built up some goodwill in the name of a city, but not in a trademark sense. To support an unjust enrichment justification, the domain name registrant must have been enriched at the expense of the plaintiff. Thus, a restitutionary rationale for domain name regulation will be limited to situations where a registrant has profited unjustly from a domain name in which the complainant has legitimate, although potentially non-proprietary or non-trademark, interests. An example might be the defendant's operation of a clickfarm⁵² that uses a domain name in which the plaintiff has some legitimate interests. The identification of these three distinct, albeit sometimes overlapping, theoretical justifi-

46. 15 U.S.C. § 1125(d)(1)(A)(i) (2006); UDRP, *supra* note 6, ¶¶ 4(a)–(c).
A)(i) (2006); UDRP, *supra* note 6, ¶¶ 4(a)–(c).

48. *See* Lipton, *supra* note 29, at 1527 (“The continued development of personal domain name jurisprudence based on trademark principles threatens to warp the boundaries of trademark law and to unjustifiably extend trademark practice online into areas where the alleged trademarks are mere fictions. . . . In any event, the application of the trademark-based UDRP to personal domain name disputes is clearly creating inconsistent results.”).

49. *See* RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS (1937).

50. *Id.* § 1 (“A person who has been unjustly enriched at the expense of another is required to make restitution to the other.”).

51. *Id.* cmt. b (“[A person] confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word ‘benefit,’ therefore, denotes any form of advantage.”).

52. Jacqueline D. Lipton, *Clickfarming: The New Cybersquatting?*, 12 J. INTERNET L. 1, 1 (2008) (defining clickfarming as the use of a domain name to lure Internet users to a website that is predominantly comprised of click-through advertisements).

cations might assist in resolving some of the current gaps and inconsistencies inherent in domain name regulation.

III. EXISTING REGULATORY INCONSISTENCIES

A. General Inconsistencies

The current state of domain name regulation might be summarized as set out in Table 1. This table matches the various motivations for domain name registration against the most obvious categories of words and phrases that are commonly registered as domain names. The individual cells within the table identify the extent to which each pairing of market motivation with domain name category is regulated under existing rules. The results evidence an inconsistent and unpredictable pastiche of regulations. There is no clear or consistent underlying theoretical basis for domain name regulation.

| | Sale Motive | Clickfarm- ing Motive | Expressive Use Motive | Commercial Use Motive |
|--|--|---|--|--|
| Trademarks | Traditional cybersquatting | Potentially cybersquatting | Usually legitimate, particularly if the registrant does not use ".com" version of trademarked name ⁵³ | Competing trademark interests — first come, first served |
| Personal Names | Cybersquatting (if name is trademarked); 15 U.S.C.A § 8131(1)(A) liability (regardless of trademark) | Potentially cybersquatting (if name is trademarked); little recourse if not trademarked | Usually legitimate, particularly if the registrant does not use ".com" version of trademarked name | Competing personal names — first come, first served |
| Cultural and Geographic Indicators | No regulation unless term is trademarked | No regulation unless term is trademarked | Presumptively legitimate use | Presumption of legitimate use |
| Generic Words and Phrases | Presumptively legitimate use | Presumptively legitimate use | Presumptively legitimate use | Presumption of legitimate use |
| Deliberate Misspellings of Trademarks | Traditional cybersquatting | Potentially cybersquatting | Unclear — potentially legitimate use | No legitimate use |
| Deliberate Misspellings of Personal Names | Cybersquatting (if name is trademarked); 15 U.S.C.A § 8131(1)(A) liability (regardless of trademark) | Potentially cybersquatting (if name is trademarked); little recourse if not trademarked | Unclear — potentially legitimate use | No legitimate use |
| "Trademark-sucks" Names | Potentially cybersquatting if domain name is substantially similar to trademark | Unclear — potentially trademark infringement, dilution, or cybersquatting | Generally legitimate use | No legitimate use |

53. See Lipton, *supra* note 39, at 1359–61.

The only conduct that is clearly sanctioned under current regulations is traditional cybersquatting on trademarks and personal names in the domain space. The regulation of other conduct is largely unclear. It is possible to discern some general principles about domain name regulation from this table, but at a fairly high level of abstraction. For example, purely expressive uses of domain names are for the most part regarded as being legitimate, regardless of the type of word or phrase registered.⁵⁴ Even expressive uses of trademarks⁵⁵ and of deliberate misspellings of trademarks⁵⁶ may be legitimate uses if the associated website is used for commentary rather than commercial purposes.

Another general principle that may be derived from Table 1 is that registration of a deliberate misspelling of another person's trademark is presumptively illegitimate, at least if undertaken for a commercial purpose. In fact, it is difficult to conceive of a situation where someone registers a deliberate misspelling of another person's trademark for a purely expressive purpose, although it is possible that the operator of a purely expressive gripe site or parody site may want to engage in this conduct. In any event, the fifth and sixth rows of Column 4 are shaded out, because it is difficult, if not impossible, to conceive of any legitimate commercial purpose for registering a deliberate misspelling of another's trademark or name.

Table 1 also illustrates the confusion inherent with respect to "sucks"-type domain names.⁵⁷ These are names that use a trademark with a pejorative word or phrase attached, such as nikesucks.com. Typically, these domains are used for gripe sites — websites that include critical commentary about a trademark holder.⁵⁸ However, these kinds of names are sometimes used for commercial purposes, such as cybersquatting or clickfarming.⁵⁹ Where pejorative domain names are used for commercial purposes, they are sometimes referred to as "sham speech" domain names.⁶⁰ There is currently no clear regulatory approach to "sucks"-type domain names.⁶¹ Most commercial uses of such names are colorably illegitimate because they take advantage of the goodwill in a trademark to draw traffic for a non-related commercial purpose.⁶² However, some uses of "sucks"-type domain names are legitimately expressive and others combine expressive and commercial elements. The development of a more coherent theoretical

54. See Table 1, column 3, *supra* p. 458.

55. See Table 1, column 3, row 1, *supra* p. 458.

56. See Table 1, column 3, row 5, *supra* p. 458.

57. See DAVID LINDSAY, INTERNATIONAL DOMAIN NAME LAW: ICANN AND THE UDRP 262 (2007).

58. See *id.*

59. See *id.*

60. *Id.*

61. See *id.*

62. This is why the last cell at the bottom of Column 4 in Table 1 is shaded out.

framework for domain name regulation might assist in ascertaining what kinds of conduct concerning “sucks”-type domain names should be proscribed, and on what basis. A theoretical framework based on both trademark policy and unjust enrichment may be useful here to separate legitimate expressive uses of “sucks”-type domain names from bad faith commercial uses.

Another notable feature of Table 1 is that it highlights the position of clickfarming in the context of current domain name regulations. Most clickfarming that involves trademarks or deliberate misspellings of trademarks is potentially regulated as a form of cybersquatting. This conduct may be considered cybersquatting because clickfarms that utilize other people’s trademarks essentially use the marks for bad faith commercial profit motives. The commercial profit motive in clickfarming is different from traditional cybersquatting. For clickfarmers, the profit is not derived from a sale of the name but rather from the use of the name to generate revenue from click-through advertisements.⁶³ Nevertheless, most cybersquatting regulations are broad enough to encompass this kind of conduct. In the ACPA, for example, the notion of a bad faith intent to profit from a mark is not inextricably linked to a sale motive.⁶⁴ The bad faith factors in the UDRP are likewise not limited to a sale motive. The intention to sell the domain name is only one of four non-exclusive bad faith factors in the UDRP.⁶⁵

Clickfarming involving words and phrases other than trademarks has a less clear regulatory rationale. Personal names, as well as cultural and geographic terms, that operate as registered or unregistered marks will likely be protected from clickfarming in the same way as other trademarks.⁶⁶ However, non-trademarked names, words, and phrases are more troublesome. While various individuals and entities may have legitimate interests in these terms, they have little recourse against clickfarmers in the absence of a trademark. Even the *sui generis* personal name protections in the Lanham Act will not cover clickfarming, because those provisions are limited to prohibiting sale-motivated registrations of personal names as domain names.⁶⁷

There is nothing necessarily wrong with these results if the regulatory policy is that clickfarming is problematic only in trademark cases, on the basis that the registrant is making unfair commercial profits from a valuable mark. The rationale for distinguishing non-

63. Lipton, *supra* note 52, at 1.

64. 15 U.S.C. § 1125(d)(1)(A)(i) (2006).

65. UDRP, *supra* note 6, ¶ 4(b).

66. See 1 ANNE GILSON LALONDE, GILSON ON TRADEMARKS § 2.03[4][d] (72d ed. 2009) (“Just as with descriptive terms, a trademark or trade name that consists of a personal name (first name, surname, or both) is entitled to legal protection only if it attains secondary meaning.”).

67. See 15 U.S.C.A. § 8131(1)(A) (West Supp. 2009).

trademarked personal names, cultural and geographic indicators, and generic terms here would be that the people and entities with interests in those terms have not necessarily put the same resources into developing goodwill in the relevant words as the trademark holder. However, this rationale may not be viable under close scrutiny.

Even an individual with no trademark interest in her personal name may have spent time and resources building up a public persona. Politicians, for example, may have no commercial trademark interest in their names, but may nevertheless have spent substantial time, effort, and resources building up their professional reputations. The ability of a clickfarmer to take unfair advantage of that reputation should arguably be sanctioned on the same basis as the regulation of clickfarming that utilizes trademarks. Likewise, local city councils may spend significant time and effort building up a reputation for their city to attract tourism or business. It is not clear why these entities should be denied protection against clickfarmers trading on their geographical reputations while trademark holders are protected.

The failure to develop any regulations that prevent the monopolization of different classes of words and phrases by clickfarmers creates a situation in which the Internet can become clogged with clickfarms. Words and phrases that could be used for more useful expressive or commercial purposes are effectively monopolized by clickfarmers or held ransom by domain name speculators. The way in which one responds to this state of affairs depends on one's view of the domain name market more generally. Free-market advocates may well support domain name speculators, including those who run clickfarms. Others may be disappointed that the Internet will likely be unable to reach its full potential as a global communications medium if more and more of its online addresses are taken up by poorly maintained clickfarms that advertise products few people want.⁶⁸

Nevertheless, even those who support regulations to preserve the potential of the Internet by reining in clickfarming face the problem of identifying: (a) a theoretical rationale for regulation; (b) an entity with constitutional competence to regulate; and (c) a party or group with standing to enforce any regulations that may be developed. These are extremely difficult issues to resolve. This Article focuses predominantly on the first. Without a clear theoretical basis for regulating domain names, the following questions are moot. With no clear idea of

68. As Kesmodel described:

Although domain parking clearly has been good for investors and the ad networks, the level of value the sites offer to consumers has been hotly debated. Some critics say the proliferation of the bare-bones [clickfarms] has sullied the Internet. Some liken the millions of ad-bloated sites to an endless stream of billboards along a highway, distracting drivers and ruining the scenery.

KESMODEL, *supra* note 2, at 138.

the basis for regulations, it does not matter who theoretically might regulate or how those regulations might be enforced.⁶⁹

B. Specific Inconsistencies and Possible Solutions

1. Personal Names

This Section addresses specific instances of the regulatory inconsistencies identified in the previous section. It focuses on particular kinds of words and phrases commonly registered in modern domain name markets. Trademarks are no longer the coin of the realm in these markets since the most intuitively trademark-focused domain names are now in the hands of trademark holders. Current battles revolve around other words and phrases. One obvious example is personal names. Personal names have come to the forefront of many modern domain name battles because of their obvious commercial value and their uncertain trademark status.⁷⁰ Some famous people cannot successfully assert trademarks in their personal names.⁷¹ This is especially true of famous people who do not use their names in commerce, such as politicians and some other public figures.⁷²

Domain name speculators often register personal names as domain names and defend against any complaints on the basis of either a lack of a trademark interest in the hands of the complainant or a lack of bad faith conduct on the part of the registrant.⁷³ It is usually rela-

69. This is a bit of an oversimplification because, in reality, the three regulatory questions overlap to some extent. One might argue that in the absence of a competent regulating entity, the idea of formulating theory is arguably moot because no body could meaningfully implement relevant policies. Even if there is a competent entity — or entities — that might implement policy in new regulations, the regulations will be meaningless if aggrieved persons either do not have standing or do not have sufficient access to dispute resolution forums to enforce them. Nevertheless, there is some value in focusing on theory of regulation as an initial matter. There are currently bodies that implement regulations, albeit in a piecemeal way. They include ICANN, UDRP arbitrators, and domestic courts. The increasing pace of UDRP arbitrations over the year also suggests that there is a significant body of complainants with sufficient standing to enable the enforcement of existing regulations — even if they are currently obliged to frame their complaints in trademark terms.

70. See 1 LALONDE, *supra* note 66, § 2.03[4][d].

71. See *id.*

72. Lipton, *supra* note 29, at 1462–68 (describing the mismatch between trademark law and the status of the personal names of politicians and public figures); see also Jacqueline D. Lipton, *Who Owns “Hillary.com”? Political Speech and the First Amendment in Cyberspace*, 49 B.C. L. REV. 55 (2008).

73. See, e.g., Clinton v. Web of Deception, NAF Claim No. FA0904001256123 (June 1, 2009), <http://domains.adrforum.com/domains/decisions/1256123.htm>. In *Clinton*, the registrant of “williamclinton.com,” “williamjclinton.com,” and “presidentbillclinton.com” argued that the complainant had no trademark rights in his personal name and that the registrant had not registered and was not using the names in bad faith. Although the former President established trademark rights in his personal name, the registrant’s bad faith argument was successful, and the arbitrator did not order transfer of the names to the former President.

tively easy for domain name speculators to beat famous people to the registration of their names because many famous individuals — unlike trademark holders — do not have, plan for, or even desire an Internet presence.⁷⁴ Thus, many valuable personal names are not initially registered by the people to whom the names relate. This failure to register is understandable because a domain name is supposed to be used once it has been registered. In other words, the registrant has to do something with the associated website. Many famous people do not want to use the domain names at all. They simply do not want other people to register them.⁷⁵ The failure of individuals to register their names, however, leaves ample opportunity for cybersquatters, clickfarmers, and others to profit from the names.

Personal name conflicts in the domain space have involved all kinds of people: actors,⁷⁶ singers,⁷⁷ athletes,⁷⁸ politicians,⁷⁹ prominent business people,⁸⁰ and other public figures.⁸¹ Additionally, some disputes have involved the names of private individuals.⁸² However, such

74. See discussion of the dispute involving the domain name “juliaroberts.com” in Jacqueline D. Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 WAKE FOREST L. REV. 1361, 1414–15 (2005).

75. *See id.*

76. *See e.g.*, *Cruise v. Network Operations Ctr.*, WIPO Case No. D2006-0560 (July 5, 2006), <http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0560.html> (involving “tomcruise.com”); *Spacey v. Alberta Hot Rods*, NAF Claim No. FA0205000114437 (Aug. 1, 2002), <http://www.arb-forum.com/domains/decisions/114437.htm> (involving “kevinspacey.com”); *Roberts v. Boyd*, WIPO Case No. D2000-0210 (May 30, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0210.html> (involving “juliaroberts.com”).

77. *See, e.g.*, *Springsteen v. Burgar*, WIPO Case No. D2000-1532 (Jan. 25, 2001), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1532.html> (involving “bruce springsteen.com”); *Ciccone v. Parisi*, WIPO Case No. D2000-0847 (Oct. 12, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0847.html> (involving “madonna.com”); *Experience Hendrix, LLC v. Hammerton*, WIPO Case No. D2000-0364 (Aug. 2, 2000), *aff’d* (Aug. 15, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0364.html> (involving “jimihendrix.com”).

78. *See e.g.*, *Björn Borg Brands AB v. García*, WIPO Case No. D2007-0591 (June 21, 2007), <http://www.wipo.int/amc/en/domains/decisions/html/2007/d2007-0591.html> (involving “bjornborg.com”).

79. *See, e.g.*, *Clinton v. Web of Deception*, NAF Claim No. FA0904001256123 (June 1, 2009), <http://domains.adrforum.com/domains/decisions/1256123.htm>; *Clinton v. Dinoia*, NAF Claim No. FA0502000414641 (Mar. 18, 2005), <http://www.arb-forum.com/domains/decisions/414641.htm>; *Townsend v. Birt*, WIPO Case No. D2002-0030 (Apr. 11, 2002), <http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0030.html> (involving “kennedytownsend” domain names).

80. *See, e.g.*, *Trudeau v. Lanoue*, No. 04C7165, 2006 U.S. Dist. LEXIS 7956 (N.D. Ill. Mar. 2, 2006) (involving “trudeau.com” and “kevintrudeau.com”); *Schmidheiny v. Weber*, 285 F. Supp. 2d 613 (E.D. Pa. 2003).

81. *See, e.g.*, *Smith v. DNS Research, Inc.*, NAF Claim No. FA0312000220007 (Feb. 21, 2004), <http://www.adrforum.com/domains/decisions/220007.htm> (involving “annanicolesmith.com”); *Hebrew Univ. of Jerusalem v. Alberta Hot Rods*, WIPO Case No. D2002-0616 (Oct. 7, 2002), <http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0616.html> (involving “alberteinstein.com”).

82. *Wright v. Domain Source, Inc.*, No. 02C2525, 2002 U.S. Dist. LEXIS 16024 (N.D. Ill. Aug. 27, 2002).

cases are less common, because non-famous names are less valuable to domain name speculators. The recorded conflicts evidence a variety of motivations for registration, including commercial purposes, expressive purposes, and combinations of both. For example, a private individual registered the domain name “brucespringsteen.com” and later turned it into a fan site about the popular singer Bruce Springsteen.⁸³ This is, by and large, an expressive purpose, although it is also possible for fan site operators to make commercial profits by charging fees to join the fan club or to subscribe to a newsletter, or by operating a clickfarm on the website.

Since this Article is focused on the extent to which a better theory of domain name regulation could help address current domain name problems, a question arises as to whether such a theory would help with personal names. While existing regulations have been premised on trademark policy, the regulations have been skewed towards protection of commercial trademarks.⁸⁴ Trademark policy does not always provide the best protection for personal names. A pure trademark focus, for example, fails to explain the regulatory impulse behind Section 8131(1)(A) of the Lanham Act⁸⁵ — the *sui generis* personal name protections against cybersquatting. Clearly, the legislature saw a need to protect personal names. However, Congress’s actions cannot be explained solely with respect to trademark policy. There must be some other theoretical justification.

The unjust enrichment model might help with protecting personal names. Unjust enrichment theory does not require a trademark or even a generic property right to ground a claim for relief. Table 2 contains examples of five hypothetical scenarios involving personal names. The subsequent discussion illustrates how the adoption of a clearer policy basis for the domain space — potentially based on unjust enrichment — might help to resolve the conflicts arising in these scenarios.

83. *See* Springsteen v. Bugar, WIPO Case No. D2000-1532 (Jan. 25, 2001), <http://arbitrator.wipo.int/domains/decisions/html/2000/d2000-1532.html>.

84. *See* Lipton, *supra* note 74, at 1363 (“[C]urrent dispute resolution mechanisms are focused on the protection of commercial trademark interests, often to the detriment of other socially important interests that may inhere in a given domain name.”).

85. 15 U.S.C.A. § 8131(1)(A) (West Supp. 2009).

Table 2: Hypothetical Scenarios Involving Personal Names in the Domain Space

Scenario 1: An individual, with a view to illuminating the lack of regulation for cybersquatting on personal names, registers a domain name corresponding with the name of an internationally famous Democratic ex-president. Ultimately, he directs the domain name to a website containing information posted by the Republican National Committee. He makes no attempt to sell the name to the ex-president or to anyone else.⁸⁶

Scenario 2: An individual registers a domain name corresponding with the name of a minor celebrity known mainly for her reality TV show. She rose to fame as a model with a weight problem who married a wealthy millionaire but does not use her name to sell any particular products or services. The registrant would be prepared to sell the name to her for an acceptable fee.⁸⁷

Scenario 3: An individual registers a domain name corresponding with the name of a famous movie star for an unauthorized fan site containing click-through advertisements. It is clear from the content of the website that it is not the “official” fan site for the movie star. The click-through advertisements on the website are unrelated to any of the movie star’s professional activities. The registrant makes no attempt to sell the name, although she would be prepared to consider an offer if it was forthcoming.⁸⁸

Scenario 4: An individual registers a domain name corresponding with the name of a famous movie star. She puts minimal content on the associated website — a two paragraph plain text description of the actor’s movies. She conducts no commercial activities from the website and makes no offer to sell the name.

Scenario 5: A young, little-known junior senator from the Midwest makes a speech at the Democratic National Convention. It is a major hit with the people. The next day the national newspapers are abuzz with speculation that the senator is going to be the next major star of the Democratic Party and may even run for president in a subsequent election. A domain name entrepreneur registers the senator’s name as a domain name, thinking that it may be valuable one day.

86. See *Clinton v. Web of Deception*, NAF Claim No. FA0904001256123 (June 1, 2009), <http://domains.adrforum.com/domains/decisions/1256123.htm>.

It is difficult to apply existing domain name regulations to these scenarios. The first hurdle in all five scenarios is that the complainant needs a trademark in his or her personal name for a UDRP arbitration.⁸⁹ This may be difficult to establish even in the case of famous names.⁹⁰ The little-known politician from Scenario 5 would not likely be successful, as he would not be able to establish the secondary meaning necessary for trademark protection. However, an unknown politician who later becomes famous and uses his name in commerce — for example, by selling campaign merchandise relating to his name — might later succeed in a UDRP arbitration. In this scenario, he would need to establish that the registrant was using the name in bad faith and not for any legitimate purpose.⁹¹ An attempt to sell the domain name for a profit in the course of a subsequent presidential election may satisfy this requirement.

These distinctions seem theoretically unsatisfying. There is no clear principle to guide registrants on what conduct is legitimate. Reliance on the trademark policy rationale underlying the UDRP creates significant uncertainty in relation to its application to personal name disputes. Unjust enrichment theory, on the other hand, might support rules to ensure return of a domain name to a rightful owner — or at least cancellation of the registration — in cases where a registrant had taken unfair commercial advantage of the name. This approach would not interfere with free speech since it would be based on unjust *commercial* enrichment — not the use of another's name for expressive purposes.

Applying an unjust enrichment approach to Scenario 1 in Table 2, for example, we might find that a registrant who has used a politician's name for purely expressive and non-commercial purposes should not be subject to a transfer or cancellation order. While at least one UDRP decision supports this result, the underlying theoretical rationale for the decision has traditionally been trademark policy. For example, applying the UDRP as written, an arbitrator found that, although former President William J. Clinton did have a trademark in his personal name, the registrant was not acting in bad faith in regis-

87. See *Smith v. DNS Research, Inc.*, NAF Claim No. FA0312000220007 (Feb. 21, 2004), <http://www.adrforum.com/domains/decisions/220007.htm>.

88. This hypothetical is based on *Cruise v. Network Operations Ctr.*, WIPO Case No. D2006-0560 (July 5, 2006), <http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0560.html>.

89. See UDRP, *supra* note 6, ¶ 4(a)(i).

90. See *Springsteen v. Burgar*, WIPO Case No. D2000-1532, § 6 (Jan. 25, 2001), <http://arbitr.wipo.int/domains/decisions/html/2000/d2000-1532.html> (explaining that it is unclear whether “Bruce Springsteen” has acquired secondary meaning and thus, whether it should be given trademark protection).

91. See UDRP, *supra* note 6, ¶¶ 4(b)–(c).

tering the name for an expressive purpose.⁹² It would make more sense as a matter of theory and practice for such disputes to be decided not on the grounds of trademark policy, but on the grounds of unjust enrichment. An unjust enrichment rationale would support the development of new regulations that do not require individuals to rely on trademarks in their personal names in order to seek relief.

Even though the ACPA personal name action was previously incorporated into trademark legislation,⁹³ it provides an example of a regulation that arguably evidences an unjust enrichment rationale. To bring an action against a cybersquatter under section 8131(1)(A), a complainant need not establish a trademark in her name. But the provision is limited in operation because the cybersquatter must have a clear sale motive. Thus, the operation of a clickfarm under another person's name will not run afoul of the provision's terms. This provision would be inapplicable to Scenario 3 in Table 2, which involves an unauthorized fan website including a commercial clickfarm. However, the provision would likely apply to Scenario 2, which represents more of a straightforward cybersquatting case.

These results in the context of personal name disputes are unsatisfying and piecemeal. Some commercial activities are proscribed by legislation while others are not. The *sui generis* ACPA provision is also limited because it is stand-alone legislation in the United States with no analogs in other jurisdictions. Unless a complainant can establish a nexus with the United States and can assert personal jurisdiction over a defendant, the provision will be useless. In any event, the costs of litigation may be prohibitive for many personal name complainants.

The use of an unjust enrichment rationale to support the development of more accessible personal domain name regulations may be useful for future regulation in the domain space. This approach would support the drafting of simple dispute resolution procedures similar those found in the UDRP, but that are more broadly based on preventing unjust commercial profits relating to the use of another person's name in the domain space.⁹⁴ A restitutionary approach still leaves ample room to protect purely expressive uses of personal names. In other words, the conduct of the registrants in Scenarios 1 and 4 in Table 2 would likely be protected as they relate predominantly to speech and do not implicate commerce. Scenario 3, which involves an unauthorized fan website that contains a clickfarm, is more problematic because it combines commercial profits with expression. Nevertheless, a

92. *Clinton v. Web of Deception*, NAF Claim No. FA0904001256123 (June 1, 2009), <http://domains.adrforum.com/domains/decisions/1256123.htm>.

93. See 15 U.S.C.A. § 8131(1)(A) (West Supp. 2009).

94. See, e.g., Lipton, *supra* note 29, at 1512–26 (crafting a new personal domain name dispute resolution policy along similar lines).

restitutionary policy rationale for regulation would assist in developing the appropriate contours for dealing with these kinds of situations in practice.

2. Culturally and Geographically Significant Words and Phrases

The regulatory matrix is more complex in the area of culturally and geographically significant words and phrases such as “ubuntu,” “uluru,” and “amazon.” These kinds of words only attain trademark status if they have sufficient secondary meaning in association with the offering of goods or services.⁹⁵ It is important for these terms to be available for legitimate expressive uses in the domain space.⁹⁶ For example, traders from a particular region will often want to use a geographic term to indicate the geographical source of the goods, as opposed to the manufacturing source. Any regulation that inhibits the use of a geographical or cultural term in the domain space must take into account the delicate balance of uses to which such a term may be put in practice.⁹⁷ The lack of a principled theoretical basis for domain name regulation has hindered the development of effective regulations in the context of cultural and geographic indicators.⁹⁸ Consider the hypothetical scenarios in Table 3.

95. See LINDSAY, *supra* note 57, at 225.

96. See *id.* at 225–26.

97. Lindsay described the difficulties inherent when geographically significant words attain trademark status:

The inclusion of a geographical term in a registered trade mark always gives rise to particular difficulties. The difficulties arise because, although it may be desirable to use a geographical term to indicate the source of goods or services, registration would prevent the legitimate use of the geographical term in a descriptive sense by other traders.

Id. at 225.

98. See *id.* at 224–25 (noting that the World Intellectual Property Organization has, to date, declined to develop specific protections for geographical terms because of the lack of clear international principles on which such protections might be based).

Table 3: Hypothetical Scenarios Involving Cultural and Geographic Indicators in the Domain Space

Scenario 1: A popular online bookstore registers a domain name that corresponds with the name of a famous landmark. A group of manufacturers located near the landmark uses the name of the landmark in marketing their products and services and wishes to use the name in the domain space.

Scenario 2: The official tourist bureau for a popular skiing region uses the name of the region in its domain name. A mark holder with registered trademark interests in the relevant term seeks transfer of the domain name.⁹⁹

Scenario 3: A domain name speculator registers a group of domain names corresponding with well-known geographical terms in the hopes of making money from clickfarms on associated websites. Her aim is to target Internet users who might be seeking information about the geographic locations. The click-through advertisements are not specifically associated with any of the geographic locations.

Scenario 4: The President of the United States happens to have a last name that corresponds with the name of a city in Japan. The “.com” domain name relating to the name is registered to the city offices for the Japanese city. The President wants to use the name for his new online open government initiative.

As was the case with the personal name scenarios in Table 2, the available domain name regulations focus on trademark policy. A complainant who cannot establish a trademark in a geographic or cultural term will have little meaningful recourse against a registrant. In some cases, the registrant of the domain name itself may hold a valid trademark in the name.¹⁰⁰ Thus, the regulations would protect that registrant against challenges from those with other interests in the domain name.¹⁰¹ It is an open question whether this is an appropriate

99. This hypothetical is loosely based on *Kur-und Verkehrsverein St. Moritz v. St.Moritz.com*, WIPO Case No. D2000-0617 (Aug. 17, 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0617.html>.

100. See, e.g., LINDSAY, *supra* note 57, at 229 (describing the example of the “amazon.com” trademark).

101. For a more detailed discussion of the issue of multiple competing interests in a domain name, see discussion in Jacqueline D. Lipton, *A Winning Solution for YouTube and Utube? Corresponding Trademarks and Domain Name Sharing*, 21 HARV. J.L. TECH. 509 (2008).

result as a matter of policy. In other words, the default regulatory approach has been that trademark rights take precedence over other legitimate interests.¹⁰² Questions relating to the balance of competing legitimate interests in the domain space are beyond the scope of this discussion, although the Author has addressed them elsewhere.¹⁰³ The focus of this Article is on creating a more coherent theoretical framework to regulate unfair or unjust conduct in the domain space.

Existing regulations generally protect purely expressive uses of a domain name as legitimate uses, even against trademark holders. Thus, the trademark holder in Scenario 2 will likely be out of luck provided that the tourist bureau is using the name for expressive, rather than commercial, purposes.¹⁰⁴ The lines between expressive and commercial uses may become blurred if the registrant has a dual purpose in registering the name. Not all commercial purposes are in bad faith, although courts and arbitrators may be more protective of purely expressive uses than of other uses. While a number of adjudicators have been sympathetic to those with expressive purposes, it is worth pointing out that free speech is not expressly identified as a legitimate use in either the ACPA or the UDRP.¹⁰⁵ It is not impossible for a registrant whose primary motivation is expressive to be found to be acting in bad faith.

Scenarios 3 and 4 in Table 3 raise complex issues that are not particularly well-handled under current regulations. While some domain names that fall under Scenario 3 may correspond with trademarks, many are also general terms that might attract Internet users to the registrant's clickfarm irrespective of any association with a particular mark. While it is possible that the registrant in Scenario 3 had a financial motive in the back of her mind when she registered the names, it is not clear that her actions are in bad faith in the traditional cybersquatting sense. The registration of multiple domain names corresponding with another person's trademarks is an express bad faith factor under both the ACPA and the UDRP.¹⁰⁶ However, the registration of domain names corresponding with cultural and geographic terms that *may* correspond in some cases with trademarks is not the same as the intentional registration of trademarks in the domain space. The motivations for the conduct are different. Unlike traditional cybersquatting, the former scenario relies on happenstance. If by chance

102. Lipton, *supra* note 74, at 1363 (“[C]urrent dispute resolution mechanisms are focused on the protection of commercial trademark interests, often to the detriment of other socially important interests that may inhere in a given domain name.”).

103. See generally Lipton, *supra* note 39; Lipton, *supra* note 101.

104. See *Kur- und Verkehrsverein St. Moritz*, WIPO Case No. D2000-0617.

105. However, in October of 2006 the Trademark Dilution Revision Act inserted criticism and commentary into the Lanham Act as defense for trademark dilution. 15 U.S.C. § 1125(c)(3)(A)(ii) (2006).

106. 15 U.S.C. § 1125(d)(1)(B)(i)(VIII) (2006); UDRP, *supra* note 6, ¶ 4(b)(ii).

a domain name relates to someone's trademark, the registrant might serendipitously profit from clickfarm traffic by Internet users seeking the trademark holder's official website.

Applying the trademark-focused provisions of the UDRP and other domain name regulations is confusing in situations like Scenario 3. Since the policy underpinnings for the regulations lie in trademark protection, there is no guidance to arbitrators and judges regarding the correct approach to disputes involving these kinds of names. Presumably, in many situations like Scenario 3, arbitrators and judges will find the registrant's use of relevant terms to be legitimate. If there is no motive to profit from someone else's trademark, the application of rules based largely on trademark policy is not very helpful. Row 3 of Table 1, *supra*, suggests that most uses of cultural and geographic words that are not trademarked are legitimate.

Current trademark-focused policy has nothing to say about whether this is the "right" result in the context of domain space. It is not clear whether we need specific regulations to protect cultural and geographic indicators that are not trademarked. If so, such regulations might usefully be based on unjust enrichment. Irrespective of trademark interests, it may be worthwhile to develop rules that prevent clickfarmers from making commercial profits that capitalize on words and phrases that have particular significance to one or more cultural groups, even if that significance is not manifested in a trademark or other property right. In some cases, the words and phrases may have a proprietary connection with a particular cultural group, but more likely than not, an unjust enrichment rationale will be the best fit. Under this rationale, it would be possible to develop rules based on the notion that a registrant should not be unjustly enriched at the expense of a group of people with a legitimate interest in a particular word or phrase.

Scenario 4 in Table 3 is another problematic situation under traditional trademark-focused policy. It does not involve any trademarks at all, unless the Japanese city officials have trademarked the city's name or the President has established sufficient secondary meaning in his name to support a trademark.¹⁰⁷ In the absence of trademark rights, current regulations give little guidance as to who has a better right to the domain name. It is an open question whether any set of rules

107. High-level politicians have had some success in establishing trademarks in their personal names. *Clinton v. Web of Deception*, NAF Claim No. FA0904001256123 (June 1, 2009), <http://domains.adrforum.com/domains/decisions/1256123.htm> ("President Clinton's best-selling books are probably enough to qualify his personal name as a common law mark."); *Clinton v. Dinoia*, NAF Claim No. FA0502000414641 (Mar. 18, 2005), <http://www.arb-forum.com/domains/decisions/414641.htm> (finding that "the HILLARY CLINTON mark has become distinctive through Complainant's use and exposure of the mark in the marketplace and through use of the mark in connection with Complainant's political activities").

should be developed for rare scenarios like this. It may be preferable to deal with them on a case-by-case basis. In any event, the adoption of a theoretical basis for domain name regulation rooted in unjust enrichment may be helpful in delineating the kinds of conduct that should not be regulated at all. A regulatory approach premised on unjust enrichment at the expense of another would militate against regulating situations like Scenario 4 in Table 3. The adoption of a clear theoretical basis for domain name regulation that is broader than mere trademark policy may better delineate which situations require regulation and which simply involve balancing competing legitimate interests in the domain space. Scenario 4 is likely an example of the latter.

3. Generic Terms

Generic terms raise a different set of regulatory and policy issues from those discussed above. Such terms are broader than other classes of words and phrases in the domain space. They include words such as “love,” “joy,” “business,” and “hope” — not to mention “sex,” the subject of one of the most intriguing domain name battles fought outside the bounds of trademark law.¹⁰⁸ More recently, “p2p.com” has been the subject of controversy in the domain space.¹⁰⁹ Generic terms are generally neither trademarked nor trademarkable, subject to some relatively rare exceptions.¹¹⁰ Nevertheless, they are often valuable cyber-realty. A survey of the top twenty-five reported domain name sales at the end of 2007 illustrates that generic terms generally raised the largest sales revenues of any domain names.¹¹¹ “Porn.com” raised almost ten million dollars, while “business.com” and “diamond.com” tied at seven and a half million apiece.¹¹² Even names like “fish.com” raised just over a million dollars, while “if.com” and “rock.com” tied at a million.¹¹³

Again, current trademark-focused rules are a poor fit for conflicts that arise in relation to generic domain names. A registrant of multiple generic terms in the domain space may have a variety of commercial and expressive motives, none of which are likely to have anything to do with interfering with a trademark holder’s rights. There is a healthy and active market in generic domain names that has developed outside the realm of existing trademark-focused regulations.¹¹⁴ This raises a

108. See *Kremen v. Cohen*, 337 F.3d 1024, 1030–34 (9th Cir. 2003) (finding domain name to be property for the purposes of the California statutory tort of conversion).

109. See Patel, *supra* note 42.

110. LINDSAY, *supra* note 57, at 352 (“[B]y definition, a generic term cannot operate to distinguish the source of goods or services What is generic in one part of the world may, however, be distinctive in another part of the world.”).

111. KESMODEL, *supra* note 2, at 193.

112. *Id.*

113. *Id.*

114. *Id.* at 24, 30.

number of issues for regulators, including the foundational question of whether there is ever a valid theoretical justification for regulating generic domain names. The answer to this question depends on how much of a free market approach one is prepared to take with respect to the domain space.

To the extent that regulations have been found wanting in the context of generic terms, the underlying theoretical quandary has related to the categorization of generic names as intangible property. In other words, a property rights rationale for domain name regulation potentially comes into play here. For example, the “sex.com” domain name was the subject of a conversion action under California tort law.¹¹⁵ This dispute arose in circumstances where the name was, in effect, converted for the purposes of the California statute by a fraudulent request to its registrar to transfer the name to a party who had no legal entitlement to the name. A similar situation arose more recently in the case of the “p2p.com” domain name.¹¹⁶ Registrants of generic names that are “stolen” in this way have very little guidance as to their rights. The regulatory impulse to date has been to gravitate toward property theory and explain the conflict in terms of the misappropriation of another’s property.

However, as noted in Part II.B, property analogies can be problematic in the domain space because they never apply perfectly to the virtual world. The attraction of the property theory is that it fits the way people routinely think about domain names. Markets for trading in domain names have developed over the years, and people treat the domain names as proprietary assets.¹¹⁷ Despite the market approach, the judicial verdict has been less clear. While some judges have accepted domain names as intangible property,¹¹⁸ others have not.¹¹⁹ Now might be a good time in the development of domain name jurisprudence to make a clear decision one way or the other. For example, regulators could make a policy decision to accept domain names as a form of property, and thus accept a property rights rationale for their regulation. This would include allowing more ready access to trespass and conversion actions in cases involving generic domain names. Alternatively, regulators could make the opposite decision and deny domain names proprietary status. Any subsequent regulations might then have to be based on an unjust enrichment rationale.

115. *Kremen v. Cohen*, 337 F.3d 1024, 1029–36 (9th Cir. 2003).

116. *See Patel*, *supra* note 42.

117. *Kremen*, 337 F.3d at 1030 (“[L]ike other forms of property, domain names are valued, bought and sold, often for millions of dollars.”).

118. *Id.* at 1030 (accepting domain names as property for the purposes of California statutory conversion action).

119. *Network Solutions v. Umbro Int’l, Inc.*, 529 S.E.2d 80, 88 (Va. 2000) (rejecting domain names as property for the purposes of a garnishment action).

This Article suggests that the property model may be preferable for several reasons. It best accords with the way market participants relate to domain names. Even though a domain name is a form of contractual license from a registrar to a registrant,¹²⁰ it results in a valuable asset that is freely traded on the open market and that is occasionally stolen by a bad faith actor. Even though a transfer of a domain name is, in reality, a de-registration from the original registrant and re-registration to the new registrant, it is now treated routinely as a seamless transfer, as if the name was being handed directly from the original registrant to the new registrant. Further, the acceptance of a property rights rationale for regulating generic domain names could take advantage of existing property-based laws such as theft and conversion, and simply extend them judicially to virtual property.

4. Typosquatting

Typosquatting has been defined as “taking advantage of common misspellings made by Internet users who are looking for a particular site of a particular provider of goods or services, in order to obtain some benefit therefrom.”¹²¹ This definition covers typosquatting as it relates to trademarks, but theoretically one could just as easily squat on other words and phrases. One might register common misspellings of generic words, personal names, and cultural or geographic indicators in the hope of attracting Internet traffic. For example, a domain name speculator who could not afford to bargain for “porn.com”¹²² might more easily register “pron.com” in the hope of attracting customers.¹²³ Though the most common forms of typosquatting involve trademarks and, to some extent, personal names,¹²⁴ such conduct is unlikely to amount to bad faith or to be regulated under existing domain name rules because it does not implicate any trademark interests.

Typosquatting that involves misspelling a trademark is currently regulated by the ACPA and the UDRP. Each of these rules covers situations where the domain name is identical or confusingly similar to a trademark.¹²⁵ Misspellings of generic, cultural, and geographic terms that do not correspond with trademarks do not currently raise

120. Patel, *supra* note 42 (“[D]omain names aren’t physical property, but a right to contract . . . because owners pay for the right to use the name.”).

121. LINDSAY, *supra* note 57, at 259, (quoting *Expedia, Inc. v. Alvaro Collazo*, WIPO Case No. D2003-0716, § 6 (Oct. 30, 2003), <http://www.wipo.int/amc/en/domains/decisions/html/2003/d2003-0716.html>).

122. The actual “porn.com” domain name most recently sold for \$9,500,000. KESMODEL, *supra* note 2, at 193.

123. At the time of writing, the domain name “pron.com” was in fact registered for this purpose.

124. See Table 1, rows 5 and 6, *supra* p. 458.

125. 15 U.S.C. §§ 1125(d)(1)(A)(ii)(I)–(II) (2006); UDRP, *supra* note 6, ¶ 4(a)(i).

the specter of regulation. There is perhaps no reason why such misspellings should be regulated, but again it is a question that has not received any meaningful regulatory attention.

Typosquatting, particularly with respect to trademarks and some personal names, should be an easy issue in the regulatory context. The fact that someone has registered a deliberate misspelling of someone else's mark or name may suggest a bad faith motive in and of itself. Such conduct may therefore raise an initial presumption of bad faith commercial conduct that should be regulated as a matter of policy. This presumption might be rebutted by the registrant in certain circumstances. The question then arises as to the basis on which such conduct should be regulated as a policy matter. Typosquatting, at least as it relates to trademarks, can be, and currently is, regulated under the trademark policy rationale.

Under this approach, commercially profitable uses of a misspelling of another's mark in the domain space may attract sanctions while purely expressive uses might not. We might therefore expect the regulation of typosquatting on trademarks to mirror the regulation of "sucks"-type domain names relating to trademarks. While speech should be protected, unfair commercial profit should not. A brief look back at Table 1 suggests that there are potentially some differences in the application of current regulations to typosquatting as compared with "sucks"-type domain names. It appears that typosquatting more readily attracts sanctions than the registering of "sucks"-type domain names. This is unsurprising given that the deliberate misspelling of a mark is more likely to be undertaken for a commercial purpose than the registering of a "sucks"-type domain name. The latter domain names tend to be used for commentary and criticism, while the former tend to be used for unfair commercial advantage.

Over time, savvy domain name speculators have come to use "sucks"-type domains for commercial purposes, hiding behind the pejorative term to clothe their conduct in the guise of speech. As observed by David Lindsay, the use of "sucks"-type domain names in this way is termed "sham speech."¹²⁶ While still amenable to regulation under a trademark policy rationale, arbitrators and judges approaching sham speech websites must be careful to apply trademark protection laws as robustly as they would in the case of typosquatting.

This Article has not yet touched on typosquatting on personal names. Many personal names are commercially valuable in spite of the potential lack of trademark protection. This is one reason why Congress adopted specific anti-cybersquatting rules relating to personal names.¹²⁷ In the case of typosquatting on a non-trademarked personal name, a trademark policy rationale cannot be the basis for

126. LINDSAY, *supra* note 57, at 262.

127. 15 U.S.C.A. § 8131(1)(A) (West Supp. 2009).

regulation. Presumably, a property rights rationale is likewise not a particularly good fit in the absence of clearly accepted property rights in personal names.¹²⁸ So again, the only viable theoretical justification would be unjust enrichment. Drawing on this theory, one could develop accessible rules for individuals aggrieved by personal-name typosquatting for unfair commercial profit motives. This would be similar to the approach that could be taken to better streamline regulations relating to the use of personal names in the domain space more generally.¹²⁹

IV. THE ROLE OF THE REGISTRAR

One piece of the puzzle missing from the preceding discussion relates to the role of domain name registrars. A significant advantage of creating a clearer theoretical basis for domain name regulation would be increased clarity as to the role and potential liability of domain name registrars in domain name disputes. Existing law and policy have been unclear about the extent to which a domain name registrar should be liable for bad faith conduct by domain name registrants. There are arguments both for and against the imposition of such liability. In early cases, registrars were routinely sued in trademark infringement and dilution actions.¹³⁰ This was an obvious strategy for plaintiffs. The registrar was often much easier to locate than the registrant and was likely wealthier. The registrar also maintained the necessary contact information about the registrant. Moreover, in early domain name cases the registrar was typically one party, Network Solutions, situated in Reston, Virginia.¹³¹ This made the assertion of jurisdiction under the Lanham Act an easy matter for potential plaintiffs.

The registrar was obviously complicit in the registration of domain names since it had taken the registrant's money and handed out a domain name that corresponded with the plaintiff's mark. Thus, it was fairly easy to argue at least contributory trademark infringement

128. As Mark P. McKenna noted:

It might be true that identity is sufficiently similar to other objects the law regards as property and therefore deserves at least some of the sticks in the traditional bundle of property rights. But far too few courts and commentators have offered a theory as to why any of the traditional property justifications lead to that conclusion.

Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 247 (2005).

129. See discussion *supra* Part III.B.1.

130. See, e.g., *Lockheed Martin Corp. v. Network Solutions Inc.*, 194 F.3d 980 (9th Cir. 1999); Philip Zadeik, *Domain Name Disputes: The United States Experience*, FINDLAW, Jan. 1, 1999, <http://library.findlaw.com/1999/Jan/1/129411.html> ("NSI become [sic] concerned when companies who could not work out any resolution started suing NSI.").

131. MUELLER, *supra* note 5, at 1–2.

or dilution. It was also argued unsuccessfully that once a registrar had knowledge — in the form of a complaint by a trademark holder — that a domain name registration potentially infringed a mark, the registrar should take action to cancel the registration.¹³² While this view has some merit, it potentially puts the registrar in the role of having to adjudicate between two competing claims if the registrant has also asserted a legitimate interest in the domain name. Most domain name registrars are ill-equipped to determine the appropriate outcome of disputes involving competing claims in a domain name.

Other Internet intermediaries have faced analogous situations. For example, many Internet service providers have been asked to remove material contributed by their users on the basis that it infringes a copyright,¹³³ infringes a trademark,¹³⁴ or is defamatory.¹³⁵ Internet intermediaries are often not in a position to ascertain the validity of these claims against, say, a fair use defense asserted by an alleged copyright infringer.¹³⁶ Ultimately, Congress has legislated in some of these areas in an attempt to clarify the responsibility of the intermediaries. Thus, Section 230 of the Communications Decency Act provides a safe harbor for Internet intermediaries for the speech of others.¹³⁷ Applied in the defamation context, the Act prevents the chilling effect on Internet speech that might result if gateway services enabling online speech faced legal liability for the speech of others.¹³⁸ In the copyright context, the Digital Millennium Copyright Act also provides a safe harbor from copyright infringement for Internet service providers that have acted expeditiously in removing infringing material on receipt of a notice from the copyright holder.¹³⁹

The role of domain name registrars in terms of their liability for the conduct of their users has been variously dealt with in the context of domain name regulation. Much of the rule-making here is contractual. After serving as defendants in early trademark cases, domain name registrars quickly inserted clauses into their registration policies that disclaimed liability for trademark infringement. These clauses squarely placed the onus on registrants to ensure that they were not

132. See *Lockheed Martin Corp.*, 194 F.3d 980.

133. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (alleging copyright infringement by operators of a popular peer-to-peer file sharing service).

134. *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020 (9th Cir. 2004) (alleging trademark infringement by search engine operators).

135. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (involving action against Internet service provider for defamatory comments posted by user of the service).

136. 17 U.S.C. § 107 (2006) (fair use defense to copyright infringement).

137. 47 U.S.C. § 230(c)(1) (2006).

138. See, e.g., *Zeran*, 129 F.3d at 331; *Blumenthal v. Drudge*, 992 F. Supp. 44, 51 (D.D.C. 1998).

139. 17 U.S.C. § 512(c) (2006).

infringing other people's trademark rights or other legal interests.¹⁴⁰ The UDRP is a significant part of this approach. It contractually binds registrants to submit to mandatory arbitrations if a trademark owner complains about the registration of a domain name.¹⁴¹ Under the UDRP, the registrar represents that it will abide by decisions of arbitrators and domestic courts on matters relating to rights in domain names.¹⁴² These contractual measures take much of the early pressure off registrars by making it clear that they do not — and cannot be expected to — take initial responsibility for bad faith registrations in breach of trademark policy. However, the contractual measures do not go much beyond trademark policy.

While UDRP arbitrators may squeeze disputes involving domain names of unclear trademark status into their jurisdiction, their expressed justification must rest on a finding of a trademark interest in a word or phrase in the domain space. In other words, a UDRP arbitrator, seeking to be sympathetic to an interest holder in a personal name or geographic term, might order the transfer of a domain name corresponding to such a term to the complainant. However, in these cases the arbitrator must find a trademark right in that name or term on which to base the transfer order. There is simply no action available under the UDRP without a trademark.¹⁴³ This fact may have caused some arbitrators to readily accept trademarks in words that have not unequivocally achieved trademark status.¹⁴⁴ The fact that the UDRP is the most accessible avenue of recourse for domain name complainants might motivate some arbitrators to find trademarks in personal names and in cultural and geographic indicators too readily. This in itself may be a sufficient argument for identifying and developing theoretical justifications for domain name regulation outside of trademark policy.

The adoption of regulations that are accessible to disputants, but that encompass broader policy aims, such as the prevention of unjust enrichment, may help lead to more coherent regulations in the future. Such an approach may be instructive not only for domain name disputes per se, but also for disputes involving Internet search engines more generally. Additionally, the forthcoming extension of the domain space to incorporate new gTLDs would benefit from a clearer

140. UDRP, *supra* note 6, ¶ 2 (“By applying to register a domain name, or by asking us to maintain or renew a domain name registration, you hereby represent and warrant to us that . . . to your knowledge, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party It is your responsibility to determine whether your domain name registration infringes or violates someone else's rights.”).

141. *Id.* ¶ 4(a).

142. *Id.* ¶ 3(b)–(c).

143. *See id.* ¶ 4(a)(i).

144. *See generally* Lipton, *supra* note 29.

understanding of the kinds of policies that should be reflected in the resolution of disputes involving domain names.¹⁴⁵

The adoption of a broader and more coherent theoretical framework for domain name disputes would bring with it a need to clarify the extent to which domain name registrars might be held liable for infringements of protected interests in domain names. In the trademark policy arena, a decision has already been made that registrars are not generally required to take initial responsibility for the registration of trademarked terms, but are required to abide by remedies granted by arbitrators and courts.¹⁴⁶ As a cost-benefit exercise, this makes sense, particularly given the easily accessible mechanism now available for trademark holders to protect their interests under the UDRP.

The question remains as to whether there are other areas of domain name policy that may require a different balance of interests in terms of the potential liability of registrars for conduct of registrants. The obvious example is the relatively rare situation involving conversion or theft of domain names where a wrongdoer fraudulently approaches a registrar for transfer of a name originally registered to someone else. These situations raise a different cost-benefit analysis from the trademark policy issues addressed by the UDRP. In the case of fraudulent conversions of domain names involving generic terms, the domain name registrar is implicated in a manner different from the way in which it is typically involved in a trademark registration dispute. In the latter situation, the registrar is simply performing its typical function of processing large volumes of applications for currently unregistered domain names. In contrast, the former situation involves a request to transfer a domain name from an existing registrant into the hands of a new registrant. In these cases, it is reasonable to expect the registrar to be at least a little bit vigilant to ensure that the original registrant has indeed acquiesced to the transfer. In case of any doubt, it is not difficult for the registrar to send an e-mail to the original registrant to verify the transfer.

The Ninth Circuit took this view in the “sex.com” case.¹⁴⁷ Holding Network Solutions — the registrar — liable for conversion under the California statute, the court noted that Network Solutions had made no effort to contact the original registrant of the domain name before giving it away on the basis of a facially suspect letter from a third party who had subsequently left the jurisdiction.¹⁴⁸ While accepting that the third party was guilty in the case, the court felt that

145. Farley, *supra* note 5 (criticizing the proposal for new gTLDs for its unclear policy underpinnings that are overly focused on trademark principles).

146. UDRP, *supra* note 6, ¶ 3(b)–(c).

147. Kremen v. Cohen, 337 F.3d 1024, 1035 (9th Cir. 2003).

148. *Id.* at 1035.

there was nothing inappropriate about holding Network Solutions responsible for giving away the domain name when it could have taken simple precautions to ensure that the transfer request was not fraudulent.¹⁴⁹ With respect to the argument accepted in the district court regarding the policy problems inherent in imposing liability on domain name registrars, the Ninth Circuit noted:

[T]he district court was worried that “the threat of litigation threatens to stifle the registration system by requiring further regulations by [Network Solutions] and potential increases in fees.” Given that Network Solutions’ “regulations” evidently allowed it to hand over a registrant’s domain name on the basis of a facially suspect letter without even contacting him, “further regulations” don’t seem like such a bad idea. And the prospect of higher fees presents no issue here that it doesn’t in any other context. A bank could lower its ATM fees if it didn’t have to pay security guards, but we doubt that most depositors would think that was a good idea.¹⁵⁰

In fraudulent transfer situations, there is a good argument for imposing liability on a domain name registrar if the registrar has not taken inexpensive and simple precautions to ensure the validity of a transfer request. The question remains as to what is the appropriate policy justification for the imposition of such liability. While the Ninth Circuit was prepared to rely on the property rights rationale underpinning the California conversion statute,¹⁵¹ its holding is specific to its interpretation of that statute. A more widely accepted property rights rationale for these kinds of cases might lead to judicial interpretations of existing legislation in other states that would more readily accept property rights in generic domain names in support of similar holdings. At the present time, a property rights approach to domain name disputes is not generally accepted, and some situations involving alleged conversion of others’ generic domain names have proved difficult to resolve as a matter of law.¹⁵²

An unjust enrichment rationale would be an alternative theoretical possibility for remedying fraudulent transfer situations. Where a fraudulent transferee is unjustly enriched at the expense of the original registrant, the domain name registrar might be held liable for facilitat-

149. *Id.*

150. *Id.* at 1035–36 (citation omitted).

151. *Id.* at 1030.

152. See *Network Solutions, Inc. v. Umbro Int’l, Inc.*, 529 S.E.2d 80 (Va. 2000) (declining to accept domain names as property for the purposes of a garnishment action).

ing the unjust enrichment. Unlike the property rights approach, the unjust enrichment rationale likely calls for new regulations that are less focused on property than current conversion laws and that deal more directly with unjust enrichments outside of property rights. It may ultimately be possible to develop a new kind of UDRP that is more squarely based on the unjust enrichment concept and is not limited to trademark policy. This would effectively allow a cost-effective and accessible avenue of recourse for complainants and might also side-step the question of registrar liability because registrars would presumably continue to be bound by private arbitration decisions involving domain names. Perhaps the system could work towards a general unjust enrichment model to capture unjust commercial conduct in the domain space involving any kind of word or phrase. In the meantime, registrants faced with fraudulent transfer situations may have to rely on a property rights rationale and pursue actions under existing theft and conversion laws.

V. CONCLUSIONS

The domain name system currently suffers from a lack of cohesive and coherent underlying theory. This is partly the result of a lack of focus on domain name issues outside trademark-oriented disputes. Importantly, there is no single entity that has global constitutional competence to create an overarching policy for domain name regulation. Nevertheless, the gaps and inconsistencies in current regulations are causing problems of application in practice. The domain name system requires the identification of an underlying theoretical framework that would support more workable and coherent regulations. In particular, trademark policy — although useful to counteract traditional cybersquatting — has significant limitations when applied to more general practices in global domain name markets.¹⁵³

An examination of existing domain name regulations, coupled with approaches by courts and arbitrators in applying them to novel situations, suggests the development of an underlying model that might draw from three distinct theoretical bases: trademark policy, restitution, and property theory. Developing a framework that draws on the synergies between these three theoretical bases would more effectively facilitate future developments in domain name regulation and practice that better address the needs of modern domain name markets.

153. Lipton, *supra* note 74, at 1363.