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106TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT 106–412

TRADEMARK CYBERPIRACY PREVENTION ACT

OCTOBER 25, 1999.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. COBLE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 3028]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3028) amending certain trademark laws to prevent the misappropriation of marks, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the "Trademark Cyberpiracy Prevention Act.".

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(b) REFERENCES TO THE TRADEMARK ACT OF 1946.—Any reference in this Act to the Trademark Act of 1946 shall be a reference to the Act entitled "An Act to provide for the registration and protection of trade-marks used in commerce, to carry out the provisions of certain international conventions, and for other purposes", approved July 5, 1946 (15 U.S.C. 1051 et seq.).

SEC. 2. CYBERPIRACY PREVENTION.

(a) IN GENERAL.—Section 43 of the Trademark Act of 1946 (15 U.S.C. 1125) is amended by inserting at the end the following:

"(d)(1)(A) A person shall be liable in a civil action by the owner of a trademark or service mark if, without regard to the goods or services of the parties, that person—

"(i) has a bad faith intent to profit from that trademark or service mark; and

"(ii) registers, traffics in, or uses a domain name that—

"(I) in the case of a trademark or service mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to such mark;

"(II) in the case of a famous trademark or service mark that is famous at the time of registration of the domain name, is dilutive of such mark; or

"(III) is a trademark, word, or name protected by reason of section 706 of title 18, United States Code, or section 220506 of title 36, United States Code.

"(B) In determining whether there is a bad-faith intent described under subparagraph (A), a court may consider factors such as, but not limited to—

"(i) the trademark or other intellectual property rights of the person, if any, in the domain name;

"(ii) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;

"(iii) the person's prior lawful use, if any, of the domain name in connection with the bona fide offering of any goods or services;

"(iv) the person's lawful noncommercial or fair use of the mark in a site accessible under the domain name;

"(v) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;

"(vi) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services;

"(vii) the person's provision of material and misleading false contact information when applying for the registration of the domain name or the person's intentional failure to maintain accurate contact information;

"(viii) the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to trademarks or service marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous trademarks or service marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of such persons;

"(ix) the person's history of offering to transfer, sell, or otherwise assign domain names incorporating marks of others to the mark owners or any third party for consideration without having used, or having an intent to use, the domain names in the bona fide offering of any goods and services;

"(x) the person's history of providing material and misleading false contact information when applying for the registration of other domain names which incorporate marks, or the person's history of using aliases in the registration of domain names which incorporate marks of others; and

"(xi) the extent to which the trademark or service mark incorporated in the person's domain name registration is distinctive and famous within the meaning of subsection (c)(1) of section 43 of the Trademark Act of 1946 (15 U.S.C. 1125).

"(C) In any civil action involving the registration, trafficking, or use of a domain name under this paragraph, a court may order the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.

"(D) A person shall be liable for using a domain name under subparagraph (A)(ii) only if that person is the domain name registrant or that registrant's authorized licensee.

"(E) As used in this paragraph, the term 'traffics in' refers to transactions that include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration.

"(2)(A) The owner of a mark may file an in rem civil action against a domain name in the judicial district in which suit may be brought against the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name if—

"(i) the domain name violates any right of the registrant of a mark registered in the Patent and Trademark Office, or subsection (a) or (c) of this section, or is a trademark, word, or name protected by reason of section 706 of title 18, United States Code, or section 220506 of title 36, United States Code; and

"(ii) the court finds that—

"(I) the owner has demonstrated due diligence and was not able to find or was not able to serve a person who would have been a defendant in a civil action under paragraph (1); or

"(II) personal jurisdiction cannot be established over any person who would have been a defendant in a civil action under paragraph (1).

"(B) The remedies in an in rem action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.

"(C) The in rem action established under this paragraph and any remedy available under such action shall be in addition to any other civil action or remedy otherwise applicable.

"(3) The civil action established under paragraph (1) and any remedy available under such action shall be in addition to any other civil action or remedy otherwise applicable.".

SEC. 3. DAMAGES AND REMEDIES.

(a) REMEDIES IN CASES OF DOMAIN NAME PIRACY.—

(1) INJUNCTIONS.—Section 34(a) of the Trademark Act of 1946 (15 U.S.C. 1116(a)) is amended in the first sentence by striking "(a) or (c)" and inserting "(a), (c), or (d)".

(2) DAMAGES.—Section 35(a) of the Trademark Act of 1946 (15 U.S.C. 1117(a)) is amended in the first sentence by inserting ", (c), or (d)" after "section 43(a)".

(b) STATUTORY DAMAGES.—Section 35 of the Trademark Act of 1946 (15 U.S.C. 1117) is amended by adding at the end the following:

"(d) In a case involving a violation of section 43(d)(1), the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits, an award of statutory damages in the amount of not less than $1,000 and not more than $100,000 per domain name, as the court considers just. The court may remit statutory damages in any case in which the court finds that an infringer believed and had reasonable grounds to believe that use of the domain name by the infringer was a fair or otherwise lawful use.".

SEC. 4. LIMITATION ON LIABILITY.

Section 32(2) of the Trademark Act of 1946 (15 U.S.C. 1114) is amended—

(1) in the matter preceding subparagraph (A) by striking "under section 43(a)" and inserting "under section 43(a) or (d)"; and

(2) by redesignating subparagraph (D) as subparagraph (E) and inserting after subparagraph (C) the following:

"(D)(i) A domain name registrar, a domain name registry, or other domain name registration authority that takes any action described under clause (ii) affecting a domain name shall not be liable for monetary relief to any person for such action, regardless of whether the domain name is finally determined to infringe or dilute the mark.

"(ii) An action referred to under clause (i) is any action of refusing to register, removing from registration, transferring, temporarily disabling, or permanently canceling a domain name—

"(I) in compliance with a court order under section 43(d); or

"(II) in the implementation of a reasonable policy by such registrar, registry, or authority prohibiting the registration of a domain name that is identical to, confusingly similar to, or dilutive of another's mark registered on the Principal Register of the United States Patent and Trademark Office, or of a trademark, word, or name protected by reason of section 706

of title 18, United States Code, or section 220506 of title 36, United States Code.

"(iii) A domain name registrar, a domain name registry, or other domain name registration authority shall not be liable for damages under this section for the registration or maintenance of a domain name for another absent a showing of bad faith intent to profit from such registration or maintenance of the domain name.

"(iv) If a registrar, registry, or other registration authority takes an action described under clause (ii) based on a knowing and material misrepresentation by any other person that a domain name is identical to, confusingly similar to, or dilutive of a mark registered on the Principal Register of the United States Patent and Trademark Office, or a trademark, word, or name protected by reason of section 706 of title 18, United States Code, or section 220506 of title 36, United States Code, the person making the knowing and material misrepresentation shall be liable for any damages, including costs and attorney's fees, incurred by the domain name registrant as a result of such action. The court may also grant injunctive relief to the domain name registrant, including the reactivation of the domain name or the transfer of the domain name to the domain name registrant.

"(v) A domain name registrant whose domain name has been suspended, disabled, or transferred under a policy described under clause (ii)(II) may, upon notice to the mark owner, file a civil action to establish that the registration or use of the domain name by such registrant is not unlawful under this Act. The court may grant injunctive relief to the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant.".

SEC. 5. DEFINITIONS.

Section 45 of the Trademark Act of 1946 (15 U.S.C. 1127) is amended by inserting after the undesignated paragraph defining the term "counterfeit" the following:

"The term 'domain name' means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.

"The term 'Internet' has the meaning given that term in section 230(f)(1) of the Communications Act of 1934 (47 U.S.C. 230(f)(1)).".

SEC. 6. SAVINGS CLAUSE.

Nothing in this Act shall affect any defense available to a defendant under the Trademark Act of 1946 (including any defense under section 43(c)(4) of such Act or relating to fair use) or a person's right of free speech or expression under the first amendment of the United States Constitution.

SEC. 7. EFFECTIVE DATE.

Sections 2 through 6 of this Act shall apply to all domain names registered before, on, or after the date of enactment of this Act, except that damages under subsection (a) or (d) of section 35 of the Trademark Act of 1946 (15 U.S.C. 1117), as amended by section 3 of this Act, shall not be available with respect to the registration, trafficking, or use of a domain name that occurs before the date of enactment of this Act.

SEC. 8. ADJUSTMENT OF CERTAIN TRADEMARK AND PATENT FEES.

(a) TRADEMARK FEES.—Notwithstanding the second sentence of section 31(a) of the Trademark Act of 1946 (15 U.S.C. 1113(a)), the Commissioner of Patents and Trademarks is authorized in fiscal year 2000 to adjust trademark fees without regard to fluctuations in the Consumer Price Index during the preceding 12 months.

(b) PATENT FEES.—

(1) ORIGINAL FILING FEE.—Section 41(a)(1)(A) of title 35, United States Code, relating to the fee for filing an original patent application, is amended by striking "$760" and inserting "$690".

(2) REISSUE FEE.—Section 41(a)(4)(A) of title 35, United States Code, relating to the fee for filing for a reissue of a patent, is amended by striking "$760" and inserting "$690".

(3) NATIONAL FEE FOR CERTAIN INTERNATIONAL APPLICATIONS.—Section 41(a)(10) of title 35, United States Code, relating to the national fee for certain international applications, is amended by striking "$760" and inserting "$690".

(4) MAINTENANCE FEES.—Section 41(b)(1) of title 35, United States Code, relating to certain maintenance fees, is amended by striking "$940" and inserting "$830".

(c) EFFECTIVE DATE.—Subsection (a) shall take effect on the date of the enactment of this Act. The amendments made by subsection (b) shall take effect 30 days after the date of the enactment of this Act.

PURPOSE AND SUMMARY

Over the last two years, the Subcommittee on Courts and Intellectual Property held multiple hearings on domain names to access their impact on intellectual property rights, particularly the Lanham Act. Through this committee's oversight, it has become very aware of the problems faced by owners of famous marks when dealing with the issue of domain names. Much testimony has been gathered evidencing the practice of cybersquatters who register numerous domain names containing American trademarks or tradenames only to hold them ransom in exchange for money. Sometimes these pirates put pornographic materials on theses sites in an effort to increase the likelihood of collecting ransom by damaging the integrity of a mark. The time has come for this practice to stop.

The legal recourse provided for in this legislation, combined with the intellectual property alternative dispute resolution procedures being adopted by the domain name registrars, will give trademark owners important tools to protect their intellectual property. This is a measured and balanced response to a growing problem, and will clarify that trademark property rights are respected as the Internet continues to grow.

BACKGROUND AND NEED FOR THE LEGISLATION

A great deal of controversy surrounds trademark rights vis-a-vis domain names. In the early years of the Internet, when the primary users were academic institutions and government agencies, little concern existed over trademarks and domain names. As the Internet grew, however, the fastest growing number of requests for domain names were in the .com domain because of the explosion of businesses offering products and services on the Internet.

Because people use domain names to locate Web resources, companies doing business online now want domain names that are easy to remember and that relate to their products, trade names, and trademarks. Owners of famous trademarks typically register their trademarks as domain names (such as "microsoft.com"). This kind of identification can be highly important to a business that conducts commerce on the Internet. In fact, many consumers who do not know the domain name of a company will first try the principal trademark or trade name of that company to locate the company's Web site.

Since domain names are available from Network Solutions, Inc. (NSI), and now other registrars, on a first-come, first-served basis, some owners have discovered that the domain name containing their trademark has already been registered. The situation has been aggravated by some people, known as "cyberpirates," registering domain names in the hope that they might be able to sell them to companies that place a high value on these trademarks. These cyberpirates have no intention of using the domain name in commerce, and instead often attempt to exact money from a com-

pany in exchange for domain names that relate to that company's trademarks.

Disputes involving domain names and trademarks place registrars in the awkward position of being pressured to takes sides in trademark disputes, or to deny, grant, or suspend a domain name based on an allegation of infringement. NSI has maintained a domain name dispute policy since 1995, but it has been criticized by many intellectual property owners. Only owners of trademarks that are registered with the U.S. Trademark Office's Principal Register and are identical to the disputed domain name can invoke the dispute policy. This means that NSI will not act on complaints from parties that have Federal registrations on the Supplemental Register, have State trademark registrations, or have only common law trademark rights, or rights under Section 43(a) of the Lanham Act.

"Cyberpiracy" can involve individuals seeking extortionate profits by reserving Internet domain names that are similar or identical to trademarked names with no intention of using the names in commerce themselves. Such actions undermine consumer confidence, discourage consumer use of the Internet, and destroy the value of brand-names and trademarks of American businesses.

Cyberpiracy can hurt businesses in a number of ways. First, a cyberpirate's expropriation of a mark as part of a domain name prevents the trademark owner from using the mark as part of its domain name. As a result, consumers seeking a trademark owner's Web site are diverted elsewhere, which means lost business opportunities for the trademark owner. A cyberpirate's use may also blur the distinctive quality of a mark and, when linked to certain types of Internet activities such as pornography, may also tarnish the mark. Finally, businesses are required to police and enforce their trademark rights by preventing unauthorized use, or risk losing those rights entirely.

Currently, the legal remedies available to trademark owners to prevent cyberpiracy are both expensive and uncertain. Federal courts have generally found in favor of the owner of a trademark where a similar or identical domain name is actively used in connection with a cyberpirate's Web site.[1] The law is less settled, however, where a cyberpirate has either registered the domain name and done nothing more, or where the cyberpirate uses a significant variation on the trademark.[2] Regardless of the ultimate outcome of litigation, trademark owners must expend significant resources and endure the inevitable delay associated with bringing a civil action in order to validate their rights. Many companies simply choose to pay extortionate prices to cyberpirates in order to rid themselves of a potentially damaging headache with an uncertain outcome. For

[1] See, e.g., *Toeppen* v. *Panavision International L.P.*, 141 F.3d 1316 (9th Cir. 1998) (noting that the registration of the trademark "Panavision" as a domain name by a cyberpirate resulted in the dilution of that mark); *Cardservice International Inc.* v. *McGee* 950 F.Supp. 737 (E.D.Va. 1997), *aff'd without op.*, 129 F.3d 1258 (4th Cir. 1997) (ruling that the owner of the registered mark "Cardservice" is entitled to a permanent injunction against the use of the domain name "cardservice.com" by another party because it is likely to confuse customers).

[2] See, e.g., *Toys "R" Us Inc.* v. *Feinberg*, 26 F.Supp. 2d 639 (S.D.N.Y. 1998) (holding that the use of "gunsareus.com" as a domain name does not infringe or dilute the mark of "Toys 'R' Us" due to the dissimilarity of the terms).

example, Gateway recently paid $100,000 to a cyberpirate who had placed pornographic images to the Web site "www.gateway20000."

HEARINGS

The committee's Subcommittee on Courts and Intellectual Property held a hearing on Wednesday, July 28, 1999, on *Internet Domain Names and Intellectual Property Rights*. The following witnesses appeared at the hearing: Andrew Pincus, General Counsel, United States Department of Commerce; Francis Gurry, Assistant Director General & Legal Counsel, World Intellectual Property Organization; Michael Roberts, Interim President and CEO, Internet Corporation for Assigned Names and Numbers (ICANN); Michael A. Daniels, Chairman of the Board, Network Solutions, Incorporated; Jonathan Cohen, President, Intellectual Property Constituency of the Domain Name Supporting Organization of ICANN; Ken Stubbs, Chairman of the Executive Committee, Internet Council of Registrars (CORE) ; Kathlene Karg, Director of Intellectual Property and Public Policy, Interactive Digital Software Association, for the Copyright Coalition on Domain Names; Mike Kirk, Executive Director, American Intellectual Property Law Association (AIPLA); and Anne Chasser, President, International Trademark Association (INTA).

COMMITTEE CONSIDERATION

On September 9,1999, the Subcommittee on Courts and Intellectual Property met in open session and ordered favorably reported the bill H.R. 3028, by voice vote, a quorum being present. On October 13, 1999, the committee met in open session and ordered favorably reported the bill H.R. 3028 as amended, by voice vote, a quorum being present.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budget authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Congressional Budget Office estimates the bill would not have a significant effect on the Federal budget nor would affect direct spending or receipts; therefore pay-as-you-go procedures would not likely apply.

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R. 3028, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 22, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3028, the Trademark Cyberpiracy Prevention Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Hadley (for Federal costs), who can be reached at 226–2860, Shelley Finlayson (for the State and local impact), who can be reached at 225–3220, and John Harris (for the private-sector impact), who can be reached at 226–6910.

Sincerely,

DAN L. CRIPPEN, *Director.*

H.R. 3028—Trademark Cyberpiracy Prevention Act.

Cyberpiracy (or cybersquatting) consists of registering, trafficking in, or using domain names (Internet addresses) that are identical or confusingly similar to trademarks with the bad-faith intent to profit from the goodwill of the trademarks. H.R. 3028 would allow trademark owners to sue anyone who engages in such conduct, and allow the courts to order the forfeiture, cancellation, or transfer of domain names in such instances. CBO estimates that implementing these provisions would not have a significant effect on the Federal budget.

In addition, the bill would reduce the amounts the Patent and Trademark Office (PTO) charges inventors to file patents and would authorize the PTO to adjust the amounts it charges to file trademarks. In reviewing the cost of each activity the PTO performs, the agency determined that applicants for trademarks paid less than the cost to process trade applications, and applicants for patents paid more than the cost to process patent applications. Based on that information, CBO expects that the agency would increase trademark fees by more than enough to offset the lower patent fees that the bill would require. Under current law, PTO adjusts charges to patent and trademark owners to reflect fluctuations in the Consumer Price Index.

All fees collected by the PTO are credited to its appropriation as an offset to discretionary spending. Thus, CBO estimates that implementing H.R. 3028 would reduce net appropriated spending by the PTO by an average of about $10 million a year over the 2000–2004 period, assuming appropriation of the necessary amounts. Because H.R. 3028 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

H.R. 3028 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and could benefit state, local, or tribal governments if they sue to recover damages from infringement or dilution of trademarks based on the provisions of the bill. Any such benefits are expected to be minimal. The changes in patent and trademark fees authorized in the bill also

are expected to have only minimal effects on the budgets of state, local, and tribal governments.

H.R. 3028 would create a new private-sector mandate for trademark holders by granting the PTO the discretion to increase trademark fees. Trademark fee increases are private-sector mandates because the Federal Government controls the trademark system and no reasonable alternatives to the system exist. CBO estimates that the PTO would collect roughly $40 million a year, on average, in fee increase over the next five years. The costs of the mandate thus fall below the threshold established in UMRA ($100 million in 1996, adjusted annually for inflation).

The bill would benefit patent holders and applicants by reducing several patent fees, including filing, reissuance, and certain maintenance fees. CBO estimates that the fee reductions would save patent holders and applicants roughly $30 million a year, on average, over the next five years. Although some firms and individuals may hold both trademarks and patents, the patent fee reductions would not offset the trademark fee increases. Trademarks and patents serve separate and distinct purposes, and many trademark holders hold no patents.

On August 5, 1999, CBO transmitted an estimate of S. 1255, the Anticybersquatting Consumer Protection Act, as reported by the Senate Committee on the Judiciary on July 29, 1999. Because S.1255 would not affect the fees collected by the PTO, CBO estimated that it would not have a significant budgetary impact.

The CBO staff contacts are Mark Hadley (for Federal costs), who can be reached at 226–2860, Shelley Finlayson (for the state and local impact), who can be reached at 225–3220, and John Harris (for the private-sector impact), who can be reached at 226–6910. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of the rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article I, section 8, clause 3 of the Constitution, the authorizing provision for the underlying Lanham Act to which this Act is an amendment.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short title; references.

This section provides that the act may be cited as the "Trademark Cyberpiracy Prevention Act" and that any references within the bill to the Trademark Act of 1946 shall be a reference to the act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes," approved July 5, 1946 (15 U.S.C. § 1051 et seq.), also commonly referred to as the Lanham Act.

Section 2. Cyberpiracy prevention

Subsection (a). In General. This subsection amends section the Trademark Act to provide an explicit trademark remedy for

cyberpiracy under a new section 43(d). Under paragraph (1)(A) of the new section 43(d), actionable conduct would include the registration, trafficking in, or use of a domain name that is identical to, confusingly similar to, or dilutive of the trademark or service mark of another, provided that the mark was distinctive (i.e., enjoyed trademark status) at the time the domain name was registered. The bill is carefully and narrowly tailored, however, to extend only to cases where the plaintiff can demonstrate that the defendant registered, trafficked in, or used the offending domain name with bad-faith intent to profit from the goodwill of a mark belonging to someone else. Thus, the bill does not extend to innocent domain name registrations by those who are unaware of another's use of the name, or even to someone who is aware of the trademark status of the name but registers a domain name containing the mark for any reason other than with bad faith intent to profit from the goodwill associated with that mark.

Paragraph (1)(B) of the new section 43(d) sets forth a number of nonexclusive, nonexhaustive factors to assist a court in determining whether the required bad-faith element exists in any given case. These factors are designed to balance the property interests of trademark owners with the legitimate interests of Internet users and others who seek to make lawful uses of others' marks, including for purposes such as comparative advertising, comment, criticism, parody, news reporting, fair use, etc. The bill suggests a total of eleven factors a court may wish to consider. The first four suggest circumstances that may tend to indicate an absence of bad-faith intent to profit from the goodwill of a mark, and the others suggest circumstances that may tend to indicate that such bad-faith intent exists.

First, under paragraph (1)(B)(i), a court may consider whether the domain name registrant has trademark or any other intellectual property rights in the name. This factor recognizes, as does trademark law in general, that there may be concurring uses of the same name that are noninfringing, such as the use of the "Delta" mark for both air travel and sink faucets. Similarly, the registration of the domain name "deltaforce.com" by a movie studio would not tend to indicate a bad faith intent on the part of the registrant to trade on Delta Airlines or Delta Faucets' trademarks.

Second, under paragraph (1)(B)(ii), a court may consider the extent to which the domain name is the same as the registrant's own legal name or a nickname by which that person is commonly identified. This factor recognizes, again as does the concept of fair use in trademark law, that a person should be able to be identified by their own name, whether in their business or on a web site. Similarly, a person may bear a legitimate nickname that is identical or similar to a well-known trademark and registration of a domain name using that nickname would not tend to indicate bad faith. This factor is not intended to suggest that domain name registrants may evade the application of this act by merely adopting Exxon, Ford, Bugs Bunny or other well-known marks as their nicknames. It merely provides a court with the appropriate discretion to determine whether or not the fact that a person bears a nickname similar to a mark at issue is an indication of an absence of bad-faith on the part of the registrant.

Third, under paragraph (1)(B)(iii), a court may consider the domain name registrant's prior use, if any, of the domain name in connection with the bona fide offering of goods or services. Again, this factor recognizes that the legitimate use of the domain name in online commerce may be a good indicator of the intent of the person registering that name. Where the person has used the domain name in commerce without creating a likelihood of confusion as to the source or origin of the goods or services and has not otherwise attempted to use the name in order to profit from the goodwill of the trademark owner's name, a court may look to this as an indication of the absence of bad faith on the part of the registrant. A defendant should have the burden of introducing evidence of lawful use to assist the court in evaluating this factor.

Fourth, under paragraph (1)(B)(iv), a court may consider the person's legitimate noncommercial or fair use of the mark in a web site that is accessible under the domain name at issue. This factor is intended to balance the interests of trademark owners with the interests of those who would make lawful noncommercial or fair uses of others' marks online, such as in comparative advertising, comment, criticism, parody, news reporting, etc. Under the bill, the use of a domain name for purposes of comparative advertising, comment, criticism, parody, news reporting, etc., even where done for profit, would not alone satisfy the bad-faith intent requirement. The fact that a person may use a mark in a site in such a lawful manner may be an appropriate indication that the person's registration or use of the domain name lacked the required element of bad-faith. This factor is not intended to create a loophole that otherwise might swallow the bill, however, by allowing a domain name registrant to evade application of the Act by merely putting up a noninfringing site under an infringing domain name. For example, in the well know case of Panavision Int'l v. Toeppen, 141 F.3d 1316 (9th Cir. 1998), a well known cyberpirate had registered a host of domain names mirroring famous trademarks, including names for Panavision, Delta Airlines, Neiman Marcus, Eddie Bauer, Lufthansa, and more than 100 other marks, and had attempted to sell them to the mark owners for amounts in the range of $10,000 to $15,000 each. His use of the "panavision.com" and "panaflex.com" domain names was seemingly more innocuous, however, as they served as addresses for sites that merely displayed pictures of Pana Illinois and the word "Hello" respectively. This act would not allow a person to evade the holding of that case—which found that Mr. Toeppen had made a commercial use of the Panavision marks and that such uses were, in fact, diluting under the Federal Trademark Dilution Act—merely by posting noninfringing uses of the trademark on a site accessible under the offending domain name, as Mr. Toeppen did. Similarly, the bill does not affect existing trademark law to the extent it has addressed the interplay between first amendment protections and the rights of trademark owners. Rather, the act gives courts the flexibility to weigh appropriate factors in determining whether the name was registered or used in bad faith, and it recognizes that one such factor may be the use the domain name registrant makes of the mark.

Fifth, under paragraph (1)(B)(v), a court may consider whether, in registering or using the domain name, the registrant intended

to divert consumers away from the trademark owner's website to a website that could harm the goodwill of the mark, either for purposes of commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site. This factor recognizes that one of the main reasons cyberpirates use other people's trademarks is to divert Internet users to their own sites by creating confusion as to the source, sponsorship, affiliation, or endorsement of the site. This factor recognizes that one of the main reasons cyberpirates use other people's trademarks is to divert Internet users to their own sites by creating confusion as to the source, sponsorship, affiliation, or enforcement of the site. This is done for a number of reasons, including to pass off inferior goods under the name of a well-known mark holder, to defraud consumers into providing personally identifiable information, such as credit card numbers, to attract eyeballs to sites that price online advertising according to the number of "hits" the site receives, or even just to harm the value of the mark. Under this provision, a court may give appropriate weight to evidence that a domain name registrant intended to confuse or deceive the public in this manner when making a determination of bad-faith intent.

Sixth, under paragraph (1)(B)(vi), a court may consider a domain name registrant's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain, where the registrant has not used, and did not have any intent to use, the domain name in the bona fide offering of any goods or services. This factor is consistent with the court cases, like the Panavision case mentioned above, where courts have found a defendant's offer to sell the domain name to the legitimate mark owner as being indicative of the defendant's intent to trade on the value of a trademark owner's marks by engaging in the business of registering those marks and selling them to the rightful trademark owners. It does not suggest that a court should consider the mere offer to sell a domain name to a mark owner or the failure to use a name in the bona fide offering of goods or services is sufficient to indicate bad faith. Indeed, there are cases in which a person registers a name in anticipation of a business venture that simply never pans out. And someone who has a legitimate registration of a domain name that mirrors someone else's domain name, such as a trademark owner that is a lawful concurrent user of that name with another trademark owner, may, in fact, wish to sell that name to the other trademark owner. This bill does not imply that these facts are an indication of bad-faith. It merely provides a court with the necessary discretion to recognize the evidence of bad-faith when it is present. In practice, the offer to sell domain names for exorbitant amounts to the rightful mark owner has been one of the most common threads in abusive domain name registrations. Finally, by using the financial gain standard, this allows a court to examine the motives of the seller.

Seventh, under paragraph (1)(B)(vii), a court may consider the registrant's provision of material and misleading false contact information in an application for the domain name registration. Falsification of contact information with the intent to evade identification and service of process by trademark owners is also a common

thread in cases of cyberpiracy. This factor recognizes that fact, while still recognizing that there may be circumstances in which the provision of false information may be due to other factors, such as mistake or, as some have suggested in the case of political dissidents, for purposes of anonymity. This bill balances those factors by limiting consideration to the person's contact information, and even then requiring that the provision of false information be material and misleading. As with the other factors, this factor is nonexclusive and a court is called upon to make a determination based on the facts presented whether or not the provision of false information does, in fact, indicate bad-faith.

Eighth, under paragraph (1)(B)(viii), a court may consider the domain name registrant's acquisition of multiple domain names that are identical to, confusingly similar to, or dilutive of others' marks. This factor recognizes the increasingly common cyberpiracy practice known as "warehousing", in which a cyberpirate registers multiple domain names—sometimes hundreds, even thousands—that mirror the trademarks of others. By sitting on these marks and not making the first move to offer to sell them to the mark owner, these cyberpirates have been largely successful in evading the case law developed under the Federal Trademark Dilution Act. This act does not suggest that the mere registration of multiple domain names is an indication of bad faith, but allows a court to weigh the fact that a person has registered multiple domain names that infringe or dilute the trademarks of others as part of its consideration of whether the requisite bad-faith intent exists.

Ninth, under paragraph (1)(B)(ix), a court may consider the person's history of offering to transfer, sell, or otherwise assign domain name incorporating marks of others to the mark owners or other third party for consideration without having used, or having intent to use, the domain name. This factor should assist a court in distinguishing those circumstance more akin to warehousing versus those circumstances where the registrant has made a change is a business plan or course of action.

Tenth, under paragraph (1)(B)(x), a court may consider the person's history of providing material and misleading false contact information when applying for the registration of other domain names, or the person's history of using aliases in the registration of domain names which incorporate the marks of others. This factor recognizes that more often an applicant uses false or misleading contact information, the more likely it is that the applicant is engaging in speculative activity.

Lastly, under paragraph (1)(B)(xi), a court may consider the extent to which the mark incorporated in the person's domain name registration is distinctive and famous within the meaning of subsection (c)(1) of section 43 of the Trademark Act of 1946. The more distinctive or famous a mark has become, the more likely the owner of that mark is deserving of the relief available under this act.

Paragraph (1)(C) makes clear that in any civil action brought under the new section 43(d), a court may order the forfeiture, cancellation, or transfer of a domain name to the owner of the mark. Paragraph (1)(D) further clarifies that a use of a domain name shall be limited to a use of the domain name by the registrant or

his or her authorized licensee. This provision limits the right to use the domain name as a means to infringe on another's other bona fide trademark rights.

Paragraph (2)(A) provides for in rem jurisdiction, which allows a mark owner to seek the forfeiture, cancellation, or transfer of an infringing domain name by filing an in rem action against the name itself, where the mark owner has satisfied the court that it has exercised due diligence in trying to locate the owner of the domain name but is unable to do so. Such in rem jurisdiction is proper in two instances. First, where the mark owner has satisfied the court that it has exercised due diligence in trying to locate the owner of the domain name but is unable to do so, or is unable to affect service. As indicated above, a significant problem faced by trademark owners in the fight against cybersquatting is the fact that many cybersquatters register domain names under aliases or otherwise provide false information in their registration applications in order to avoid identification and service of process by the mark owner. The act alleviates this difficulty, while protecting the notions of fair play and substantial justice, by enabling a mark owner to seek an injunction against the infringing property in those cases where, after due diligence, a mark owner is unable to proceed against the domain name registrant because the registrant has provided false contact information or is otherwise not to be found, provided that mark owner can show that the domain name itself violates substantive Federal trademark law (i.e., that the domain name violates the rights of the registrant of a mark registered in the Patent and Trademark Office, or section 43 (a) or (c) of the Trademark Act). Second, such in rem jurisdiction is also appropriate in instances where personal jurisdiction cannot be established over the domain name registrant. This situation occurs when a non-U.S. resident cybersquats on a domain name that infringes upon a U.S. trademark. This type of in rem jurisdiction still requires a nexus based upon a U.S. registry or registrar would not offend international comity. This jurisdiction would not extend to any domain name registries existing outside of the United States. Nor would this jurisdiction preclude the movement of any registries to outside of the United States. Instead, providing in rem jurisdiction based upon the lack of personal jurisdiction over the cybersquatter would provide protection both for trademark owners and perhaps, more importantly, consumers. Finally, this jurisdiction does not offend due process, since the property and only the property is the subject of the jurisdiction, not other substantive personal rights of any individual defendant.

Paragraph (2)(B) limits the relief available in such an in rem action to an injunction ordering the forfeiture, cancellation, or transfer of the domain name.

Paragraph (2)(C) states that the in rem remedies under this section shall be in addition to other remedies that are applicable.

Paragraph (3) makes clear that the creation of a new section 43(d) in the Trademark Act does not in any way limit the application of current provisions of trademark, unfair competition and false advertising, or dilution law, or other remedies under counterfeiting or other statutes, to cyberpiracy cases.

Section 3. Damages and Remedies

Section 3 applies traditional trademark remedies, including injunctive relief, recovery of defendant's profits, actual damages, and costs, to cyberpiracy cases under the new section 43(d) of the Trademark Act. The bill also amends section 35 of the Trademark Act to provide for statutory damages in cyberpiracy cases, in an amount of not less than $1,000 and not more than $100,000 per domain name, as the court considers just. The act requires the court to remit statutory damages in any case where the infringer believed and had reasonable grounds to believe that the use of the domain name was a fair or otherwise lawful use.

Section 4. Limitation on liability

This section amends section 32(2) of the Trademark Act to extend the Trademark Act's existing limitations on liability to the cyberpiracy context. This section also creates a new subparagraph (D) in section 32(2) to encourage domain name registrars and registries to work with trademark owners to prevent cyberpiracy through a limited exemption from liability for domain name registrars and registries that suspend, cancel, or transfer domain names pursuant to a court order or in the implementation of a reasonable policy prohibiting cyberpiracy. The act anticipates a reasonable policy against cyberpiracy will apply only to marks registered on the Principal Register of the Patent and Trademark Office in order to promote objective criteria and predictability in the dispute resolution process.

This section also protects the rights of domain name registrants against overreaching trademark owners. Under a new section subparagraph (D)(iv) in section 32(2), a trademark owner who knowingly and materially misrepresents to the domain name registrar or registry that a domain name is infringing shall be liable to the domain name registrant for damages resulting from the suspension, cancellation, or transfer of the domain name. In addition, the court may grant injunctive relief to the domain name registrant by ordering the reactivation of the domain name or the transfer of the domain name back to the domain name registrant. Finally, in creating a new subparagraph (D)(iii) of section 32(2), this section codifies current case law limiting the secondary liability of domain name registrars and registries for the act of registration of a domain name, absent bad-faith on the part of the registrar and registry.

Section 5. Definitions

This section amends the Trademark Act's definitions section (section 45) to add definitions for key terms used in this act. First, the term "Internet" is defined consistent with the meaning given that term in the Communications Act (47 U.S.C. § 230(f)(1)). Second, this section creates a narrow definition of "domain name" to target the specific bad-faith conduct sought to be addressed while excluding such things as screen names, file names, and other identifiers not assigned by a domain name registrar or registry.

Section 6. Savings clause

This section provides an explicit savings clause making clear that the bill does not affect traditional trademark defenses, such as fair use, or a person's first amendment rights.

Section 7. Effective date

This section provides that new statutory damages provided for under this bill shall not apply to any registration, trafficking, or use of a domain name that took place prior to the enactment of this act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TRADEMARK ACT OF 1946

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TITLE VI—REMEDIES

SEC. 32. (1) * * *

(2) Notwithstanding any other provision of this Act, the remedies given to the owner of a right infringed under this Act or to a person bringing an action [under section 43(a)] *under section 43(a) or (d)* shall be limited as follows:

(A) * * *

* * * * * * *

(D)(i) A domain name registrar, a domain name registry, or other domain name registration authority that takes any action described under clause (ii) affecting a domain name shall not be liable for monetary relief to any person for such action, regardless of whether the domain name is finally determined to infringe or dilute the mark.

(ii) An action referred to under clause (i) is any action of refusing to register, removing from registration, transferring, temporarily disabling, or permanently canceling a domain name—

(I) in compliance with a court order under section 43(d); or

(II) in the implementation of a reasonable policy by such registrar, registry, or authority prohibiting the registration of a domain name that is identical to, confusingly similar to, or dilutive of another's mark registered on the Principal Register of the United States Patent and Trademark Office, or of a trademark, word, or name protected by reason of section 706 of title 18, United States Code, or section 220506 of title 36, United States Code.

(iii) A domain name registrar, a domain name registry, or other domain name registration authority shall not be liable for

damages under this section for the registration or maintenance of a domain name for another absent a showing of bad faith intent to profit from such registration or maintenance of the domain name.

(iv) If a registrar, registry, or other registration authority takes an action described under clause (ii) based on a knowing and material misrepresentation by any other person that a domain name is identical to, confusingly similar to, or dilutive of a mark registered on the Principal Register of the United States Patent and Trademark Office, or a trademark, word, or name protected by reason of section 706 of title 18, United States Code, or section 220506 of title 36, United States Code, the person making the knowing and material misrepresentation shall be liable for any damages, including costs and attorney's fees, incurred by the domain name registrant as a result of such action. The court may also grant injunctive relief to the domain name registrant, including the reactivation of the domain name or the transfer of the domain name to the domain name registrant.

(v) A domain name registrant whose domain name has been suspended, disabled, or transferred under a policy described under clause (ii)(II) may, upon notice to the mark owner, file a civil action to establish that the registration or use of the domain name by such registrant is not unlawful under this Act. The court may grant injunctive relief to the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant.

[(D)**]** *(E)* As used in this paragraph—

(i) the term "violator" means a person who violates section 43(a); and

(ii) the term "violating matter" means matter that is the subject of a violation under section 43(a).

* * * * * * *

SEC. 34. (a) The several courts vested with jurisdiction of civil actions arising under this Act shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office or to prevent a violation under subsection **[**(a) or (c)**]** *(a), (c), or (d)* of section 43. Any such injunction may include a provision directing the defendant to file with the court and serve on the plaintiff within thirty days after the service on the defendant of such injunction, or such extended period as the court may direct, a report in writing under oath setting forth in detail the manner and form in which the defendant has complied with the injunction. Any such injunction granted upon hearing, after notice to the defendant, by any district court of the United States, may be served on the parties against whom such injunction is granted anywhere in the United States where they may be found, and shall be operative and may be enforced by proceedings to punish for contempt, or otherwise, by the court by which such injunction was

granted, or by any other United States district court in whose jurisdiction the defendant may be found.

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SEC. 35. (a) When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 43(a)*, (c), or (d)*, or a willful violation under section 43(c), shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of sections 29 and 32, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only, defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

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(d) In a case involving a violation of section 43(d)(1), the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits, an award of statutory damages in the amount of not less than $1,000 and not more than $100,000 per domain name, as the court considers just. The court may remit statutory damages in any case in which the court finds that an infringer believed and had reasonable grounds to believe that use of the domain name by the infringer was a fair or otherwise lawful use.

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TITLE VIII—FALSE DESIGNATIONS OF ORIGIN, FALSE DESCRIPTIONS, AND DILUTION FORBIDDEN

SEC. 43. (a) * * *

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(d)(1)(A) A person shall be liable in a civil action by the owner of a trademark or service mark if, without regard to the goods or services of the parties, that person—

(i) has a bad faith intent to profit from that trademark or service mark; and

(ii) registers, traffics in, or uses a domain name that—

(I) in the case of a trademark or service mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to such mark;

(II) in the case of a famous trademark or service mark that is famous at the time of registration of the domain name, is dilutive of such mark; or

(III) is a trademark, word, or name protected by reason of section 706 of title 18, United States Code, or section 220506 of title 36, United States Code.

(B) In determining whether there is a bad-faith intent described under subparagraph (A), a court may consider factors such as, but not limited to—

(i) the trademark or other intellectual property rights of the person, if any, in the domain name;

(ii) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;

(iii) the person's prior lawful use, if any, of the domain name in connection with the bona fide offering of any goods or services;

(iv) the person's lawful noncommercial or fair use of the mark in a site accessible under the domain name;

(v) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;

(vi) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services;

(vii) the person's provision of material and misleading false contact information when applying for the registration of the domain name or the person's intentional failure to maintain accurate contact information;

(viii) the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to trademarks or service marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous trademarks or service marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of such persons;

(ix) the person's history of offering to transfer, sell, or otherwise assign domain names incorporating marks of others to the mark owners or any third party for consideration without having used, or having an intent to use, the domain names in the bona fide offering of any goods and services;

(x) the person's history of providing material and misleading false contact information when applying for the registration of other domain names which incorporate marks, or the person's history of using aliases in the registration of domain names which incorporate marks of others; and

(xi) the extent to which the trademark or service mark incorporated in the person's domain name registration is distinc-

tive and famous within the meaning of subsection (c)(1) of section 43 of the Trademark Act of 1946 (15 U.S.C. 1125).

(C) In any civil action involving the registration, trafficking, or use of a domain name under this paragraph, a court may order the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.

(D) A person shall be liable for using a domain name under subparagraph (A)(ii) only if that person is the domain name registrant or that registrant's authorized licensee.

(E) As used in this paragraph, the term 'traffics in' refers to transactions that include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration.

(2)(A) The owner of a mark may file an in rem civil action against a domain name in the judicial district in which suit may be brought against the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name if—

(i) the domain name violates any right of the registrant of a mark registered in the Patent and Trademark Office, or subsection (a) or (c) of this section, or is a trademark, word, or name protected by reason of section 706 of title 18, United States Code, or section 220506 of title 36, United States Code; and

(ii) the court finds that—

(I) the owner has demonstrated due diligence and was not able to find or was not able to serve a person who would have been a defendant in a civil action under paragraph (1); or

(II) personal jurisdiction cannot be established over any person who would have been a defendant in a civil action under paragraph (1).

(B) The remedies in an in rem action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.

(C) The in rem action established under this paragraph and any remedy available under such action shall be in addition to any other civil action or remedy otherwise applicable.

(3) The civil action established under paragraph (1) and any remedy available under such action shall be in addition to any other civil action or remedy otherwise applicable.

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TITLE X—CONSTRUCTION AND DEFINITIONS

SEC. 45. In the construction of this Act, unless the contrary is plainly apparent from the context—

The United States includes and embraces all territory which is under its jurisdiction and control.

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A "counterfeit" is a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.

The term "domain name" means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.

The term "Internet" has the meaning given that term in section 230(f)(1) of the Communications Act of 1934 (47 U.S.C. 230(f)(1)).

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SECTION 41 OF TITLE 35, UNITED STATES CODE

§ 41. Patent fees; patent and trademark search systems

(a) The Commissioner shall charge the following fees:

(1)(A) On filing each application for an original patent, except in design or plant cases, **[**$760**]** *$690*.

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(4)(A) On filing each application for the reissue of a patent, **[**$760**]** *$690*.

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(10) Basic national fee for an international application where the Patent and Trademark Office was the International Searching Authority but not the International Preliminary Examining Authority, **[**$760**]** *$690*.

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(b) The Commissioner shall charge the following fees for maintaining in force all patents based on applications filed on or after December 12, 1980:

(1) 3 years and 6 months after grant, **[**$940**]** *$830*.

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