
CYBERLAW — TRADEMARK LAW — WIPO ARBITRATORS UPHOLD CONJUNCTIVE VIEW OF BAD FAITH UNDER THE UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY. — *Guru Denim Inc. v. Abu-Harb*, Case No. D2013-1324, Administrative Panel Decision (WIPO Arbitration & Mediation Ctr. 2013), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-1324>.

Under the Uniform Domain Name Dispute Resolution Policy¹ (UDRP), a system of international arbitration to which the majority of domain name registrants are contractually bound, trademark holders may seek cancellation or transfer of a domain name infringing upon their mark. Designed and maintained by the Internet Corporation for Assigned Names and Numbers (ICANN), the UDRP generally imports the principles of trademark law, yet it differs in one significant way: if a domain name was initially registered in good faith, it is immune to challenge under the UDRP regardless of present infringement. Recently, in *Guru Denim Inc. v. Abu-Harb*,² a panel of arbitrators revisited and upheld the statutory basis for the good faith registration defense, finding the website truereligion.com could not have violated the UDRP because it was registered in good faith. The two-panelist majority provided textual and precedential justifications for its position but articulated no clear policy rationale; in contrast, a third, dissenting panelist argued that the good faith registration defense was at odds with the purposes of both the UDRP and trademark law and should thus be discarded. Before future panelists are persuaded by the dissent's critique, it is important to supplement the majority opinion with a robust policy defense. Far from a mere artifact of text and precedent, the good faith registration defense serves vital policy concerns at the heart of the UDRP and protects the sui generis property right contained in a domain name. Future panelists should think carefully before discarding it.

In November 1998, Ibrahim Ali Ibrahim Abu-Harb of Riyadh, Saudi Arabia, registered the domain name truereligion.com as a blog through which to promote the Islamic faith.³ In 2002, Guru Denim Inc., a California-based company, commenced use of the mark “True Religion” as a brand name for its jeans.⁴ Over the next seven years, True Religion Jeans gained in popularity — so much so that in 2009,

¹ *Uniform Domain Name Dispute Resolution Policy*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS (Oct. 24, 1999), <http://archive.icann.org/en/udrp/udrp-policy-24oct99.htm> [hereinafter *UDRP*].

² Case No. D2013-1324, Administrative Panel Decision (WIPO Arbitration & Mediation Ctr. 2013), <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-1324>.

³ *See id.*; TRUE RELIGION, <http://www.truereligion.com> (last visited Mar. 30, 2014).

⁴ *Guru Denim*, Case No. D2013-1324. Guru Denim has registered its mark in numerous localities, including the United States. *See id.*

Abu-Harb noticed that his site was attracting up to 1000 hits a day from visitors seeking the jeans brand.⁵ Seeing an opportunity, Abu-Harb severed the domain from his network of Islamic sites, added references to True Religion Jeans as well as paid links to Amazon.com, and put the site on the market for \$380,000 — a price he alleged was “reasonable . . . for a domain name . . . attracting 1000 hits per day.”⁶

On July 19, 2013, Guru Denim filed a complaint against Abu-Harb’s use of truereligion.com with the World Intellectual Property Organization (WIPO), a licensed arbitrator⁷ for the UDRP.⁸ To win under the UDRP, Guru Denim had to prove three elements: first, that the domain name was “identical or confusingly similar” to its registered mark; second, that Abu-Harb had “no rights or legitimate interests in respect of the domain name”; and third, that the domain name “ha[d] been registered and [was] being used in bad faith.”⁹

Writing for the majority, presiding panelist Alistair Payne denied Guru Denim’s complaint.¹⁰ First, he swiftly established that truereligion.com was confusingly similar to True Religion Jeans.¹¹ Under the second element, however, Payne determined that Abu-Harb’s decade of noncommercial religious proselytizing through his website suggested he retained some rights or legitimate interests in the disputed do-

⁵ *Id.*

⁶ *Id.*

⁷ See *List of Approved Dispute Resolution Service Providers*, ICANN, <http://www.icann.org/en/help/dndr/udrp/providers> (last visited Mar. 30, 2014).

⁸ *Guru Denim*, Case No. D2013-1324. The UDRP evolved in the 1990s as a way of solving the problem of trademark enforcement over the Internet. Originally constructed as mnemonic devices, domain names transformed in the 1990s into a warzone of trademark law. See Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 771 (2003). Mark holders sought cancellation in court of numerous domains, including many that would not have been found infringing under traditional trademark law — an abusive practice that came to be known as reverse domain name hijacking. See MILTON MUELLER, *ROUGH JUSTICE: AN ANALYSIS OF ICANN’S UNIFORM DISPUTE RESOLUTION POLICY 3-4* (2000), available at <http://ccent.syr.edu/PDF/roughjustice.pdf>. Even as mark holders won lawsuits against sites traditionally exempted from infringement liability, they often failed to successfully police actual “cybersquatting,” the “regist[r]ation of well-known brand names as Internet domain names in order to force the rightful owners of the marks to pay.” DAVID LINDSAY, *INTERNATIONAL DOMAIN NAME LAW* 96 (2007) (quoting *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 946 (9th Cir. 2002)). In short, a pattern of over- and under-enforcement suggested that courts were ill-suited to address the problem of trademark enforcement in the emerging domain of the Internet. Reacting to this inadequacy, trademark interests petitioned the U.S. government for a cheaper, faster international enforcement regime. The result was the creation of ICANN, which in turn crafted and continues to maintain the UDRP. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 431-32 (2006).

⁹ *UDRP*, *supra* note 1, § 4(a); see also *Guru Denim*, Case No. D2013-1324. The UDRP includes four examples that “shall be evidence of the registration and use of a domain name in bad faith.” *UDRP*, *supra* note 1, § 4(b). According to *Guru Denim*, Abu-Harb’s use of truereligion.com fell under the fourth example: when a registrant profits off of consumer confusion by intentionally directing consumers to his own site. *Guru Denim*, Case No. D2013-1324.

¹⁰ *Guru Denim*, Case No. D2013-1324. Payne was joined by panelist Dan Hunter. *Id.*

¹¹ See *id.*

main.¹² Even if he had no such rights, Payne continued, Abu-Harb would still win under element three.¹³ The majority interpreted the phrase “registered and is being used in bad faith”¹⁴ conjunctively — as laying out two separate requirements of bad faith registration and bad faith use, each necessary for a finding of infringement.¹⁵ Because Abu-Harb registered truereligion.com years before the existence of True Religion Jeans, Guru Denim could not show bad faith registration and thus could not satisfy the requirements of element three.¹⁶

Dissenting panelist M. Scott Donahey disagreed with the majority’s decision and textual interpretation of element three.¹⁷ Donahey argued that the majority’s conjunctive understanding of bad faith was incorrect; bad faith use and registration should not be read as separate requirements for a finding of bad faith but instead as part of one “unitary” inquiry.¹⁸ Donahey provided three arguments to support his position. First, the text of element three specifically and the UDRP generally did not clearly require — and arguably contradicted — a conjunctive reading.¹⁹ Second, analysis of the original intent of the UDRP’s writers supported a holistic, not conjunctive, understanding of bad faith.²⁰ And finally, the conjunctive view was incompatible with the UDRP’s

¹² *See id.*

¹³ *See id.*

¹⁴ *UDRP*, *supra* note 1, § 4(a)(iii).

¹⁵ *See Guru Denim*, Case No. D2013-1324. Payne noted that had ICANN intended a nonconjunctive understanding of element three, it would have used an “or” rather than an “and.” *Id.* Payne also pointed to a long line of precedent upholding the conjunctive view. *See id.*

¹⁶ *See id.*

¹⁷ *Id.* (Donahey, Arb., dissenting).

¹⁸ *See id.*

¹⁹ *See id.* Donahey suggested that if the text of element three instead read “has been registered [in bad faith] and is being used in bad faith,” then the conjunctive reading would be proper. *Id.* (alteration in original) (quoting *UDRP*, *supra* note 1, § 4(a)(iii)) (internal quotation mark omitted). The actual language, Donahey maintained, was at best ambiguous. *Id.* Donahey further argued that because the UDRP’s fourth example of element three — when a registrant free rides off of a confusingly similar trademark, *see UDRP*, *supra* note 1, § 4(b)(iv) — makes no mention of bad faith registration, strong evidence of bad faith use alone should be sufficient. *Guru Denim*, Case No. D2013-1324 (Donahey, Arb., dissenting).

²⁰ *Guru Denim*, Case No. D2013-1324 (Donahey, Arb., dissenting). Donahey suggested the majority had constructed a false dichotomy that made its conjunctive reading sound more plausible than it was: the majority had implied that the only alternative to a conjunctive view — requiring *both* registration and use — was a disjunctive one — holding *either*, by itself, sufficient. Donahey argued for a third view: a unitary inquiry into whether, “under all the facts and circumstances . . . the respondent [wa]s acting in bad faith.” *Id.* This holistic view comported with a common view expressed during the drafting of the UDRP that “the only way to tell that a registration was in bad faith was to look at subsequent conduct, i.e., use, and that the two therefore should not be separated.” *Id.* (quoting A. Michael Froomkin, *ICANN’s “Uniform Dispute Resolution Policy” — Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 655 (2002)) (emphasis omitted). In other words, Donahey argued, the UDRP’s creators chose “and” not to affirm a conjunctive view, as the majority suggested, but to disclaim a disjunctive reading in favor of a unitary one. *See id.*

purpose of preventing trademark infringement.²¹ Donahey “def[ie]d]” the majority to find any evidence in the legislative history suggesting that Abu-Harb’s clear present infringement could survive a system so designed merely because, years ago, he had registered his domain name in good faith.²²

Guru Denim is not a novel dissent for Donahey: for the past half-decade, he has consistently advocated for a unitary understanding of bad faith in the face of widespread acceptance of the conjunctive view.²³ Conventional wisdom would suggest that Donahey’s dissents are unlikely to turn the tide. Since the earliest arbitrations under the UDRP, panelists have almost unanimously upheld the conjunctive view,²⁴ and though the system has no formal doctrine of stare decisis, arbitrators tend to defer to precedent.²⁵ Further, Donahey’s originalist framing leaves out plausible counterinterpretations of the legislative history, mitigating its persuasive effect.²⁶ Still, Donahey is not just any arbitrator: he is the progenitor of the conjunctive view transformed into its harshest critic.²⁷ Though the majority presented strong textualist and precedential arguments for the good faith registration defense, it offered little to counter Donahey’s policy argument that the conjunctive view subverts the purpose of the UDRP and the trademark regime that informs it. Given that some evidence suggests UDRP arbitrators

²¹ See *Guru Denim*, Case No. D2013-1324 (Donahey, Arb., dissenting).

²² *Id.*

²³ See, e.g., *A. Nattermann v. Watson Pharm., Inc.*, Case No. D2010-0800, Administrative Panel Decision (WIPO Arbitration & Mediation Ctr. 2010) (Donahey, Arb., dissenting), <http://www.wipo.int/amc/en/domains/decisions/text/2010/d2010-0800.html>.

²⁴ See LINDSAY, *supra* note 8, at 367.

²⁵ *Id.* at 131 (“UDRP panellists display a high degree of comity with respect to the decisions of other panellists that, especially where there is a consensus view on a particular matter, approaches an informal doctrine of precedent.”).

²⁶ In an article cited by Donahey as evidence of the unitary view, Professor A. Michael Froomkin notes that as ICANN deliberated over whether to include “or” or “and,” trademark partisans suggested the latter might allow “a hypothetical pure-hearted registrant gone bad [to] escape the policy.” Froomkin, *supra* note 20, at 655. Notwithstanding this complaint, ICANN chose “and.” Further, the Froomkin quotation Donahey cited — that “the only way to tell that a registration was in bad faith was to look at subsequent conduct,” *id.* — suggests not that inquiries into bad faith registration and use comprise one unitary investigation, but that evidence of bad faith use may inform the separate inquiry into bad faith registration. When the initial mindset of a registrant is ambiguous, arbitrators may need to look to evidence of subsequent use to give rise to a retroactive inference of bad faith. Yet when registration is clearly in good faith, such as in *Guru Denim*, there is no reason to suggest ICANN wanted arbitrators to look to subsequent conduct to inform an already unambiguous inquiry.

²⁷ Donahey wrote the seminal opinion in *World Wrestling Fed’n Entm’t, Inc. v. Michael Bosman*, Case No. D99-0001 (WIPO Arbitration & Mediation Ctr. 2000), <http://www.wipo.int/amc/en/domains/decisions/html/1999/d1999-0001.html>, that first set out the conjunctive view. In *Guru Denim*, Donahey suggested that new legislative history convinced him to repudiate his initial interpretation. See *Guru Denim*, Case No. D2013-1324 (Donahey, Arb., dissenting).

form their textual interpretations in part around their policy beliefs,²⁸ and the fact that ICANN retains the authority to change the text of the UDRP to reflect a new policy understanding,²⁹ this lack of a clear policy rationale for the conjunctive view renders it vulnerable to attack. It is time, then, to unambiguously defend the good faith registration defense. A vital part of the UDRP, the defense serves important policy concerns at the heart of the regime and protects domain registrants' sui generis property interests in their domain names. It should not be discarded.

Two policy considerations central to the UDRP justify the good faith registration defense: the need to avoid deciding close cases through an expedited arbitration process and the danger of reverse domain name hijacking. First, the conjunctive view supports ICANN's intention of allowing the UDRP to handle only the "easiest" cases, "leaving other disputes to the courts."³⁰ The split between the majority and the dissent in *Guru Denim* demonstrates how hard it is to demarcate when a once-legitimate right transforms into illegitimate free riding: even if the majority had adopted the dissent's view of bad faith, it would still have found for Abu-Harb on element two.³¹ The conjunctive view thus performs a vital policy function: it keeps complex, high-stakes inquiries outside "the scope" of the expedited, inexact UDRP.³²

Second, the conjunctive view mitigates the danger of reverse domain name hijacking.³³ Evidence suggests that power imbalances

²⁸ Professor Milton Mueller has noted that when arbitrators believe a "registrant is a bad actor, they tend to stretch the UDRP definitions to cover the . . . particular facts of the case." See MUELLER, *supra* note 8, at 22.

²⁹ ICANN can revise the UDRP at any time, and any change can apply retroactively. See UDRP, *supra* note 1, § 9 ("[A]ll . . . changes will be binding upon [a registrant] . . . whether the dispute arose before, on or after the effective date of [the] change.").

³⁰ MUELLER, *supra* note 8, at 4–5; see also LINDSAY, *supra* note 8, at 110 (quoting ICANN, SECOND STAFF REPORT ON IMPLEMENTATION DOCUMENTS FOR THE UNIFORM DISPUTE RESOLUTION POLICY § 4.1(c) (1999), available at <http://archive.icann.org/en/udrp/udrp-second-staff-report-24oct99.htm>). The UDRP was designed not to replace the courts, but to provide a more expedient avenue for dispute resolution. Because greater expedience can lead to less precision, the UDRP's drafters ensured that arbitrators would not be able to grant damages and that neither party would waive her right to file a lawsuit before or after the completion of a complaint. See Froomkin, *supra* note 20, at 666, 678–79.

³¹ See *Guru Denim*, Case No. D2013-1324. The dissent did not address element two, but Donahey's final paragraphs and implicit conclusion suggest he did not consider Abu-Harb to retain any rights or legitimate interests. See *id.* (Donahey, Arb., dissenting).

³² See *Teradyne, Inc. v. 4Tel Tech.*, Case No. D2000-0026, Administrative Panel Decision (WIPO Arbitration & Mediation Ctr. 2000), <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0026.html> ("A conscious decision was made that UDRP proceedings be limited to abusive registrations. The question whether domain names registered in good faith become infringing is outside the scope of this inquiry.")

³³ The UDRP was designed to balance equities — to both help mark holders police cyber-squatting and limit the practice of reverse domain name hijacking. See MUELLER, *supra* note 8, at 5.

permeate the UDRP: mark holders can more easily appeal,³⁴ they select the arbitration authority,³⁵ they have little to lose in filing frivolous complaints,³⁶ and they generally are wealthier than respondents.³⁷ These advantages make the system dangerously susceptible to reverse domain name hijacking. A registrant who once owned a domain in good faith is, on the whole, more likely to retain rights or legitimate interests in that domain than a registrant who never had any such claim. Thus, in light of these power imbalances, the good faith registration defense serves as a vital prophylactic shield against reverse domain name hijacking where such hijacking would be most likely to result in the annulment of legitimate rights.³⁸

In addition to serving core policies of the UDRP, the conjunctive view protects registrants' property interests by affirming that domains are not identical to trademarks, but rather *sui generis* property conferring significant independent ownership rights.³⁹ Such protection is vital: trademark partisans, seeking the expansion of trademark rights and protection over the Internet, have urged policymakers to equate domains with trademarks rather than treat them as *sui generis* property.⁴⁰ Recognizing that domain names serve many of the same functions as trademarks,⁴¹ mark holders have argued that domains should be subject to the same regulations: they should be cancelled or transferred to prevent consumer confusion with little if any regard to the

³⁴ Though both parties may appeal to a court with jurisdiction, in practice this right benefits only complainants. Losing complainants can file a lawsuit at any time in the foreseeable future; losing respondents have seven days to file a lawsuit before ICANN transfers or cancels their domain. Froomkin, *supra* note 20, at 679. Losing complainants have a clear cause of action: trademark infringement. Respondents struggle to find a cause of action with which to overturn an adverse arbitration. *See id.* at 681 ("U.S. courts do not ordinarily review 'administrative' decisions of private parties . . ."); *see also id.* at 678–88.

³⁵ *See* MUELLER, *supra* note 8, at 18. Mueller notes that certain arbitration authorities are statistically more likely to find for a mark holder than a domain name registrant, giving a powerful advantage to complainants who select the forum. *See id.* at 16.

³⁶ Arbitrators may label a complainant "abusive," but in practice, they rarely do so, and no sanctions accompany the label. *See* Froomkin, *supra* note 20, at 666–68.

³⁷ *Id.* at 637.

³⁸ This argument is particularly salient in the present case: Abu-Harb suggested to the panel that Guru Denim had tried to acquire his site in October 2009, before he exhibited any bad faith, and that Guru Denim's conduct provided strong evidence that its allegation of bad faith was now a pretense for reverse domain name hijacking. *See Guru Denim*, Case No. D2013-1324.

³⁹ Courts have held that registrants acquire a property right in their domains, but they have left the contours of that right amorphous. *See, e.g., Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) (observing that domains are properly understood as property because, under the current regime, they may be bought and sold and confer an exclusive right of ownership and use).

⁴⁰ *See* BENKLER, *supra* note 8, at 430–32; *cf.* MUELLER, *supra* note 8, at 23–24.

⁴¹ Like trademarks, domain names confer an exclusive right to use a mark on the Internet, such as "Microsoft.com." Consumers naturally assume an association when a domain name is similar to a "real world identifier, such as a trade mark." LINDSAY, *supra* note 8, at 98.

ownership claims of the registrant.⁴² Trademark law would not recognize initial good faith as an absolute defense. Neither then, mark holders argue, should the UDRP.⁴³

The argument that trademark law should be grafted wholesale onto domain names, and that such grafting requires elimination of the good faith registration defense, is flawed. First, there is no compelling theoretical reason to equate domain names with any extant property regime, nor to suppose that the property interest in a domain name, when defined as a *sui generis* right, should not permit free riding.⁴⁴ Domain names are not trademarks any more than they are copyrights: they are something new. Analogies to trademark law may help determine which rights should comprise the *sui generis* property interest in a domain name, yet compelling alternate analogies belie the conclusion that free riding cannot be among those rights. Domain names may resemble marks, but they also resemble land.⁴⁵ Free riding is tolerated and sometimes *encouraged* in landed property regimes,⁴⁶ and people are quick to offer criticism when the lawful ownership interest in a piece of land is challenged.⁴⁷ When domain names are viewed through this analogy, Abu-Harb becomes a speculator who lawfully acquired a domain and profited off of an unexpected uptick in its value. In rushing to conclude that his actions make him a cyberpirate, trademark partisans have elided the *ex ante* question of whether free riding should be a legitimate exercise of Abu-Harb's *sui generis* right.⁴⁸

Second, significant differences in the way the law treats domain names and trademarks, beyond just the sphere of infringement liabili-

⁴² Under modern trademark doctrine, mark holders do not “own” their marks; they may use them exclusively only insofar as their exclusive use minimizes consumer confusion. See Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 76–77 (2012).

⁴³ Cf. Froomkin, *supra* note 20, at 655.

⁴⁴ In defining the contours of a new form of property, analogies to extant regimes can be helpful, but wholesale invocation is arbitrary and inexact. Cf. JAMES BOYLE, *THE PUBLIC DOMAIN* 107 (2008) (“Analogies are only bad when they ignore the key difference between the two things being analyzed.”).

⁴⁵ See *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) (“Registering a domain name is like staking a claim to a plot of land . . .”); Chander, *supra* note 8, at 760 (offering the analogy). Land, too, was once doled out on a first-come, first-served basis and may still be bought and sold with few restrictions. Cf. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 544 (1823).

⁴⁶ See BOYLE, *supra* note 44, at 113 (“The owner of the petrol station . . . cannot stop a second-comer from setting up shop across the road, even if the first-comer’s labor, capital, and effort proved that the location is a good one. We . . . encourage follow-on imitation in those cases.”).

⁴⁷ Cf. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009) (discussing the backlash to *Kelo v. City of New London*, 545 U.S. 469 (2005)).

⁴⁸ Cyberlaw scholar Konstantinos Komaitis believes that the UDRP “minim[i]zes, degrad[es], brutaliz[es] and decapitat[es] registrants of[] their legitimate rights.” KONSTANTINOS KOMAITIS, *THE CURRENT STATE OF DOMAIN NAME REGULATION* 7 (2010). One need not endorse so stark a critique to nevertheless suggest that good faith registration establishes a separate, *sui generis* property right that should at least be balanced against the trademark rights asserted.

ty, belie the suggestion that the two should be equated. Under the current legal regime, domains may be bought and sold without restriction; trademarks may be bought and sold only in narrowly defined circumstances.⁴⁹ Registrants may purchase generic domain names; such names are unavailable in the trademark regime.⁵⁰ Domains may be purchased and not used; if unused for a few years, trademarks are involuntarily abandoned.⁵¹ On the one hand, these differences suggest that the good faith registration defense is not an aberrant departure from the principles of trademark law but a reflection of a broad legal understanding that domain names confer a sui generis property right. More significantly, they point to a key inconsistency in the way mark holders have advocated against the good faith registration defense. Even as trademark partisans have argued for the wholesale application of trademark infringement liability to domain names, they have actively profited off of the sui generis status of domains, buying generic domain names that would be unavailable in the trademark sphere⁵² and selling their domains without the restrictions they would encounter were those domains regulated as trademarks.⁵³ Insofar as the good faith registration defense reflects the sui generis status of domains, it is thus consistent with how mark holders have themselves sought to use domains, even if it diverges from how they have stated they want those domains to be regulated. In short, it is a fair reflection of the way those who control the law have defined the contours of the Internet.⁵⁴

The good faith registration defense serves as a reflection of the imperfection of an expedited arbitration system, a vital shield against reverse domain name hijacking, and a just recognition of a property right mark holders have sought to preserve for themselves. It would not serve the purposes of the UDRP to discard it.

⁴⁹ Trademarks are subject to cancellation if their holders sell them to a company that offers a somewhat different product, *see, e.g.*, *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999), or if they license them without retaining some control over the quality of the licensee's product, *see, e.g.*, *Eva's Bridal Ltd. v. Halanick Enters., Inc.*, 639 F.3d 788, 790 (7th Cir. 2011).

⁵⁰ *See, e.g.*, *Murphy Door Bed Co. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 100 (2d Cir. 1989). In contrast, on the Internet, companies may acquire exclusive rights in a generic name. *See, e.g.*, *SHOES.COM*, <http://www.shoes.com> (last visited Mar. 30, 2014).

⁵¹ *See, e.g.*, *Silverman v. CBS Inc.*, 870 F.2d 40, 46 (2d Cir. 1989).

⁵² *See, e.g.*, *THERMOS@*, <http://www.thermos.com> (last visited Mar. 30, 2014). Courts have ruled "thermos" to be a generic name, *see King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 320 F. Supp. 1156, 1160 (D. Conn. 1970), yet the original maker has exclusive rights in *thermos.com*.

⁵³ In *Sugar Busters LLC v. Brennan*, the court invalidated the transfer of a mark from a retail store owner to book authors because the products were too dissimilar. 177 F.3d at 266. Cancellation notwithstanding, the book authors still own the website. *See SUGAR BUSTERS*, <http://www.sugarbusters.com> (last visited Mar. 30, 2014).

⁵⁴ *Cf. BENKLER*, *supra* note 8, at 432–34 (“[T]he battle [over the domain name space] is indicative of the efforts to use proprietary rights in . . . trademarks in domain names . . . to tilt the environment in favor of the owners of famous brand names . . .” *Id.* at 434.).