

Sites in Shadow

Typosquatters on the Web don't deserve the mask of anonymity.

BY BRUCE A. MCDONALD

On April 14, a council within the Internet Corporation for Assigned Names and Numbers voted to sharply limit the availability of information about domain name registrants.

This came as a blow to consumer advocates, businesses, trademark owners, and members of the public who have relied on the WhoIs database to identify companies improperly selling products on the Internet.

The U.S. government, which considers a publicly transparent WhoIs database necessary for law enforcement purposes, may intervene. And though this is unlikely, the full organization might yet reject the misguided conclusion of its internal council.

But so far, the ICANN council has rebuffed all concerns. Unfortunately, by doing so, it is aiding fly-by-night operations, trademark violators, and other online outlaws.

WHO ARE THEY?

Pending before the ICANN council were competing proposals for the WhoIs database. One would limit the identifying information in the database to the absolute minimum necessary for resolving technical problems only. An alternative would have required identification sufficient to contact a responsible party to resolve not only technical issues, but also legal or other problems related to the use of a domain name. The ICANN council chose the just-technical-issues requirement.

The problem is that the WhoIs database is the only available means to identify persons legally responsible for domain names. Amending the *raison d'être* of the database to eliminate that purpose would make it much more difficult—in too many cases, nearly impossible—to ascertain the sources of products and services on the Internet. Anonymous Web site owners could all too easily escape accountability both to consumers and to companies with legal rights in established trademarks.

Moreover, private investigations conducted by trademark owners

in places such as Thailand, China, and Panama have established that the real parties in interest behind domain names purportedly registered to entities in such remote jurisdictions is almost always the domain name registrar itself. In other words, registrars acting under false names are registering domains with themselves.

The registrar is frequently a fictitious or anonymous entity in its own right. This population of fly-by-night, spurious registrars aids the practice of fictitious domain name registration and anonymous Web site ownership.

And the problem is growing. The population of domain name registrars has increased from one in 1999 to approximately 60 in 2003, and to more than 665 at the latest count.

It's not hard to become a registrar. ICANN doesn't require much financial responsibility to accredit a registrar. But it can be lucrative. Increasing evidence suggests that those engaged in online trademark violations have discovered that the best way to play the game is to become registrars themselves.

It is widely recognized, for example, that domain name registrars are predominantly responsible for the software that roams the Internet and snaps up domain names immediately upon their deletion. There is now a thriving secondary market in domain names.

And it is the constituency of domain name registrars that truly owns the portfolios of domain names containing infinite variations on registered trademarks. It certainly is not the nominal registrants themselves who own these counterfeit domain names, at least not registrants that are adequately identified in the WhoIs database. Indeed, the statutory liability under U.S. law of up to \$100,000 per trademark-infringing domain name makes it economically unviable to own such a portfolio *unless* the owner hides its identity.

If ICANN ultimately rejects a formulation for the WhoIs database that keeps at least some information about domain name registrants available to the public, this problem of fictitious and anonymous Web site owners would be exacerbated because the public wouldn't be able to use the WhoIs database even to identify those nominal owners.

'PARKED' WEB SITES

One of the biggest problems resulting from anonymous Web

sites is the difficulty in identifying trademark and service-mark counterfeiters. At the moment, companies can at least try to use information in the WhoIs database to find the real parties responsible for the trademark and service-mark counterfeiting that is rampant on the Internet—and the consumer deception that goes along with it.

Trademark counterfeiters often set up “parked” Web sites, which exist for no purpose other than to attract and redirect Internet traffic to other sites. These Web sites characteristically draw in users by incorporating or imitating well-known names and trademarks in their domain names—a practice known as typosquatting. For example, a user trying to reach Citibank’s Web site might accidentally type www.citibabnk.com instead, and find there a parked Web site with multiple links to other sites.

These parked sites are owned primarily by registrars because registrars are uniquely capable of registering domain names en masse. Why do the registrars bother? This phenomenon is driven by the advertising revenues paid out by online search engines such as Google and Yahoo! Third-party Web site owners pay Google and Yahoo! to place their ads on the Internet and direct users to their Web sites on a pay-per-click basis. Under a program called AdSense for Domains (aimed at “large domain portfolio owners”), Google then pays the owners of other Web sites for directing traffic to the advertisers’ sites. Thus, legitimate companies end up indirectly paying the typosquatters infringing upon their trademarks. Industry observers claim that the total parked Web site market is approaching 1 billion dollars annually.

This is creating litigation. On May 1, a class action was filed against Yahoo! by a group of advertisers claiming, in part, that the company colludes with typosquatters to use infringing parked Web sites as a means of illicitly redirecting Internet traffic to the advertisers’ Web sites. Last week, a similar complaint was filed against Google.

BAD TASTING

Registrars also have developed a further refinement on typosquatting. It’s called domain name “tasting.”

Tasting involves preregistering large numbers of typosquatting domain names for five days. During this period, each typosquatting domain name directs users to a parked Web site. Depending on the number of hits that it receives, the domain name is either registered or deleted at the expiration of the five days.

The vast majority of the domain names tasted within a particular five-day period are deleted. The remainder—that is, those domain names associated with well-known trademarks that receive hits during the tasting period—are registered. It’s a brazen way for the typosquatters to test empirically the likelihood of consumer confusion and then register the results to exploit the public’s mistakes.

On any given day, millions of parked Web sites can be observed, many exhibiting counterfeit depictions of trademarks and service marks. This scamming is hardly a secret. Yet bizarrely, ICANN now is considering actions that will allow malfeasors to establish these sites without identifying themselves accurately.

THE GRAND FALLACY

ICANN, by considering a formulation for the WhoIs database that encourages fictitious domain name registration and anonymous Web

site ownership, has bought into an astonishing fallacy currently being pushed by domain name registrars. The fallacy is that people selling products and services on the Internet have a right to use false and deceptive communications to conceal their identity and location, much as American citizens can engage in anonymous political speech. But Web sites have no such commercial privilege, just as a merchant has no right to open a store in a local shopping mall under a false identity.

Registrars also bandy about the proposition that trademark owners are merely another constituency among competing groups of stakeholders, including registrars. This concept is starkly flawed. Registrars and registries exist to serve the Internet and its users. When it comes to determining legal accountability on the Internet, they should not be deemed an “interest group” with an agenda—much less an agenda that espouses the need for anonymity—that is entitled to parity with the public interest. The prospect that policy in this area may be dominated by the fictitious and anonymous entities constituting much of the current community of ICANN-accredited registrars is alarming indeed.

The interest advanced by trademark owners, the group most obviously harmed by typosquatting, is much broader than the narrow economic interests associated with the usage of specific names and marks. The Lanham Act protecting U.S. trademarks arose from the need to prevent public confusion, mistake, and deception in the marketplace. Commerce cannot flourish in an environment where people don’t know whom they’re dealing with.

But consumers themselves are unable to enforce the laws against marketplace deception, so they must largely rely on trademark owners to act against abuses of reputable brand names. Without a meaningful WhoIs database, with full and accurate contact information available to the public, the Internet will lack effective trademark enforcement. Confusion, mistake, and deception will prevail.

FINANCIAL INTERESTS

Why has ICANN not grasped this? There is an unpalatable yet compelling explanation for the organization’s astonishing lack of interest in fighting trademark counterfeiting by anonymous Web sites.

ICANN has a financial interest in stimulating new domain name registration. It receives a \$10,000 accreditation fee for every new registrar and a 25-cent fee for every new domain name registration. Because large-scale, systematic typosquatting constitutes the single largest source of new domain name registration, ICANN is another beneficiary of trademark counterfeiting by parked Web sites.

Registries also have a direct financial interest in the large-scale, systematic registration of typosquatting domain names—even though they’re not the real parties behind the false domain names. Registries receive around \$6 for each new domain name.

ICANN’s council granted a windfall to these groups by adopting a formulation for the WhoIs database that will prevent the public from identifying trademark infringers. Before fictitious domain name registrants and anonymous Web site owners get the chance to deceive even more consumers, government and industry leaders must act.

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