

A FOREIGN OUTLOOK ON SATYAM INFOWAY LTD. v. SIFFYNET SOLUTIONS PVT. LTD.

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The first dispute over a domain name occurred in 1993, over the name *mtv.com*.¹ Since then, there have been innumerable rulings all around the world made under national laws or under the Uniform Domain Name Dispute Resolution Policy.² The online publication of many of these decisions has led to an interesting phenomenon, *viz.* the citation of foreign precedents in briefs, and consequently foreign rulings influencing courts that are dealing with a dispute over a domain name for the first time. The creation of the UDRP is in itself a kind of synthesis of diverse and multinational legal approaches to the resolution of disputes between trademark-holders and domain name-owners. UDRP practice has also helped lawyers and courts to define common criteria borrowed from this policy, to determine if a domain name registration is abusive or not.³

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¹ Doug Mohney, *Happy Birthday mtv.com*, INQUIRER, July 8, 2003, available at <http://www.theinquirer.net/?article=10377> (last visited Oct. 5, 2005).

² As of May 10, 2004, there have been 13,311 decisions, according to the Internet Corporation for Assigned Names and Numbers' [hereinafter ICANN] statistics. ICANN, *Statistical Summary of Proceedings under Uniform Domain Name Resolution Policy*, at <http://www.icann.org/udrp/proceedings-stat.htm> (last visited Oct. 5, 2005).

³ See ICANN, *Uniform Domain Name Dispute Resolution Policy* (approved Oct. 24, 1999), at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (last visited Oct. 5, 2005) [hereinafter UDRP]. See also ICANN, *Rules for Uniform Domain Name Dispute Resolution Policy* (approved Oct. 24, 1999), at <http://www.icann.org/dndr/udrp/uniform-rules.htm> (last visited Oct. 5, 2005) [hereinafter Rules]. Both the UDRP and the Rules for the UDRP explicitly recognize the jurisdiction of national courts in resolving domain name disputes. ¶ 4(k) of the UDRP allows the parties to a dispute to approach a court of competent jurisdiction before the

Even after ten years of domain name disputes all over the world, there have been very few rulings by supreme courts and all of them are recent.

There have been decisions in Austria⁴, Germany⁵ and France⁶, but interestingly, there has not yet been a single Supreme Court order in the United States of America, where the Internet was born, its law developed and where the earliest domain name disputes were fought.⁷ The scarcity of authoritative decisions regarding

commencement or after the conclusion of the proceedings under the UDRP. Under ¶ 3(b)(xiii) of the Rules, at the time of making the complaint, the Complainant has to state that they will submit, with respect to any challenges to a decision in the administrative proceeding cancelling or transferring the domain name, to the jurisdiction of the courts in at least one specified Mutual Jurisdiction. In case the Administrative Panel concludes that the domain name in dispute is to be cancelled or transferred, under the provisions of the UDRP, ICANN will wait for ten business days after being informed of the Panel's decision within which the aggrieved respondents may file a suit against the Complainant in a court of mutual jurisdiction to which the Complainant has submitted. On receipt of any official documentation that is proof of such lawsuit, ICANN will not implement the decision of the Panel until the dispute in such Court is resolved. Further, under Rule 18, if any party initiates any legal proceedings (not restricted to a Court of submitted mutual jurisdiction) before or during the pendency of the proceedings before the Panel, the Panel has the discretion to suspend or terminate the proceedings before it or continue to a decision.

⁴ See Oberster Gerichtshof, Sept. 13, 2000, 4 Ob 198/00x, bundesheer.at – ÖBl 2001, 35, reviewed by Katrin Hanschitz & Peter Poch, Case Comment, *Austria: Trade Marks - Internet Domain Names*, 23 EUR. INTELL. PROP. REV. N25-26 (2001); Oberster Gerichtshof, Feb. 24, 1998, 4 OB 36/98t, jusline I – ÖBl 1998, 241, reviewed by Heinz Rindler & Peter Poch, Case Comment, *Austria: Trade Marks - Internet Domain Names*, 20 EUR. INTELL. PROP. REV. N126127 (1998). It may, however, be pertinent to note that in the third and most recent one, Oberster Gerichtshof, Mar. 16, 2004, 4 Ob 42/04m, delikomat.com – ÖBl 2004, 54, the Austrian Supreme Court did not directly address a domain name dispute, but, in fact, ruled that a defendant who is guilty of 'domain grabbing' must reimburse the plaintiff for World Intellectual Property Organisation (WIPO) procedure costs.

⁵ See Bundesgerichtshof, *Deutsche Shell GmbH v. Dr. Andreas Shell (shell.de)*, Nov. 22, 2001, I ZR 138/99, <http://www.jurpc.de/rechtspr/20020139.htm>; Bundesgerichtshof, *Vereinigung des Mitwohnzentralen v. Ring Europäischer Mitwohnzentralen (mithwonzentrale.de)*, May 17, 2001, <http://www.jurpc.de/rechtspr/20010219.htm>. See also Roland Kunze, *Generic Internet Domains in the Light of German Trade Mark and Unfair Competition Law*, 24 EUR. INTELL. PROP. REV. 424 (2002).

⁶ Cour de Cassation (Chambre Commerciale et Financière), July 7, 2004, Dalloz, 2004, Actualité Jurisprudentielle, 2151, Cédric Manara; Cour de Cassation (Chambre Commerciale et Financière), February 22, 2005, Dalloz, 2005, Actualité Jurisprudentielle, 885, Cédric Manara.

⁷ The U.S. Supreme Court on April 18, 2005, turned down an appeal by Japanese automaker domain names means that the judgment of the Supreme Court of India in

*Satyam Infoway Ltd. v. Siffynet Solutions Pvt. Ltd.*⁸ is of significant interest.

I. BACKGROUND TO THE INDIAN SUPREME COURT DECISION

The defendant was the holder of two domain names, siffynet.com and siffynet.net. The plaintiff company, Satyam Infoway, incorporated in 1995, registered several domain names that included the fanciful word 'sify': sifynet.com, sifymall.com, sifyrealestate.com, etc. The similarity between these names registered in 1999 and the two domain names of Siffynet Solutions (registered later in 2001), led Satyam Infoway to file a suit in the City Civil Court of Bangalore on the basis that the defendant was passing off its business and services by using its business name and domain name. The Court acknowledged that the plaintiff was the prior user of the trade name 'Sify' and that it had earned a good reputation in connection with Internet and computer services under this name. The Court stated that Siffynet Solutions' domain names were similar to the domain names of the plaintiff, and that confusion would be caused in the mind of the general public by such deceptive similarity. The Court was pleased to grant a temporary injunction in favour of the plaintiff. The case was brought before the High Court, which allowed the appeal. According to the High Court, the respondent was doing business other than what was being done by the appellant, so consumers could not be misled nor misguided, and would not get confused. The High Court also underscored the point that the plaintiff company had a separate trade name - Satyam Infoway - which it could use if it were not granted an order of injunction.

Since the complaint was filed in order to protect a trade name, there could have been recourse to the UDRP procedure. Even if the UDRP has been designed for abusive registrations of trademarks, it is still possible to get protection for a trade name under it, when it is deemed equivalent to a

Nissan to block Uzi Nissan, a North Carolina man, from using nissan.net and nissan.com. *See Nissan's Appeal over Website Rejected*, L.A. TIMES, Apr. 19, 2005, at C2.

⁸ (2004) 6 S.C.C. 145.

⁹ trademark. This is despite the World Intellectual Property Organization (WIPO) not being favourably disposed towards this trend.¹⁰ In fact there is

already a precedent of an Indian firm having taken advantage of this broad interpretation of the UDRP rules.¹¹ However, here, since the plaintiff chose to bring the case before a national court, it gave a chance to the Supreme Court of India to pronounce its first decision on domain names.¹²

The Court's judgement offers an interesting perspective on domain name disputes to the legal community in India and beyond. It characterises the domain name under two main aspects – as “an address for computers” and, also as a “business identifier” owing to increased commercial activity on the Internet.¹³

⁹ See, e.g., LIN Television Corporation v. Home In USA and Home In USA, Inc, WIPO D2000-0257 (June 2, 2000), at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0257.html>; Cedar Trade Associates, Inc. v. Gregg Ricks, NAF 93633 (February 25, 2000), at <http://www.arbforum.com/domains/decisions/93633.htm>.

¹⁰ Second WIPO Internet Domain Process, *The Recognition of Rights and the Use of Names in the Internet Domain Names System*, September 3, 2001, § 318 to 320, at <http://arbiter.wipo.int/processes/process2/report/html/report.html>.

¹¹ Online Ltd. v. Applying Thought.com, AF-0198 (eResolution July 7, 2000), at <http://www.disputes.org/decisions/0198.htm> (in which “the supporting documents presented by the Complainant [were] not trademark registration documents under India's Trade & Merchandise Marks Act 1958, Trade & Merchandise Marks Rules 1959, or any other Indian law or regulation respecting trade marks”).

¹² Under the UDRP, ICANN will cancel, transfer or make changes to a domain name only under one of the following three circumstances and no others:

- a. receipt of written or appropriate electronic instructions from you or your authorized agent to take such action (except when the domain name is in dispute);
- b. receipt of an order from a court or arbitral tribunal, in each case of competent jurisdiction, requiring such action;
- c. receipt of a decision of an Administrative Panel requiring such action in any administrative proceeding to which you were a party and which was conducted under this Policy or a later version of this Policy adopted by ICANN. See UDRP, *supra* note 3, at ¶ 3.

¹³ *Satyam*, (2004) 6 S.C.C. at 150.

II. THE IRRELEVANCE OF THE TECHNICAL NATURE OF A DOMAIN NAME IN A DISPUTE BETWEEN BUSINESS USERS

The respondent's first argument was to contend that a domain name is merely an address on the Internet.¹⁴ To say that a domain name is an address is similar to comparing a contract to an agreement: It merely

amounts to a circular argument, and one cannot draw any legal consequence from this contention. If a domain name is only regarded as a technical tool, such an approach is neutral to lawyers because it does not highlight the features of a domain name. From a technical viewpoint, a domain name is part of the Internet communication system and allows anyone to access a website. When the name is used for business, and becomes the vehicle of the firm's identity, it cannot be viewed only as a technical tool, but also has to be recognised as a sign with specific features. However, can it be protected as such, and can there be a property right over it?

III. A DOMAIN NAME AS A DISTINCTIVE SIGN

In order to answer the question posed in the preceding section, the Court first distinguishes between the different signs used by the appellant. This company was incorporated in 1995, under the name Satyam Infoway, which is used extensively to promote its identity in real space. In 1999, it registered several domain names which have in common the word Sify, a word coined by the appellant using the elements of its corporate name. It is clear from the facts that the appellant has a separate trade name, and the conflict was solely about the *electronic identity* of the appellant. The Supreme Court of India and the courts below framed the core legal question properly, but ought to have delineated the facts that needed consideration more precisely in order to issue a ruling pertinent to the electronic environment, as I will discuss below.

The core question is: Can domain names be subject to an intellectual property right? The first problem lies in the definition of intellectual property.

¹⁴ *Id.* at 149. It is significant to note that the Court is mistaken when it suggests that that the appellant's domain names were registered with the ICANN and the WIPO. In fact, domain names are not registered with the ICANN, but with registrars accredited by the ICANN.

The main international treaties on intellectual property¹⁵ do not define the concept of intellectual property - they merely give a definition of what is subject to an intellectual property right. In the scope of these treaties, there are trademarks, copyrights, industrial designs, patents, geographical indications and topographies of integrated circuits. However, there is no

mention of domain names in existing international conventions, and that is why domain names cannot be statutorily listed in the intellectual property category.

There is no recognition of rights over a domain name in national laws and India, like most other States, does not provide a specific legal regime with regard to it. In fact it seems that, in some jurisdictions, legislators are reluctant to grant them protection equivalent to other distinctive signs.¹⁶ The absence of a definition meant that the Supreme Court of India could not rely on a positive statutory basis and instead had to seek other ways to ensure defensive protection to domain names.

Following the reasoning of the City Civil Court and the High Court, the Supreme Court of India proceeded on the basis that principles relating to passing-off actions in connection with trademarks could apply to domain names. After recapitulating the provisions of the Indian Trade Marks Act 1999 (sections 2(1)(m) to 2(zb)), the Court concluded that a domain name is a sign which can have a distinguishing function indicating the source of a good or of a service and that it thus has the usual features of a trademark.¹⁷

¹⁵ Berne Convention for the Protection of Literary and Artistic Works, art. 2, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341: 828 U.N.T.S. 221; Paris Convention for the Protection of Industrial Property, art. 1, Mar. 20, 1883, 13 U.S.T. 2: 828 U.N.T.S. 107, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1538: 828 U.N.T.S. 303. *See also* European Commission, *Statement by the European Commission Concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the Enforcement of Intellectual Property Rights*, 2005/295/EC, O.J. (L 94/37) (April 13, 2005), available at http://europa.eu.int/eurlex/lex/LexUriServ/site/en/oj/2005/l_094/l_09420050413en00370037.pdf.

¹⁶ For a recent example, *see* Italian Decreto Legislativo No. 30 of Feb. 10, 2005, Gazz. Uff. No. 52, Mar. 30, 2005, <http://gazzette.comune.jesi.an.it/2005/52/7.htm>.

¹⁷ *Satyam*, (2004) 6 S.C.C. at 150. Such a finding is correct in India, a common law country, where it is not compulsory to register a trademark. However, in other countries such as France, Spain, Italy and Monaco, registration of a sign is compulsory for the grant of trademark rights over it. In these countries, even if the definition of a trademark is more or less the same as in India – “any sign capable of graphic representation which serves to distinguish

After putting domain names in the same category as trademarks, the Court did not focus on domain names anymore, since there is no use of the phrases ‘domain name’ or ‘domain names’.¹⁸ It then shifts its focus to passing-off actions in trademark law. In fact the Court seems to have likened domain names to trademarks, and it seems to assume that it can by

mere substitution directly apply the legal provisions applicable to trademarks to the issue at hand. I disagree with this thesis.

IV. DOMAIN NAMES ARE DISTINCTIVE SIGNS, BUT CAN THEY BE DEEMED TRADEMARKS?

There is a difference in the relationship between users and domain names that does not exist with trademarks: To surf the web, users type a domain name in their Internet browser to access a website. This is not the case with trademarks: Consumers react to trademarks, but they do not act or interact with them.

The only distinction the Court drew between trademarks and domain names was the distinction in the manner in which the two operate: “A trademark is protected by the laws of the country where such trademark may be registered ... On the other hand, since the Internet allows for access without any geographical limitation, a domain name is potentially accessible irrespective of the geographical location of the consumers”¹⁹ and the consequence, according to the Court, is “not only that a domain name would require worldwide exclusivity but also that national laws might be inadequate to effectively protect a domain name”.²⁰ The Court ignored other distinctions such as the fact that a domain name can only be made of letters or numerals,

the goods or services of a person” – the judicial outcome would have been different, because of the need to formally hold the trademark. Therefore, the ruling of the Court cannot be universal.

¹⁸ *Satyam*, (2004) 6 S.C.C. at 150-151.

¹⁹ *Id.* at 152.

²⁰ *Id.* The necessity of an alert vigil in cases where services are being rendered on the internet has been stressed upon even by the High Court in *Yahoo! Inc v. Akash Arora*, [1999] F.S.R. 931, the rationale being easy access by anyone across the globe.

but a trademark may be figurative.²¹ Another evident but important distinction lies in the fact that domain names can only be found on the Internet. Again, given the difference of nature and significance between a domain name and a trademark, a domain name should be examined only in conjunction with the environment in which it is used.

V. DOMAIN NAMES AND CONFUSION: A WEB OF UNCERTAINTY

According to the Court, "...[t]he use of the same or similar domain name may lead to a *diversion* of users which could result from such users mistakenly accessing one domain name instead of another."²² (emphasis supplied)

The issue is whether this notion of 'diversion' is appropriate in the case of domain names. The World Wide Web is a disorganised world – users know that they will always find information on the Internet, but not necessarily the information that they seek. Several U.S. courts have already addressed this in previous rulings,²³ observing that consumers frequently do not find the website they are looking for, a phenomenon which is unique to the Internet: confusion is consubstantial to the web, and 'diversion' to domain names. Therefore, the question arises as to whether one can consider the idea of confusion of the consumer to be realistic and 'legally significant' when cyberspace itself is a world of confusion. As succinctly noted by a United States District Court,

²¹ The Court on the basis of its earlier premise compares the words 'Sify' and 'Siffy' as if they were verbal trademarks. *See Satyam*, (2004) 6 S.C.C. at 155.

²² *Satyam*, (2004) 6 S.C.C. at 151. It is pertinent to note that the Indian Supreme Court noted that ordinary consumers and users seeking to locate the functions available under one domain name may be confused if they accidentally arrived at a different but similar web site which offers no such services. Here, the Court modifies the stated assertion by assuming that websites as well as domain names are similar. *Satyam*, (2004) 6 S.C.C. at 157.

²³ *Chatam International, Inc. v. Bodum, Inc.*, 157 F. Supp. 2d 549, 558 (E.D. Pa., 2001) (dealing with a case of 'initial interest confusion' which permits a finding of a likelihood of confusion although the consumer quickly becomes aware of the source's actual identity.); *Strick Corporation v. James B. Strickland, Jr.*, 162 F. Supp. 2d 372, 377 (E.D. Pa., 2001); *Hasbro v. Clue Computing*, 232 F.3d 1, 2 (1st Cir., 2000). *See also* *Warm Things, Inc. v. Adam S. Weiss*, WIPO D2002-0085 (April 18, 2002), at <http://arbiter.wipo.int/domains/decisions/html/2002/d2002-0085.html> (reiterating the role of initial interest confusion with respect to the Internet on the basis of U.S. Courts' decisions).

"Internet surfers are inured to the false starts and excursions awaiting them in this evolving medium."²⁴

VI. ELEVATING THE UDRP: RE-MIXING LAWS

The electronic environment is a global one. The transnational nature of electronic networks led ICANN to develop the UDRP, a transnational procedure designed to help trademark owners fight abusive registrations.²⁵ According to the Court, “the defences available to a complaint are... substantially similar to those available to an action for passing off under trademark law”.²⁶ It is true that there are “substantially similar” features, but

²⁴ *Chatam International, Inc. v. Bodum, Inc.*, 157 F. Supp. 2d 549, 559 (E.D. Pa., 2001), citing *The Network Network v. CBS, Inc.*, 54 U.S.P.Q.2d 1150 (Cent. Dist. Cal., 2000).

²⁵ Under the UDRP the Complainant has to prove the all of the following three allegations in order to be successful in a dispute:

- (i) the respondent’s domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;
- (ii) they have no rights or legitimate interests in respect of the domain name; and
- (iii) the domain name has been registered and is being used in bad faith.

Instances of bad faith include:

(i) circumstances indicating that the respondents have registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark, or to a competitor of that complainant, for valuable consideration in excess of their documented out-of-pocket costs directly related to the domain name; or

(ii) they have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that they have engaged in a pattern of such conduct; or

(iii) they have registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, they have intentionally attempted to attract, for commercial gain, Internet users to their web site or other on-line location, by creating a likelihood of confusion with the complainant’s mark as to the source, sponsorship, affiliation, or endorsement of their web site or location or of a product or service on their web site or location.

See UDRP, *supra* note 3, at ¶ 4.

²⁶ *Satyam*, (2004) 6 S.C.C. at 153-154.

this is not entirely correct. The concept of passing off underlies the UDRP procedure, which is influenced by the Lanham Act 1946, the main statute on trademark in the US, which in turn is influenced by common law jurisprudence, where the notion of passing off exists. Even though the phrase ‘passing off’ is not in the UDRP rules, the Court interprets the provisions and concepts of Indian trademark law with the help of the

UDRP rules. This virtually elevates the UDRP rules, a private source of law, to the status of an international treaty.²⁷

Is it correct on the Court's part to use the UDRP rules as a relevant and applicable source of law simply because there are no domestic legal provisions pertaining to domain names? This is clearly audacious, but this is exactly what the Supreme Court of India has done. In this case the complainant, the only person entitled to launch a UDRP procedure (and thereby be subjected to its provisions), had decided not to be bound by the terms of the policy. In fact the outcome of a UDRP decision could have well been different from the outcome in the case. The UDRP rules were not pertinent to the case because they were only designed for conflict between a trademark on one side and a domain name on the other and nothing else. In this case, Siffynet had used the mark 'Sify' in its business name, but the plaintiff had *not* used such a sign as trademark, and only a few UDRP decisions have granted protection to trade names.²⁸

Not only does the Court partially ground its decision in the UDRP rules, it also interprets them in a very extensive manner. The Court assumed, for instance, that the rules apply to disputes "between domain name owners inter se".²⁹

The issue is really whether there are UDRP precedents where a domain name has been deemed equivalent to the mark regarding which there is a complaint. Putting aside a lone vague decision that can be interpreted as

²⁷ *Id.* at 152-153.

²⁸ LIN Television Corporation v. Home In USA and Home In USA, Inc, WIPO D20000257 (June 2, 2000), at <http://arbiter.wipo.int/domains/decisions/html/2000/d20000257.html>; Cedar Trade Associates, Inc. v. Gregg Ricks, NAF 93633 (February 25, 2000), at <http://www.arbforum.com/domains/decisions/93633.htm>.

²⁹ *Satyam*, (2004) 6 S.C.C. at 153-154.

recognising rights on domain names³⁰, at least one panel has clearly stated that violation of rights on a prior domain name is not within the scope of the Policy.³¹ In any case, even if the Court can be criticised for using the UDRP rules as it did, there were no adverse consequences on the facts of the present case, as the bad faith of the domain name owner was quite evident.³²

VI. IN CONCLUSION: A MODERN DECISION

With law very often lagging behind technology, the existing body of law proves to be inadequate. Solutions have to be pieced together by deriving them from a variety of sources, thereby sidestepping the traditional practice of placing reliance on only those laws that are the ‘commands of the sovereign’ in the positivist conception. The Supreme Court of India, in this decision, refers to international organisations such as the WIPO and private bodies such as the ICANN which are involved in formulating technology law. In a rather radical move, which appears to address a void in the law, the Court also mixes a purely private dispute resolution policy (the UDRP) with national laws. In doing so, the Supreme Court of India gives an example of a modern decision in an interconnected world, further reinforcing its place in the international judicial network.³³

³⁰ Singapore Airlines Limited v. European Travel Network, WIPO D2000-0641 ¶ 6 (August 29, 2000), at <http://arbitrator.wipo.int/domains/decisions/html/2000/d2000-0641.html> (“The Complainant has registered the domain name ‘singaporeair.com’ with NSI, as well as other domain names containing ‘singaporeair’ with country codes, e.g., ‘singaporeair.com.sg’, ‘singaporeair.com.de’. It claims common law trademark rights for ‘singaporeair’ in cyberspace in those jurisdictions where such rights are recognized, including the United States. ... The domain names ‘singaporeairlines.org’, ‘singaporeair.net’ and ‘singaporeair.org’ are obviously identical or confusingly similar to the Complainant’s marks, whether registered or common law. The fact that in two of them the letters ‘lines’ are omitted does not diminish the fact that the marks refer clearly to an airline with a close connection with Singapore – in fact the universally-known Singapore Airlines.”)

³¹ Cadbury Limited v. Jonathan Harris, WIPO D2000-1249 ¶ 6 (December 6, 2000), at <http://arbitrator.wipo.int/domains/decisions/html/2000/d2000-1249.html> (“[T]he Complainant has registered – and is using – the domain name cadburyland.co.uk which is, in effect, identical to the disputed domain name. Similarity with existing domain names is not an offence under the ICANN Policy, but in these circumstances for the Respondents to chide the Complainant for not having previously registered cadburyland.com is plainly unfair.”)

³² *Satyam*, (2004) 6 S.C.C. at 155-156.

³³ ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65-103 (2004).