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21st Century

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NEWS FROM MOSS & BARNETT

A Professional Association

FAA STEPS UP SAFETY EFFORTS

By: JOSEPH G. MATERNOWSKI



Many business owners can relate to this scenario: An important customer calls with word that a product shipment has just arrived, but the goods were scratched in transit. The customer needs a small container of touch up paint. The

business owner assures the customer that the paint will be sent out via overnight delivery. The shipping department places the paint in a small box and sends it via air freight.

the FAA classifies as a flammable liquid. The FAA also proposed a \$60,000 penalty to an Ohio company for shipping 12 10-ounce containers of aerosol paint by air.

The alleged violations include improperly classifying, describing, packaging or labeling shipments of:

- *Equipment containing residual amounts of fuel;*
- *Products classified as hazardous;*
- *Bottles or cans containing flammable liquids; and*
- *Infectious substances.*

COMPANIES THAT OFFER SHIPMENTS IN VIOLATION OF DOT REQUIREMENTS FACE CIVIL FINES AND PENALTIES FROM THE FAA.

The business owner has demonstrated the type of responsiveness that customers expect but, depending on the method of shipping that may be used, the manufacturer may have just broken the law and incurred serious penalties.

Shipments of relatively small quantities of common materials which are classified as hazardous can lead to large penalties. For example, the FAA assessed an Indiana company a \$60,000 penalty for shipping four one-pint containers of rubbing alcohol, which

U.S. Department of Transportation (DOT) regulations set out very detailed requirements as to how shipments of hazardous material must be packaged and labeled. Companies that offer shipments in violation of DOT requirements face civil fines and penalties from the FAA. Violation categories set baselines from proposed fines. Businesses that use or handle hazardous materials in the regular course of their business can expect higher fines. The fact that a violation is unintentional is no defense. Significant fines are assessed even for first violations. Intentional or knowing violations can result in criminal charges.

The level of the civil penalty may vary depending on the nature of the goods that are shipped. Shipments of dangerous materials – explosives, compressed gases, flammable liquids, spontaneously combustible materials, oxidizing materials, organic peroxides and poisonous liquids – often result in higher levels of sanctions. Shipment of cargo aircraft quantities on passenger aircraft is also deemed to be an egregious violation.

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FAA article continued from front cover

Fittingly, public safety concerns are paramount in this enforcement effort. Two of the country's primary overnight express delivery companies, United Parcel Service (UPS) and Federal Express, out of concern for their own potential liability for improper shipments, report immediately to the FAA regarding packages of any leaking materials or any suspicious containers that may contain hazardous materials.

The DOT's hazardous materials shipping regulations place the burden of compliance on the business, and not on the air freight company. As a result, any business that hires a third party to transport its hazardous materials bears the responsibility of understanding and complying with the entire set of applicable federal regulations. UPS, other delivery companies and private training consultants offer Hazardous Materials/Dangerous Goods training courses to their customers and clients who ship hazardous materials.

DOT regulations specify how shipments are to be packaged, labeled, placarded, classified and described. The regulations mandate that any person involved with the shipment of hazardous materials complete appropriate initial and periodic refresher training. Given the level of detail contained within the shipping regulations and the potential for a catastrophe if an improper shipment is made, shippers would be well-advised to create systems with appropriate redundancies that are designed to verify the accuracy of all outgoing hazardous material shipments.

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The ease of shipping goods to customers across the country or around the globe is something that businesses have taken for granted. The public expects that our nation's skies will remain safe and that any risk to commercial or passenger air travel should be minimized. Business owners need to take special care to ensure that shipments of hazardous materials in even the smallest quantity are handled with due care.

IMPORTANT NOTICE TO PARTNERS IN LIMITED LIABILITY PARTNERSHIPS AND LIMITED LIABILITY LIMITED PARTNERSHIPS

A recent change in Minnesota law requires all Minnesota limited liability partnerships and limited liability limited partnerships to make a filing with the office of the Minnesota Secretary of State after August 31, 2001, and on or before December 31, 2001, to avoid a gap in their liability shields. If you are a partner in a Minnesota limited liability partnership or a limited liability limited partnership, please contact your regular attorney at Moss & Barnett as soon as possible to enable us to assist you with the required filing. Alternatively, please feel free to contact Nick Hay, Esq. at (612) 347-0443 or Mitchell H. Cox, Esq. at (612) 347-0291.

A ROSE BY ANY OTHER [DOMAIN] NAME...

BY: THOMAS R. SHERAN



Everyone knows about the “dot-coms” – those mostly e-commerce Web sites with addresses (aka “Domain Names”) that end with “com.” Now the Internet powers that be are offering Internet users the “opportunity” to obtain Internet Domain Names with three new endings: “.biz,” “.info” and “.name.” This is the first expansion of the name space within the Domain Name System (DNS) since it started in the mid 1980’s.

Unlike the famous “rose by any other name,” Domain Names registered under the new “Top Level Domains” (TLD’s) may *or may not* be the same. This means that expanding the DNS naming structure presents both opportunities and challenges. If you have thought about obtaining a Domain Name but were discouraged by the shortage of available space in the “.com” TLD, the new registries may open valuable new opportunities. But for those who have heavily invested in existing trademarks, the new TLD’s may present new opportunities for “cybersquatters” – i.e., registrants who seek only to profit from the “good will” you have established in your trademark or tradename. And if you have already established a presence in the “.com” domain space, you will have to consider whether you need to make multiple “defensive” registrations to prevent dilution of your Internet presence.

What is the correct strategy? That will depend on your individual situation. Moss & Barnett can help you select the strategy that best responds to the new Domain Name registries.

SOME WAY-BACK BACKGROUND

Unlike the telephone numbering system, the DNS is organized by usage category rather than by geography. Each destination on the Internet has an “address” that consists of two parts. The first is a 12-digit purely numerical component (called the “IP address”), which is maintained on a central registry server referred to as the “core server.” The IP address registry has been around since the government first set up a loose “inter-network” of academic and defense research facilities back in the 1960’s. The advent of the World Wide Web later added hordes of academic, consumer and commercial users to “the Internet.” To accommodate these less technical users, the core server added a

parallel list of “user friendly,” alpha-numeric “Domain Names.” The Domain Names for U.S. destinations originally fell into seven “Top Level Domains (TLD’s). These are the ubiquitous “.com” domain and six others: “.org,” “.edu,” “.net,” “.gov,” “.int,” and “.mil.”¹ These TLD’s are typically preceded by a “Second Level Domain” (SLD) containing another alpha-numeric character string (e.g., “Moss-Barnett.com”). The DNS provides a mechanism for “mapping” each alpha-numeric Domain Name to its “unique” IP address.

The IP address registry was originally operated by a government agency – the National Science Foundation (NSF). The naming protocol was set by a quasi-governmental advisory body known as the Internet Assigned Name Authority (IANA). The informality of this arrangement was well suited to the Internet’s original, non-commercial function; but as commercial usage grew, controversies developed over domain naming rights. In 1993, NSF “outsourced” the work of maintaining the Domain Name registry to a private contractor, National Solutions Inc. (NSI). NSI engaged another private entity, the Internet Network Information Center (InterNIC) to operate the “core computer” (within IANA’s guidelines). Until recently, InterNIC, was the organization solely responsible for maintaining the *registry* (the core server) for the “.com,” “.net” and “.org” TLD’s. The actual *registration* of domain names in these TLD’s became a lucrative monopoly business for NSI.

WE HOPE ICANN CAN

A measure of competition has been introduced in the market for DNS registration services as the result of a U.S. Government Statement of Policy (known as “the white paper”) released in October 1998. The U.S. Department of Commerce then established a quasi-governmental body called the Internet Corporation for Assigned Names and Numbers (ICANN) in which it reposed most of the “authority” that the government claimed to exert over the operation of the DNS. ICANN’s intended role was to consolidate DNS control and open the registration process to competition. Despite its ambiguous claim to authority (and its lack of public finances), ICANN was able to replace NSI’s exclusive registrar agreement with a standard ICANN registrar contract which includes mandatory data sharing provisions. In September 1999, ICANN and NSI reached agreements that: (1) diminished NSI’s *future* role in the administration of the DNS’s core registry, and (2) provided for the integration of a new set of supplemental registrars into NSI’s

¹ There is also a TLD for each of the ISO3166 country codes (e.g., “.UK” and “.JP”). These Country Code Top Level Domain (ccTLD) registries are administered separately from NSI’s “.com,” “.net” and “.org” TLD registry.

existing registration system. About 170 companies have received ICANN accreditation to act as Domain Name registrars for the existing TLD's, and about 80 of them are fully operational.

The “.com” Scarcity Problem: The DNS is configured into levels with the top level (the TLD's) based on Web site function (e.g., “.gov” for government, “.edu” for education, “.net” for networks and “.com” for commerce). The second level domain (the SLD) is used to designate the connected network (as in “Moss-Barnett.com”). A third level can be used for host computer designations. This configuration met the Internet's needs for a while, but that was before the advent of the World Wide Web and the explosive growth of *commercial* registrations under the “.com” TLD. At this time there are some 23 million Domain Names registered in the “.com” TLD (compared with about 7 million “.net” and “.org” registrations combined). One study claimed that almost every verb in the English language had been registered as the second level of a Domain Name in the “.com” TLD.

The “.com” scarcity problem is compounded by the fact that Domain Names act both as addresses and as trademarks. Cobbling these functions together has the effect of restricting the availability of “branded” Domain Names. In the offline world, product differentiation and the geographic limits of some markets make possible the multiple, non-confusing use of trademarks as *source identifiers* (e.g., the ACME bread company of Denver will not be confused with ACME pet hospital of Pittsburgh). But in order to serve its *addressing* function, each Domain Name must be unique. Within a given top level domain, there can be no sharing of second level domains that are also used as source identifiers. For example, the Domain Name for our law firm, “www.moss-barnett.com,” cannot be shared with a company in an unrelated line of commerce (e.g., a bakery), or a law firm in a totally different geographic market (e.g., Santa Fe, NM), even though such shared use of the trade name “Moss & Barnett” might not result in an infringement of anyone's trademark rights.

The New TLD's: The same SLD (“moss-barnett” in the example) can be used in multiple Domain Names without losing its ability to serve as a unique Internet address if each Domain Name is on a different TLD registry. Thus, the second level denomination “moss-barnett” could be used in “www.moss-barnett.com”; and in “www.moss-barnett.net,” and in “www.moss-barnett.org,” etc., each of which can be mapped to a unique IP address. But such multiple use of second level domains is limited by the number of authorized TLD's – which was somewhat arbitrarily fixed at seven back in the 1980s (before the advent of the commercial Web). Creation of additional TLD's was proposed as the obvious solution of the post-Web “.com” Domain Name shortage – as well as a method of expanding the capacity of Domain Names to serve as non-confusing source identifiers. However, many trademark holders had spent heavily to acquire “.com” Domain

Names from “cybersquatters” and/or to acquire parallel “.net” or “.org” domain names in order to prevent dilution of their branded “.com” Domains. These business interests tended to oppose any DNS expansion that threatened the “uniqueness” of their existing name space.

In March 2000, an ICANN-sponsored group reached tentative agreement on the creation of new TLD's in stages. Six to ten would be created in the first stage, but no more would be created without careful study. In November 2000, ICANN announced its approval of seven TLD's. Four of these new TLD's (i.e., “.biz,” “.info,” “.name” and “.pro”) are intended to be relatively large, open registries that are “unsponsored” (they will be operated under policies established by the global Internet community acting through ICANN itself). Three of the new TLD's (“.aero,” “.coop” and “.museum”) are designed to serve smaller user groups; and each has an ICANN-designated “Sponsor” representing a narrower community of qualified registrants.

REGISTRATION UNDER THE NEW TLD REGISTRIES

Actual registration of the Domain Names within the new TLD registries will be made through ICANN-accredited registrars. ICANN recognizes the potential for abuse of existing trademark and other intellectual property rights when opening the new DNS namespace. As a result, ICANN is requiring its approved registry administrators to provide an orderly transition period that includes procedures that will protect holders of trademarks and other intellectual property rights.

ICANN has negotiated agreements with the administrators for three of the new TLD registries (i.e., “.biz,” “.info” and “.name”), and it continues to negotiate with administrators for its four other approved TLD registries (i.e., “.pro,” “.aero,” “.coop” and “.museum”). The ICANN-approved administrators for the “.info,” “.biz” and “.name” registries have come up with a different mechanism for addressing the issue of potential trademark abuse. By evaluating these new TLD start-up procedures ICANN hopes to be able to develop best practices for dealing with these issues in the future.

Registering a New “.info” Domain Name: The ICANN-approved administrator for the “.info” registry is Afilias Ltd., www.Afilias.com, a consortium of 18 existing DNS registrars. (See May 11, 2001 Agreement at <http://www.icann.org/tlds/agreements/info/>). Afilias' “.info” TLD registry is to be truly “open” – i.e., any person or business may register to use a Domain Name in the “.info” TLD for any purpose they choose. But before opening registration to the general public, Afilias offered a “sunrise” registration period during which companies with pre-existing trademarks could register them as second level domains in a new “.info” Domain Name. To qualify for a sunrise registration, the applicant had to

have registered a trademark of national effect before October 2, 2000, and the trademarked word(s) had to exactly match the SLD of the “.info” domain name being registered. Many sunrise “.info” registrations do not qualify for priority registration because of defects in the claimed trademark registration. Afilias’ “.info” start-up plan provides a procedure for third parties to challenge defective sunrise registrations and/or require that entitlement to any sunrise registration be verified by the World Intellectual Property Organization (WIPO).

Afilias-approved “.info” registrars began accepting applications from the general public on September 12, 2001 (a list of registrars is available at <http://www.afilias.info/>). But initially, neither the “Sunrise” or general public registrations will be processed in real-time. Such first-come-first-serve processing was seen as giving unfair advantage to those with mechanized registration scripts. To prevent the preferential treatment of any single registrant or registrar, each “.info” registrar will submit two “queues” of names to Afilias for random selection. On September 19, the first round was processed – i.e., became live and accessible through all Internet Web browsers. After two rounds of random batch processing, real-time registrations are anticipated to begin on October 1.

Registering a New “.biz” Domain Name: NeuLevel, Inc., www.NeuLevel.com, is the ICANN-approved administrator for the “.biz” TLD registry. (May 11, 2001 registry agreement available at <http://www.icann.org/tlds/agreements/biz/>). The “.biz” TLD has not been dedicated to any “sponsored” group, but it will be restricted to use for business and commercial purposes (i.e. not for personal use). Rather than offer trademark owners a preferential “sunrise” registration period, beginning in May 2001, NeuLevel offered them an “Intellectual Property Claim Service” (IPCS). For a small fee, those who promptly registered claims to pre-existing rights in potential “.biz” Domain Names (including but not limited to previously registered trademarks) were assured that, upon receipt of an application to register a “.biz” Domain Name that matched their ICPS claim, the Domain Name applicant would be notified of the existence of the rights holder’s ICPS claim, and the ICPS rights claimant would be notified of the conflicting Domain Name application and given an opportunity to challenge its registration using a pre-approved administrative dispute resolution procedure.

During a period that began in July 2001, and ends September 30, accredited “.biz” registrars were authorized to accept applications for “.biz” domain names from any business applicant. There is no limit on the number of applications that will be accepted from any given business provided the applicant pays \$2 per application. These applications will then be randomly selected in batches and awarded. The “.biz” Domain Names that are issued in this initial award process will become operational in October 2001, but they will be subject to a “Restriction Dispute Resolution Procedure” intended to resolve disputes regarding the registrant’s compliance with the business-only restriction on the “.biz” TLD.

Registering a New “.Name” Domain Name: The ICANN-approved administrator of the “.name” TLD registry is Global Name Registry (Global) (August 1, 2001, agreement available at <http://www.icann.org/tlds/agreements/name/>). Global’s “.name” TLD registry, www.theglobalname.org, is still being set up, but when it is launched it will be open and unrestricted and it will apparently allow the registration of personal names as Domain Names (in the form of “FirstName.LastName.Name”) and as Email addresses (as “Firstname@lastname.name”). A person will be allowed to register for either or both of these registry services; and if they do not register both at the time of first registration, they will have a 120-day preference period in which to register the corresponding service.

Global will begin the process of opening the “.name” registration space with a “sunrise phase” during which companies that wish to protect *previously registered* trademarks will be allowed to make preemptive “Defensive Registrations” in one of three protected combinations, namely: “*product.Company.name*” or either “**.Company.name*” or “*Company.*.name*” where “*” is any string other than the company name. (see Global’s “start up” page at <http://www.theglobalname.org/>). Global will also offer a continuing “NameWatch” service for any registered “watched string.” Registration of any string of alpha-numeric characters will activate a personal agent that will track all matching “.name” registrations and notify the watch service subscriber that a “match” has occurred. The “.info” registrars will begin accepting registrations from the general public approximately 40 days after the start of the “sunrise” period and the first registered names are expected to be activated on December 13, 2001.

OPPORTUNITY OR CHALLENGE?

The recent expansion of the DNS name space presents significant new opportunities for those who have thought about but have not yet obtained a viable Domain Name; but it also challenges those who have already developed “good will” in their business names and trademarks, especially those incorporated into existing “branded” Domain Names. Moss & Barnett has helped many of its clients address their trademark and Domain Name needs in the past and we are ready to help you deal with the ongoing DNS evolution. If past experience indicates what is to come, a prompt “strategic” response to the recent DNS changes may prove more effective and less costly in the long run.

LITIGATION IN THE 21ST CENTURY

By: CURT SMITH
DIRECTOR AND CHAIR, LITIGATION DEPARTMENT



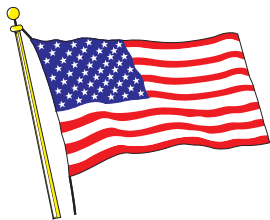
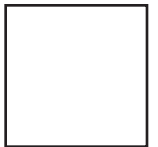
The face and pace of litigation is changing. Courts and lawyers constantly seek faster and more efficient ways to resolve disputes. Recent changes in technology and procedures by Minnesota courts reflect this nationwide trend. The Minnesota federal court recently installed state of the art, multimedia technology to allow lawyers to more effectively present evidence to juries. Federal courthouses have been fitted with video display monitors, VCRs, digital document cameras, computer terminals and other evidence presentation enhancements.

The Minnesota federal court also announced a new Expedited Trial Program as a voluntary alternative to traditional case processing. The goal is to provide a cheaper, quicker alternative for resolving disputes by significantly shortening the time and kinds of discovery and limiting the number and type of motions. Trial is guaranteed within six months of the Pretrial Conference and is limited to eight hours for each side. In Minnesota state court, Ramsey County just announced a reduced-cost pilot program. If the parties and the judge agree, the discovery period is limited to 75 days and a trial date is set within 150 days.

Moss & Barnett embraces these changes, and is well-prepared to take advantage of these opportunities to more efficiently and effectively assist our clients in resolving disputes.

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