



Don't Litigate, Mitigate!

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Introduction

Companies have adopted two diametrically opposite approaches to dealing with domain name owners infringing¹ on their IP, namely, to either take aggressive legal action or do nothing. Unfortunately, however, both these approaches destroy shareholder value.

Instead, companies should “open them up” for development. This will create shareholder value through better utilization of scarce resources and improvement of the domain name ecosystem.²

Disadvantages of Current Solutions

The legal strategy for IP enforcement is typically based on the following argument: A lax and selective enforcement of IP sets a bad precedent for the seriousness of the company in protecting its IP, while an aggressive strategy deters others from the practice.³

The following are the sources of shareholder value destruction under the current legal regime:

1. The intrinsic value of a domain name can be broken down into two components: captured value and wasted value.⁴ The latter occurs when it is

¹ We assume that the threat of litigation is for a legitimate claim and not a bullying tactic to have the domain owner surrender it.

² An ecosystem is a framework based on biological ecosystems to study business networks. See, for example, Iansiti and Levien (2004), *The Keystone Advantage*, HBS Press. An alternative framework is using complexity science. However, the former is more amenable to studying the health of a network.

³ An aggressive strategy is not optimal in the presence of a war of standards. A lax strategy can be superior so as to allow the company to first dominate the market, establish its standard, and then vigorously enforce it.

⁴ Dividing captured value into two categories, currently captured and to be captured, only clutters the argument and thus, does not add value.

not put to its best use, i.e., when visitors' intent is not congruent with the site's content.⁵ Thus, decreasing waste increases value.

2. Legal action is expensive to enforce.⁶
3. Companies that are not taking any action to enforce their IP are also losing value by relinquishing the revenues that their IP is generating to the owners and by being exposed to brand value dilution through the content of the associated website.⁷
4. A protectionist strategy by a hub⁸ creates an unhealthy ecosystem by reducing diversity, limiting consumer choices, and stifling innovation. On the other hand, a healthy ecosystem benefits the hub.

What can be done?

Based on visitor intent, one can distinguish two types of IP violations, whereby the visitor is served content different than what he or she is looking for: the visitor intends to go to the IP owner's site or is interested in items related to the IP owners products and services, i.e., domain names that are composed of the brand name and keywords, but does not find the intended information at the site visited.⁹ Ggoogle.com and AdsenceBooks.com are examples of the two intents respectively. Moreover, for each of these two types, each type can also exist under other extensions.¹⁰

A cooperative IP strategy can reduce the waste and improve the ecosystem. Such a mind set by the companies encourages the creation of new intermediaries. The new intermediaries act as keystone species. Although they are a small part to the network, they improve the overall health of the ecosystem.

IPonFire managed IP regime

Problem domains, names that use somebody else's brand name (whether directly or as a "typo" variant), are increasing at an alarming rate. The brand owner must judge whether these problem names are value destroying and/or infringing, and then, if they are, take

⁵ For more details on the intent argument, see Ales Tajirian, "[Direct Navigation: Marketing Implications.](#)"

⁶ It is not clear if any cost-benefit calculations are used to support the legal strategy.

⁷ For example, putting pornographic material on a domain name with a non-adult brand name.

⁸ A hub in the domain name ecosystem is a company with a significant stake in domain names' IP. When they follow a protectionist strategy, they are referred to as a dominator, while a cooperative hub is referred to as a keystone.

⁹ The keywords can be neutral, offensive, or defamatory to the IP owner.

¹⁰ Registering well-known U.S. brand names under certain country domain name extensions (ccTLDs) does not constitute IP violations. Thus, in such cases a legal argument action is not a viable acquisition strategy.

appropriate action. In judging and in acting, third-party management of such domains would add value to the owner.

The IP owner, or its agent, can steer problem-name owners into cooperating through a carrot and stick strategy. The carrot is to buy ad space on the problem site. As such, an ad link gives legitimacy to the advertising website, which also increases click rates on other ads, and thus, increases the domain owner's revenue. The stick is to hint at halting the ads and/or at legal action, with followthrough when necessary. The incentives to cooperate increase when a third-party is entrusted with managing and enforcing the ads.

Concluding Remarks

Whatever a company's IP enforcement strategy formulation process is, it should be coordinated among the marketing, IP management, and legal departments.

Due to inefficiencies in the initial domain name allocation mechanism, companies cannot and should not try to acquire all the relevant domain names. However, instead of adopting a legal protectionist strategy, IP owners should adopt a cooperative strategy that increases shareholder value and improves the domain name ecosystem. ■