

# Convergence of Trademark Law and E-Commerce:

## Overview of US, EU and China Regulations on Trademarks and Domain Names

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Goce Naumovski\* & Dimitri Chapkanov \*\*

### Abstract

This comment outlines the significance of the relations between trademarks and information technology from a comparative law perspective. It further affirms the indispensability of an interdisciplinary approach for consistent theoretical and legal framework with regard to trademarks and domain names in the context of e-commerce policy and practices. The comment also highlights the importance of intellectual property rights for economic development.

### Key words

Industrial property, cybersquatting, internet domain names, metatags

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### Introduction

The importance of intellectual property derives from the indispensability of providing adequate legal protection for creation of the mind. Intellectual property rights are structured in several components: patents, trademarks, geographical indications, industrial designs, copyright and related rights, as well as rights in plant varieties, topographies of integrated circuits and protection from unfair competition in broader sense. Due to its complexity, emerging e-commerce strives to provide mechanisms for the coexistence of

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\* Goce Naumovski (PhD), Associate Professor Vice-Dean for Academic Affairs,, Iustinianus Primus Law Faculty, SS. Cyril and Methodius University, Skopje, Macedonia.

\*\* Dimitri Chapkanov, Ph.D Candidate, SS. Cyril and Methodius University, Iustinianus Primus Law Faculty, Skopje, Macedonia.

the concepts of commerce and intellectual property in the digital environment, in the wider context of legal certainty and issues affecting both consumers and companies.

The objective of this comment is to determine the interdependence of intellectual property and e-commerce at international level and in the EU, US and China, having in mind the importance of online commercial activities. The comment mainly consists of presentation of essential indicators for the possibility of drafting relevant provisions concerning trademarks and their relation to domain names, patents and enforcement issues with respect to the IP legal framework. The comparative method is applied concerning the development of regulation of industrial property in the context of e-commerce. This examination includes legal acts and documents referring to intellectual property and e-commerce.

## 1. Trademarks

One of the most cited definition of trademarks is the one given in article 15 of TRIPS<sup>1</sup> Agreement which defines a trademark as “[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings”. According to the same provision, the signs that are “eligible for registration as trademarks” may be in the form of “particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs”. The system of international registration of trademarks is organized by the Madrid Agreement Concerning the International Registration of Marks (1891, as amended on September 28, 1979) and the Protocol Relating to the Madrid Agreement.

### a) United States

The United States law applicable to trademarks includes the regulations of the following acts:

- U.S. Trademark Law, Rules of Practice, 37 C.F.R. 2 et seq. & Federal Statutes, 15 U.S.C. § 1051 et seq. and 35. U.S.C. 1;
- U. S. Trademark Law, 15 U.S.C. §§ 1051 et seq.

The secondary sources include: Trademark Manual of Examining Procedure (Sixth Edition, Revision 1, Oct. 2009) as well as the Listing of Some United States Code Sections Protecting Specific Names, Terms, and Marks (16 Jan 2009). Concerning regional treaties, the US is party to the General Inter-American Convention for Trade Mark and Commercial Protection (1931).

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<sup>1</sup> Trade Related Aspects of Intellectual Property Rights (TRIPS).

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**b) European Union**

According to the Article 1 of the Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark (Codified version): “[a] Community trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.”

Based on the unique Trade mark Law of the European Union, rules have been established and the Office for Harmonization in the Internal Market, located in Alicante, Spain. The *First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks* is also relevant, since it provides for the EU Member States that they do not need to prescribe registration of certification or collective marks, but if they do so, they have to abide by the registration rules, especially the special conditions for the collective and certification mark. The Following Directives and Regulations are also applicable to trademarks in the EU:

- Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel;
- Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark (Codified version)(Text with EEA relevance);
- Directive 2008/121/EC of the European Parliament and of the Council of 14 January 2009 on textile names;
- Directive 2008/95/EC of the European Parliament and the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Codified version);
- Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91;
- Council Regulation (EC) No 1992/2003 of 27 October 2003 amending Regulation (EC) No 40/94 on the Community trademark to give effect to the accession of the European Community to the Protocol relating to the Madrid Agreement concerning the international registration of marks adopted at Madrid on 27 June 1989;
- Council Regulation (EEC) No. 3842/86 of 1 December 1986 Laying Down Measures to Prohibit the Release for Free Circulation of Counterfeit Goods.

**c) China**

Trademark regulation in China is mostly determined by the Trademark Law of the People's Republic of China of 1982, last amended in 2001. The

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definition of trademark, according to the law, focuses on the characteristics and functions of the trademark:

“...Any visible sign that can serve to distinguish the goods of a natural person, legal person, or other organization from those of another, including any work, design, letter of the alphabet, numeral, three-dimensional symbol and color combination, or any combination of the above, may be made a trademark for application for registration ... (Article 8)”

A trademark submitted for registration shall bear noticeable characteristics and be readily distinguishable, and it may not conflict with the legitimate rights obtained by others earlier (Article 9).”

Secondary Chinese trademark legislation includes:

- Implementing Measures on Management of Automobile Brand Marketing (2005);
  - China Measures for the Administration of the Trademark Agency (2009);
  - China Regulations on the Determination of Well-Known Trademarks (2009);
  - China Provisions on Utilizing the Marks of the Most Competitive Brands on the Market (2009);
  - China Trial Measures for Evaluating and Protecting Brands in the Commercial Field (2007);
  - China Notice on Interim Regulation Concerning Intensified Interlinking and Coordination in the Combat against Trademark Exclusive Right Infringing Criminal Offenses (2006);
  - China Rules for Trademark Review and Adjudication (2005);
  - China Regulations on the Protection of the World Exposition Symbols (2004);
  - China Provisions on the Determination and Protection of Well-known Marks (2003);
  - China Measures for the Registration and Administration of Collective Marks and Certification Marks (2003);
  - China Measures for the Implementation of International Registration of Marks under the Madrid Agreement (2003);
  - China Regulations for the Implementation of the Trademark Law of the People's Republic of China (2002);
  - China Opinions on Resolution of Several Issues Concerning Trademarks and Enterprise Names (1999);
  - China Opinions on Several Issues Concerning Service Trademark Protection (1999);
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- China Provisions on the Management of Trademarks in Foreign Trade (1995);
- China Certain Regulations on Prohibiting Unfair Competition activity concerning imitating specific Names, Packaging or Decoration of Well-known Commodities (1995);
- China Rules for Foreigners or Foreign Enterprises Applying for Trademark Registration in China (1983).

## 2. Domain Names

The domain name differs from the trademark by several characteristics. First, the domain is present in the virtual space and territoriality does not apply as in the trademark. Second, the domain is unique and there cannot be coexistence, as is the case with the trademarks of different categories of goods and services. The domain or IP address is unique, which means that two business entities may have the same mark, but cannot have the same domain name. Hence, the domain is unique and unrepeatable.<sup>2</sup> Trademarks, which enable differentiation of the goods and services (especially in terms of the quality and value) by the consumer, may be an integral part of the domain's name.

This is particularly important regarding the phenomenon of *malicious, deliberate registration of domains that correspond to trademarks or names of some entities in order to make profit* “domain hijacking” or “cybersquatting”. The subject undertaking domain hijacking activities is known as “cybersquatter”. This subject acts in *mala fides* (bad faith), contrary to the principles of consciousness and honesty, “occupying” an attractive domain, with the intention of later offering it to the carrier of the eponymous trademark and make profit.

Cybersquatting may also appear in the social media. The main characteristic of the social media is the so called user generated content (Web 2.0) which according to the OECD is actually: (i) content made publicly available over the Internet, (ii) which reflects a certain amount of creative effort., and (iii) which is created outside of professional routines and practices (OECD, 2006). An example of the possibility to register a personal name as social media user name, is the Facebook user name feature, established in 2009, which is in fact a distinct web addresses, i.e.

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<sup>2</sup> It is obvious why a trademark is very valuable and significant as a domain name. With its registration, the trademark loses the characteristics of territoriality and specialty. The trademark transformed into a domain is present worldwide. The issue is a virtual monopoly right, bearing its own characteristics.

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“vanity URL”. This can be achieved by each user simply at [www.facebook.com/username](http://www.facebook.com/username). This feature allows the creation of vanity URLs involving names of personalities or trademarks. Typical example is *the La Russa* case.<sup>3</sup> Similar situation of the use of reserved username without permission of the trademark owner involving sport products is [myspace.com/nike](http://myspace.com/nike)<sup>4</sup>. In this case, the owner of the profile is NIK!, a nickname of a physical person.

### 3. Selected Country Experience on the Procedures of Resolving Domain Disputes

Two parties appear in the disputes dealing with the domains: one of the parties is the person who is most often the trademark holder or a legal or physical person who believes that his/her interest is endangered by the domain (*petitioner, appellant, complainant*), while the other party is the person who registered the domain (domain holder, respondent). Due to the sensitivity of the matter, but also from economic reasons, disputes regarding domains are most commonly subject to alternative dispute resolution. The parties, however, may initiate a court procedure for the domain, even if a decision had already been made in the alternative dispute resolution procedure.

In most national legislations, there are several regimes for regulating cases involving domains, especially in terms of cybersquatting. In this regard, the practice of the USA, EU and China is indicative. In the *United States of America*, the Anti-cybersquatting Protection Act (Truth in Domain Names Act) applies since 1999. This Act forbids behavior of individuals, who have bad faith intent to profit from someone else’s trademark, by registering or using domain names that are identical, confusingly similar or delusive of a trademark. The most interesting aspect of this piece of legislation is 15 USC s. 1125 (d) 2 C. Pursuant to this provision, the domain

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<sup>3</sup> In 2009, anonymous user created: <[www.twitter.com/TonyLaRussa](http://www.twitter.com/TonyLaRussa)>. Antony La Russa, who is actually a Major League Baseball manager sued Twitter for enabling the author to use La Russa name *mala fides*. According to the complaint launched by La Russa, the Twitter page was act of cybersquatting, which has been defined as the “deliberate, bad-faith, and abusive registration of Internet domain names in violation of the rights of trademark owners.” See: *Anthony La Russa vs. Twitter Inc. Delaware Corporation et al.* Case Number: CGC-09488101, Superior Court of the State of California, City and County of San Francisco; United States District Court for the Northern District of California.

<sup>4</sup> Curtin, T.J. (2010). The Name Game: Cybersquatting and Trademark Infringement on Social Media Websites, *Journal of Law and Policy*, 19(1), 353-394.

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names are subject to an *in rem* action, in the judicial district where the domain name was registered. If, however, the cybersquatter is a legal person, then an *in personam* action is filed. Some familiar cases dealing with this issue are: *Kremen vs. Stephen Michael Cohen, Network Solutions et al*, who disputed over the *sex.com* domain.<sup>5</sup>

In *China*, the rules on domains are contained in the following legislation acts:

- The China Internet Network Information Center (CNNIC) Implementing Rules of Domain Name Registration;
- China Rules for the China Internet Network Information Center (CNNIC) Domain Name Dispute Resolution Policy;
- China CNNIC Domain Name Dispute Resolution Policy;
- China Internet Domain Name Regulations;
- China Implementation Rules for Provisional Regulations of the Administration of International Networking of Computer Information in the People's Republic of China;
- China Interim Administrative Measures on Domain Name Registration;
- China Interim Regulations on the Management of International networking of Computer Information;
- Interpretation of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes over Domain Names of Computer Network.

Court decisions in China include several important cases dealing with cybersquatting and applicability of the trademark law.<sup>6</sup>

With regard to the *European Union* legislation, specific rules have been enacted concerning the *.eu* domain:

- European Union Commission Decision of 21 May 2003 on the designation of the *.eu* Top Level Domain Registry;

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<sup>5</sup> Yi Fen Lim (2001), *Cyberspace Law*, Oxford.

<sup>6</sup> *Inter Ikea Systems B.V. v. Beijing Cinet Information Systems Company Limited* - IP Decision No. 76 of 2000 (Higher People's Court); *The Procter & Gamble Company v. Beijing Tiandi Electronics Group* - IP Decision No. 27 of 2001 (Higher People's Court); *E.I. Du Pont De Nemours and Company v. Beijing Cinet Information Systems Company Limited* - IP Decision No. 47 of 2001 (Higher People's Court); *Cartier International B.V. v. Beijing Cinet Information Systems Company Limited* - IP Decision No. 13 of 2001 (Higher People's Court); *Pfizer Inc. v. Shenzhen Wanyong Information Network Company Limited* - IP Decision No. 48 of 2001 (Higher People's Court); *The Procter & Gamble Company v. Beijing Cinet Information Systems Company Limited* - IP Decision No. 83 of 2000 (Higher People's Court).

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- European Union Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu TopLevel Domain and the principles governing registration;<sup>7</sup>
- European Union Commission amending Regulation (EC) No 874/2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration.

EU domain name legislation provides that the cases of suspicious domain registrations and their abuse are settled in a court procedure or in an alternative dispute resolution procedure. Regulation 874/2004 provides that a registered domain name may be subject to revocation where that name is identical or confusingly similar to a name in respect of which a right is recognised or established by national and/or Community law,<sup>8</sup> and where it:

- (a) has been registered by its holder without rights or legitimate interest in the name; or
- (b) has been registered or is being used in bad faith.

A legitimate interest of the holder may be demonstrated where:

- a) prior to any notice of an alternative dispute resolution (ADR) procedure, the holder of a domain name has used the domain name or a name corresponding to the domain name in connection with the offering of goods or services or has made demonstrable preparation to do so;
- b) the holder of a domain name, being an undertaking, organisation or natural person, has been commonly known by the domain name, even in the absence of a right recognised or established by national and/or Community law;
- c) the holder of a domain name is making a legitimate and non-commercial or fair use of the domain name, without intent to mislead consumers or harm the reputation of a name on which a right is recognised or established by national and/or Community law.<sup>9</sup>

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<sup>7</sup> Amended by Regulations : 1654/2005 of 10 October 2005; 1255/2007 of 25 October 2007 and 560/2009 of 26 June 2009.

<sup>8</sup> *Commission Regulation* (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration (Official Journal of the European Union L 162/43).

<sup>9</sup> *Ibid.*

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## 4. Uniform Domain Name Dispute Resolution Policy (UDRP)

In 1999, the Internet Corporation for Assigned Names and Numbers (ICANN) adopted the Uniform Domain Name Dispute Resolution Policy (UDRP), as well as the UDRP Rules that regulate the administrative procedure for resolving domain disputes.<sup>10</sup> Under the UDRP rules, the domain name dispute resolution procedure may take place before one of the following ICANN approved service providers:<sup>11</sup> the Asian Domain Name Dispute Resolution Centre (ADNDRC)<sup>12</sup>, with offices in Beijing, Hong Kong and Seoul; the National Arbitration Forum (NAF)<sup>13</sup>; the WIPO Arbitration and Mediation Center<sup>14</sup> and the Czech Arbitration Court (in regard to the .eu domain).

The UDRP rules have dual objectives: to remove bad faith domain holder from the virtual space and to enable the complainant (mark holder) to get the domain to which he has a legitimate right. UDRP rules apply to dispute resolution regarding generic top-level domains (gTLD): .com, .net, .org, .biz, .name, .info, .pro, .coop, .aero, .museum, .job and .travel. UDRP is accepted only for some of the national domains (e.g., .nu, .tv, .ws).<sup>15</sup>

Under the UDRP Rules, it is quite probable that the domain holder would lose the right to the domain, when the trademark holder submits a valid complaint. The holder should, however, prove (1) that the manner in which the domain name(s) is/are identical or confusingly similar to a trademark or service mark in which the Complainant has rights; (2) why the Respondent (domain-name holder) should be considered as having no rights or legitimate interests in respect of the domain name(s) that is/are the subject of the complaint; and (3) why the domain name(s) should be considered as having been registered and being used in bad faith (*mala fides*).

If found by the Panel to be present, the following is considered to be evidence of the registration and use of a domain name in bad faith:

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<sup>10</sup> <http://www.icann.org/udrp/udrp-rules-24oct99.htm>.

<sup>11</sup> <http://icann.org/udrp/approved-providers/htm>.

<sup>12</sup> <http://www.adndrc.org/adndrc/index.html>.

<sup>13</sup> <http://domens.adrforum.com>.

<sup>14</sup> <http://www.wipo.int/amc/en/>.

<sup>15</sup> The maintenance of the national top-level domains (ccTLD) is under the authority of a separate Agency of the International Standardisation Organisation (ISO 3166 Maintenance agency (ISO 3166/MA)), in accordance with the IANA procedures (<http://www.iana.org/domains/root/cctld/>)

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- 1) circumstances indicating that the domain name has been registered or acquired 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 documented out-of-pocket costs directly related to the domain name; or
- 2) the domain name has been registered in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that there was an engagement in a pattern of such conduct; or
- 3) the domain name has primarily been registered for the purpose of disrupting the business of a competitor; or
- 4) by using the domain name, there has been an intentional attempt to attract, for commercial gain, Internet users to the domain owner's website 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 the website or location or of a product or service on the web site or location.

#### **a) Asian Domain Name Dispute Resolution Centre (ADNDRC)**

ADNDRC was approved for dispute resolutions under the UDRP Rules in February 2002. ADNDRC is a joint undertaking of several bodies: the China International Economic and Trade Arbitration Commission (CIETAC)<sup>16</sup>; the Hong Kong International Arbitration Centre (HKIAC),<sup>17</sup> and the Korean Internet Address Dispute Resolution Committee (KIDRC).<sup>18</sup> The ADNDRC has four: Beijing, Hong Kong, Seoul and Kuala Lumpur. Each of these offices has supplemental rules to the UDRP ones, which mostly regulate technical and costs issues.

#### **b) WIPO Arbitration and Mediation Centre**

Globally, the WIPO Centre is the most popular provider organization for domain-name dispute resolution, *inter alia*, because of the First and Second WIPO Internet Domain Name Processes, which result in adoption of final reports focusing on the conflict between domain-names and trademarks. Since its establishment in 1999, the WIPO Center has received over 22,500

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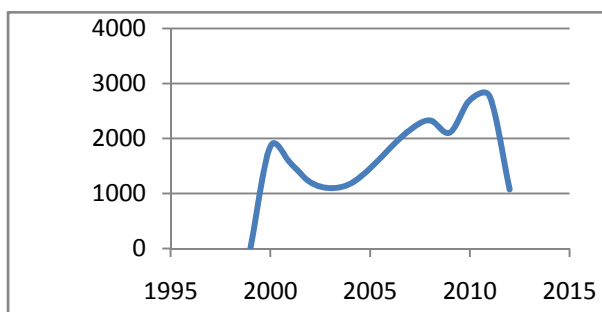
<sup>16</sup> <http://www.cietac.org.cn/>.

<sup>17</sup> [http://www.hkiac.org/HKIAC/HKIAC\\_English/main.html](http://www.hkiac.org/HKIAC/HKIAC_English/main.html).

<sup>18</sup> <http://www.idrc.or.kr/>

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UDRP based cases of around 40,500 domain names including generic and country code Top Level Domains.



*Number of WIPO Domain Name Cases in the period 1999 – 2012 (Source: WIPO)*

## 5. Metatags

Since metatags are embedded in the code for the web page, not being visible for viewers of the web page and aimed to be read by search engines, they remain one of the key issues in the relations of trademarks and e-commerce. Verbauwheide mentions the example with the “Godiva” metatag as part of the website of a small chocolate shop, so that anyone searching for “Godiva” on the internet would be directed to the shop’s web page, and not to Godiva’s site. This might be analyzed as potential trademark infringement or unfair competition.<sup>19</sup>

One of the most relevant cases in the *United States* jurisprudence is the case of *Playboy Enterprises, Inc. v. Welles*, often cited as the most typical metatags case.<sup>20</sup> The defendant (T. Welles, former “playmate of the year”) was using “Playboy” and “Playmate” as metatags in his web site. Playboy Enterprises, Inc. considered this as trademark misuse and launched an action against Welles. However, the 9<sup>th</sup> Circuit Court ruled that “...The metatags use only so much of the marks as reasonably necessary and nothing is done in conjunction with them to suggest sponsorship or endorsement by the trademark holder”, i.e. declared a fair use of the metatag.

With regard to metatags, Section 32 of the Lanham Act, applies on the following:

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<sup>19</sup> L. Verbauwheide, *Intellectual Property and E-Commerce: How to Take Care of Your Business’ Website*.

<sup>20</sup> No. 97-Z-1592, 1998 U.S. Dist. LEXIS 18359.

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- “ (1) Any person who shall, without the consent of the registrant:
- (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
  - (b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive...”

In the *European Union*, metatags issues have been in the focus of the European court of Justice (ECJ). The case *Google France v. Louis Vuitton Malletier*,<sup>21</sup> is a typical example. The relevant EU legislation on the scope of relevant IP and E-commerce include: Directive 89/104/EEC (Article 5); Regulation (EC) No 40/94 (Article 9) and Directive 2000/31/EC (‘Directive on electronic commerce’) concerning the liability of the operator. The ECJ ruled that the operator (in this case Google France) cannot be liable if someone else is using a competitor’s trademark as a key word, since the mark is used by the advertiser and not by the operator:

“... Article 14 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) must be interpreted as meaning that the rule laid down therein applies to an internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of

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<sup>21</sup> Joined Cases C-236/08 to C-238/08.

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those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned ...”

## Conclusions

The discussion in this comment shows the interdependence of intellectual property rights on e-commerce, in the context of its contemporary legal tendencies and functions. The globalisation and the rapid increase of international trade with IPRs, goods and services and the rapid development of new technologies and possibilities offered by use of IPRS are complementary to the e-commerce trends and developments. These are reflected not only in the international conventions and agreements, but also in the EU, US and China legislation.

The interdisciplinary approach and consistent theoretical framework in the realms of trademark law, e-commerce law and information technology law are important for the regulation of the protection of intellectual property law in e-commerce, and such interdisciplinary approaches should inform policies and practices. This envisages the special attention of lawyers. Moreover, there is the need for the pursuance of the appropriate approach in the formulation of the primary and secondary legislation.

E-commerce and IP regulations should reflect the forms of innovation developed by new economic activities and they assume the intervention of the law in order to control the intangible assets and to optimize their valorization. This would also have a positive effect on foreign direct investments (FDI). Inevitably, the primary national legislation would continue to adapt to the permanent changes of the comparative international legal regime, since intellectual property is considered as a "moving target" of legal and economics science. This envisages, a continuation of the policy of implementing measures based on sustained self-evaluation of the quality of legislation according to references of international standards.

This calls for affirmative secondary legislation actions and strategies, reflecting the legal and economic aspects of the inter-dependability of IP and e-commerce. These actions would enable concerned target groups, the business sector (chambers of commerce; IP companies) and particularly practitioners (IP managers and valuation experts) to have an active role in the realization of the socio-economic goals of e-commerce in their home states and in the host economies in which they operate. ■

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