



# Internet Marketing and the Law

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## Internet Marketing and Trademarks

- Domain Names
- Keywords
- Meta Tags
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```
<meta name="keywords" content =  
  "windows, registry, clean, regclean,  
  regcleaner, repair, cleaning, problems,  
  errors, crash, window, missing, driver,  
  startup, files, corrupt, cleaner">
```



## Relevant Legal Theories

- Trademark Infringement
  - Domain Names
  - Meta Tags
  - Keywords
- Cybersquatting
- Typosquatting
- Dilution

## **Critical Concepts**

- Likelihood of Confusion
- Initial Interest Confusion
- Use in Commerce
- Bad Faith
- Fair Use Defenses
- Blurring
- Tarnishment

## Likelihood of Confusion Test

- Classic Confusion
  - Strength of the Mark
  - Proximity of the Goods
  - Similarity of the Marks
  - Evidence of Actual Confusion
  - Marketing Channels Used
  - Type of Goods and the Degree of Care Likely to be Exercised by the Purchaser
  - Defendant's Intent in Selecting the Mark
  - Likelihood of Expansion of the Product Lines
- Initial Interest Confusion

## Use in Commerce

- Use in commerce is defined as “bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.”
- Courts are split regarding whether internet marketing techniques constitute use in commerce
  - *J.G. Wentworth*
  - *Edina*
  - *Merck*
  - *GEICO*
  - *Rescuecom*



## Elements of Bad Faith

- Does the Defendant have Intellectual Property Rights in the Domain Name
- Does the Domain Name Consist of a Name that is Commonly Used to Identify the Person
- Whether the Domain Name in Connection with the *bona fide* Offering of Goods or Services
- The *Bona Fide* Noncommercial or Fair Use of the Mark
- Intent to Divert Consumers
- Offer to Transfer, Sell, or Assign the Domain Name
- Provision of Falls or Misleading Contact Info on Application
- Registration of Multiple Domain Names
- Is the Mark Distinctive or Famous

## Fair Use Defenses

- Classic Fair Use
  - Use is Descriptive of Goods or Services
  - Used Fairly
  - In Good Faith
  
- Nominative Fair Use
  - The product or service must be one not readily identifiable without use of the trademark
  - The user can use only so much of the mark as is reasonably necessary to identify the owner's product or service
  - Nothing suggests sponsorship or endorsement by the trademark owner

## Secondary Theories of Liability

- Vicarious Liability
  - Actual or apparent control over the infringer
  - Financial benefit from infringement is required
  
- Contributory Liability
  - Mere awareness of potential infringement not enough for liability
  - Would a reasonable person realize situation was likely to result in infringement
  - Requires direct control and monitoring of means of infringement

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