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# DOMAIN NAMES & (TRIPS): THE ASPECT OF PROTECTIONS ROOTS

**K**eywords  
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## Abstract

*Though the main goal of (TRIPS) agreement was established to organize Trade-Related Aspects of Intellectual Property Rights, some new rights related to intellectual property have arisen away from the scope of this agreement. One of these issues was domain names. Initially, it was argued that there is no relation between domain names and trips agreement due to the fact that domain names are relatively new issue comparing to establishment of TRIPS agreement. This might be right to a point with taking into consideration the unclear nature of domain names per se. However, revealing the real nature of domain names might bollix things up.*

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## METHODOLOGY

Analytical approach will be used to analyze the related TRIPS agreement provisions, as well the comparison approach will take place to determine the relationship between trademarks and domain names.

## ASSUMPTION & THEORETICAL FRAME

This article is based on the assumption that the nature of domain names will decide the relationship with TRIPS agreement. On the other hand, this paper proposes that a domain name can be considered as internet address according to its technical mission on the one hand, but on the other hand it can be trademark (digital trademark) according to its functional mission in digital space. Accordingly, domain names can be subjected to protection provided by (TRIPS) agreement. As for Theoretical frame, some issues need to be considered as:

- TRIPS agreement can provide protections to all intellectual property rights.
- Domain names can be considered as part of intellectual property.
- Nature of domain names will decide if domain names can be protected under TRIPS agreement.
- The mystery that has shrouded domain names' nature could be an obstacle in terms of giving full protection to domain names.

### Abbreviations

- ACPA - the Anticybersquatting Consumer Protection Act
- gTLDs - General top-level domain names
- IPRS - Intellectual Property Rights
- ADR - Alternative Dispute Resolution
- FTAs - A free trade agreement
- ccTLD - A country code top-level domain
- WTO - The World Trade Organization

## NECESSARY BACKGROUND

### TRIPS agreement: existence, definition & mission

After a long rally of negotiation from 1986 to 1994, and based on multilateral parties, new agreement called TRIPS has seen the light during the round held in Uruguay (George, 2017, Stewart, 1999). This agreement came into effect in 1995 (Bhalla, 2013). The TRIPS Agreement is one of the most detailed and also comprehensive lawful regimes ever before wrapped up at the multilateral degree related to

intellectual property rights (IPR). The TRIPS Agreement comprises a significant qualitative leap which drastically customizes not only the context in which IPR are taken into consideration globally, but also their substantive material and also the approaches for their enforcement and also dispute negotiation (Correa & Yusuf, 2016). Subsequently, TRIPS approach intends to link trade policy to intellectual property requirements pushed by the pressures exerted by the United States (Wikipedians, n.d; Hussain, 2010). In this context, any country looking for acquiring difficult accessibility to the countless international markets opened up by GATT must pass the stringent intellectual property regulations mandated by TRIPS (Irogbe, 2014). Consequently, (TRIPS) is the most crucial multilateral tool for the globalization of intellectual property regulations (Ramakrishna & Anil Kumar, 2017; Irogbe, 2014; Hussain, 2010).

### Domain names: existence, definition & mission

As a result of digital revolution in cyberspace, a new shape of intellectual property has been created, called "domain names" (Goldscheider, 2002). The nature of domain names is highly controversial (Ku, 2016). What is agreed up on so far is that domain name works as website address online (Puntambekar, 2009). Domain name is not merely an Internet address (Lindsay, 2007) numeric addresses (John, 2009). However, regarding domain names definition, the scales were tipped in favor of technical mission of domain name rather than the legal nature.

## TRIPS PROTECTION SCOPE TO TRADEMARKS

TRIPS agreement has included in Articles 15-21 mandates minima trademark requirements – such as requirements for protection, legal rights approved, period of protection (Calboli & Farley, 2016). On the other hand, TRIPS paved the way to globalization through intellectual property protection obligations (Bamford, 2020). TRIPS establish minimum requirements for the accessibility, range and also usage of 7 types of IP: copyrights, trademarks, geographical indicators, industrial designs, patents, format styles for integrated circuits and undisclosed details (trade secrets) (Bamford, 2020), because TRIPS is practically 25 years of age. However, it does not resolve a number of intellectual property cases growths, such as the spiderweb cases as well as electronic copyright (Bamford, 2020). In this regard, it was argued that TRIPS also has set the flooring for minimum protecting of IPR (Taubman, 2011). Accordingly, the WIPO has actually attended to electronic copyright problems in the supposed web Treaties, particularly the WIPO Copyright Treaty (WCI) and also the WIPO Performances and also

Phonograms Treaty (WPPT) (Bamford, 2020). On the other hand, Annette Kur & Mercurio have a different point of view when it comes to level of protection given to intellectual property. In this regard, they believe that TRIPS is able even to give maximum protection to IP rights (Mercurio, 2017; Kur, 2011). However, the other point of view concluded that TRIPS agreement was a limited protection towards intellectual property rights, has been criticized and was described that it reflects an infrastructural prejudice (Jude & AL-sharieh, 2011).

### **TRIPS CORRELATION TO DOMAIN NAMES**

An initial success towards global harmonization of IPR protection has actually been the TRIPS arrangement (Scandizzo, 2001). In this term, unlike other various arrangements on intellectual property, TRIPS has an effective enforcement system. States can be disciplined via the WTO's dispute negotiation mechanism (Srivastava, 2016; Sprankling, 2014; Stamatoudi, 2010; Strasser, 2009; Wikipedians, n.d.). In this run, some would argue according to the fact that TRIPS agreement hasn't mentioned anything about domain names (Lerman, 2013). In this regard, it has taken for granted that TRIPS agreement hasn't mentioned domain names within its provisions (Lerman, 2013). The main question that arises here is whether there is a connection between domain names and TRIPS agreement. A reply to this question must begin with a definition of intellectual property per se and determining its standards, then analyzing the nature of domain names to know if it does fit trademark nature or not. The last step will be finding the connection based on trademark infringement and if the prevention of legal holder of a trademark from the registration of his trademark can be considered as such infringement over trademark which is fully protected according to TRIPS agreement as the following.

#### **Intellectual property's criteria**

The research about the relationship between domain names & TRIPS was reminiscent of the controversy around the nature of domain names. However, the contrast of perspectives gets wild in terms of consideration the domain as a part of intellectual property or not. In this context, intellectual property defines as intangible property based on creativity (Masters & Wallace, 2010; Rockman, 2004; Johnson, 2004). It has been aforementioned that TRIPS agreement was dedicated to give protection to intellectual property rights on the global level (Owoeye, 2019). Besides, it is developed to meet the demands both of the WTO as well as the intellectual property' society stakeholders (Stoll, 2008). To conclude that if the protection provided by TRIPS

agreement can be technically applied to domain names must be evaluated according to criteria of intangible property and creativity as the following.

#### **1. Intangible property**

There is a minority view amongst some lawful scholars as well as experts as to whether domain remain in reality a kind of property, some suggest that domain are intangible property (Barros, Hemingway, & Cavalieri, 2020; Hart, 2008; Anson & Drews, 2007; Barros, 2016; Bryer, Lebson, & Asbell, 2011). Since the property has traditionally been divided into two parts: tangible & intangible, it might be valuable to recognize what an intangible asset is not for better understand what an intangible property is (Reilly & Schweih, 2016). In this context, Reilly & Schweih have simplified this idea by concluding that clearly, an intangible asset is not tangible (Reilly & Schweih, 2016). However, the difference between Tangible as well as Intangible Properties would help to decide if domain names can be considered as intellectual property or not. Accordingly, Reilly & Schweih have concluded the criteria used to determine generally if this is tangible or intangible assist. In this context, they argue that tangible property should be able to be seen and to have physical existence, in addition to the fact that it can be touchable (Reilly & Schweih, 2016). Based on the aforementioned criteria, the main question that arises here is whether domain names can be considered as intangible property or not. On another way, can domain names be touchable, or have physical existence? There was a strong call considering domain names as intangible assists. Traditionally domain names are considered an example of intangible assets (Carmichael, Whittington, & Graham, 2007). In this context, Bryer & Lebson have supported this point of view by concluding that civil procedures taken against a domain name, recommending that a domain name is undoubtedly a kind of intangible assets (Bryer, Lebson, & Asbell, 2011). On the other hand, there is a minority sight amongst some lawful scholars and also professionals regarding whether domain name names remain in fact a type of property (Bryer, Lebson, & Asbell, 2011). Under the minority sight, some say that a domain name is not property which a domain name registrant receives just the conditional contractual right to the special organization of the licensed domain name for the regard to the enrollments (Ku, 2016; Bryer, Lebson & Asbell, 2011). This point of view is supported by the idea that the registrant does not, with its contract, get any type of legal rights against other stakeholders apart from the subsequent exclusivity resulting from the truth that a similar domain cannot be made use of during the of enrollment. Hence, this sight likens the lawful standing of domain to phone numbers (Bryer, Lebson, & Asbell, 2011). The American Act (ACPA) authorizes in rem civil

procedures against a domain name, recommending that a domain is without a doubt a kind of intangible property, specifically given that in rem actions are brought particularly versus property. Situations made a decision under the ACPA have actually held that the Congress considered domain names as a minimum of relative to the ACPA (Bryer, Lebson, & Asbell, 2011). On the other hand, the judicial point of view still shrouded with mystery. In this term, the question regarding whether domain names are intangible property has actually never been settled by courtroom (Ku, 2016). Accordingly, in case *Network Solutions Inc. v. Umbro International Inc.*, 529 S.F. 2d 80 (Va. 2000) the court held that domain name is not to be considered property in the context of garnishment procedures (Ku, 2016). At another occasion, the court has changed its decision in favor of the point of view that domain names are intangible property. Accordingly, in the case *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003), the Court of Appeals held that domain is suitably considered a type of intangible property (Ku, 2016).

## 2. Intangible property criteria

In this term, Courts have actually struggled to discover a suitable classification frame for domain names. The domain names have actually been compared both to an intangible property right as well as to a website address (Lipton, 2010). In return, French court (the Conseil d'Etat) issued a judgment which verifies that the domain name remains in truth an intangible property (Dreyfus, 2019).

However, the French court has set Requirements for intangible asset qualification on its judgment in the case of *eBay.france*. On December 7, 2016, the French court set Requirements for intangible asset. In dicta, the court indicated that to be qualified as an intangible asset, the property must fit three criteria:

- A. the property has to be adequately sturdy; it must hence continue to be in business for time.

- B. the property has to be a normal resource of revenue and also therefore produce earnings routinely.

- C. it should be transferable. To certify as an intangible property, meeting these 3 requirements is necessary. The property will certainly be requalified as an expense if any of these conditions is not satisfied (Dreyfus, 2019).

## 3. Creativity

The term "intellectual property" has both the principle of personal creativity and also the principle of general protection given to innovative outcomes. In one more mean, innovation as well as offered protection constitute intellectual property (Sherwood, 2019). Where an intellectual property subject arises from the workout of creativity (Mann, 2011), in this run, domain names need to be compelling and memorable (Levinson & Levinson,

2013), and innovative enough to enjoy protection given to intellectual property right. The main advice would be given here is to be creative to choose and register domain names (Rich, 2008). A threshold issue is whether domain names include enough creativity to enjoy intellectual property protection or not. In fact, there are many indicators that support this assumption that domain names have the mount of innovation to make it qualified to protection given to intellectual property rights. One of these indicators is presented by the fact that domain names are unique per se and rivalrous. On the other hand, one mission of the domain names is to attract audiences (Baumgardt, 1998) & interested internet users by their phrasing (Moro Visconti, 2017). It was noticed that such this attraction must have a kind of innovation and creativity. Froemel & Thaler have considered domain names as new source of linguistic creativity (Winter-Froemel & Thaler, 2018). On the other hand, and based on the fact that the mount of innovation grows in direct proportion to the range of protection, Elias & Gima argue that a distinctive domain obtains even more lawful protection as a trademark than a non-distinctive one does (Elias & Gima, 2000). On the other hand, when it resides on spiderweb, a domain is mostly a trade name (Charmasson & Buchaca, 2009). It is useful to place your products or services on the market if the domain name is attractive, unique and also distinctive (Charmasson & Buchaca, 2009; Elias & Gima, 2000). However, more creativity put in domain names would make it more distinctive (Elias & Gima, 2000). Accordingly, when the brand name is strongly distinctive and/or of repute, domain name would certainly be permitted further protection (Peermohamed, 2012). Another clue indicate that domain names are innovative is the financial value of such these domains that originated from website traffic, sale of shopping goods or the supply of services or internet marketing & advertising) (Moro Visconti, 2017). There is no doubt that financial value reflects the level of creativity that it enjoys it beside the mount of protection that it deserves. The domain names creativity would come also as the many believe from using gTLDs which will inspire innovation (Miller, 2012). But the main source of domain names innovation will esteem from trademarks themselves due to the fact that overwhelming majority of domain names are registered based on trademarks /or independent of a trademark right (Roelofse, 2006). In this respect, in the economics of creativity, trademarks are a crucial part of the innovation (Doern, 1999). In this connection, some argue that General words and phrases they do not have any level of innovation would be innovative for being reloaded with domain name (American Law Institute & American Bar Association Committee, 1999). Initially, and based on the previous analyzing, it was concluded that Having established all criteria required under

intellectual property concept as it was mentioned in TRIPS agreement, justifies that domain name shall be included under protection umbrella given to intellectual property's rights according to TRIPS agreement. In that direction, the scope of protection would be more effect if domain names were approved to be functionally as trademark due to the fact that trademark has been mentioned frankly under TRIPS agreement.

### **Domain names & trademarks**

One of the main legal challenges comes to cyberspace is the legal nature of domain names. In this context, it was acknowledged that the domain names' nature remains uncertain, particularly the relationship between domain names and trademarks which has been characterized as a vague and mystery. The question has arisen as to whether domain name can be a trade mark or not. However, addressing the legal nature of domain names in light of the relationship with trademark will reignite the debate whether the domain names are qualified to be considered as a trademark or not. In this context, pinpoint the domain name nature is conducted by comparing between domain names and trademarks at infrastructures and procedurals level with ignoring essence of both domain names and trademark and their geographical and digital medium. In return, the legal nature of domain names should be reviewed according to space occupied by each of them on hand, and their common mission from another hand. Accordingly, the main difference between both of them is the nature of medium occupied by each of them. Hence, the trademark's medium is geographical space, while the domain name's medium is cyberspace. The question arises here is why trademark need to be use in cyberspace? Another question arises here and would revive the debate about the way that trademark can come in /or be used in cyberspace? As for first question, trademark need to be use in cyberspace? The answer would be that it is able to do same jobs that it does in geographical territory in cyberspace. As for second question, the answer would be: by reloading the trademark with domain name (digital matrix) that takes the shaper www.trademark. GTLD/SJTLD. In another way, domain name would be the digital equivalent to geographical trademark, as well as trademark would be the geographical equivalent to domain name, due to the fact that it can practice trademark's features and characteristics (Goldscheider, 2002). Domain names have capability to produce trademark rights (Komaitis, 2010). In this regard, Domain name can enhance the strength of an existing trademark or meet trademark itself just when utilized commercially. According to the mutual functions, Alghamdi argues that Domain names serve the very same objective as trademarks: they recognize the resource of the goods as well as service (Alghamdi,

2011). In another words, it was frankly declared as Ross believes that domain name can be considered trademark if it is used as a trademark (Ross, 2000). In alignment with this, the point of view was supported in conformity with the mere truth that Trademark legislation just gives exclusive rights within the trademark on the one hand (Barrett, 2008), and domain names are traditionally subjected to trademarks law, on the other hand. Accordingly, it can be reasonably concluded there is an implicit recognition that domain names are trademark. It can be argued that domain names may be ruled by intellectual property law due to the fact that domain names often match with trademarks and therefore bring trademark legislation right into play in solving disputes concerning trademark enrollment as well as usage. The legal status of domain names remains uncertain, particularly the question as to whether or not they are appropriately regarded as property (Ku, 2016).

### **1. Domain names under trips umbrella**

By analyzing TRIPS Agreement (Article 41) it is concluded that under the TRIPS Agreement, members require to make sure that enforcement procedures are readily available under their regulation so as to allow reliable activity versus any kind of act of trademark violation, including prompt treatments to stop violations and also remedies which comprise a deterrent to further infringements (Das, 2015; Lerman, 2013; WTO, 1995). In this regard, Members states do not have any type of responsibilities to have judicial system for the enforcement of IP legal rights distinct from that for the enforcement of law in general as well as they additionally do not have any type of commitment with regard to the distribution of sources as in between enforcement of IP legal rights as well as the enforcement of legislation in basic (Lerman, 2013). Initially, the adoption of ADRs systems is not unreasonably expensive for any type of country. It may return to WIPO's prolonged system for ccTLD if a state does not want to form an alternate device of its very own. Although this option might not be excellent, it may be a fascinating course to integrate, in its neighborhood domain system, a mechanism that is very looked for by established states under the TRIPS Agreement framework. Adopting ADRs for ccTLDs might be a method for a country to offer a concession on domain issues in order to acquire helpful giving ins on various other IP issues in exchange. This has been the experience of China, an arising country which integrated ADRs devices for the '.cn' as a signal of opening its economy as well as associated policies simultaneously with their inauguration to the WTO (Lerman, 2013). It ought to maintain in mind that Article 41 of the TRIPS Agreement could be analyzed in light of the worldwide practice in domain name dispute resolution post TRIPS. As Article 31.3 of the Vienna

Convention of the Legislation of Treaties (Vienna Convention) develops, treaties will be interpreted by considering (Lerman, 2013) :

(a) any succeeding contract between the members parties pertaining to the explanation of the treaty or the application of its arrangements;

(b) any type of subsequent method in the application of the treaty which develops the agreement of the parties concerning its interpretation (Lerman, 2013). Another potential connection between TRIPS agreement and domain names might stem from reciprocal treaties such as FTAs, along with the country-practice in domain conflict resolution mechanisms, might be considered in a WTO-TRIPS structure. If it may be wrapped up that there is a new criterion of ADRs (Alternative Dispute Resolution) in ccTLD disagreement resolution that has ended up being a worldwide practice, after that the article 41 of the TRIPS agreement can be interpreted to call for WTO Members to embrace Alternative dispute Resolution in order to give an reasonable level of protection. This prospective impact of the global requirements has been recognized in other fields of IP under the TRIPS Agreement including Domain names (Ku, 2016; Lerman, 2013). However, one of the biggest raised of profits comes from domain names market that proceed to prosper based on the fact that domain names are widely considered as intangible property (Ku, 2016).

Domain names are not expressly included within the exclusive rights of the trademark proprietor under TRIPS Article 16 (Perry, 2016; Buckley, Io Lo, & Boule, 2008). Supporting by their study, Carlos M. Correa, Abdulqawi A. Yusuf concluded that domain name disputes did not exist (Correa & Yusuf, 2016).

### **Infringement on trademark**

No doubt that one of the main goals of TRIPS agreement is to provide international protection to trademarks' rights (Cross & Miller, 2020). Based on this mere fact, the trademark rights would comprise the right to use trademark as domain name by the legal holder of trademark (Spinello, & Tavani, 2005). Under trips agreement, the trademark holders right to register domain name based on his trademark shall be protected as apart of trademark's right. In return, a registration of a domain name by the one who doesn't have legal right in that trademark will be considered as a violation of trademark's right (Spinello & Tavani, 2005). Accordingly, it is concluded that preventing trademark holder from using his trademark in domain name or using his trademark in domain name by the other will be infringement on trademark rights that shall be protected under TRIPS agreement's umbrella. According to this abroad approach, it can be argued that infringement on domain names based on trademarks shall be protected under Trips provision. Another potential connection between TRIPS agreement and domain

names might stem from Reciprocal treaties such as FTAs, along with the country-practice in domain conflict resolution mechanisms, might be considered in a WTO-TRIPS structure. If it may be wrapped up that there is a new criterion of ADRs (Alternative Dispute Resolution) in ccTLD dispute resolution that has ended up being a worldwide practice. Accordingly, the article 41 of the TRIPS agreement can be interpreted to call for WTO Members to embrace Alternative Dispute Resolution in order to give a reasonable level of protection. This prospective impact of the global requirements has been recognized in other fields of IP under the TRIPS Agreement including Domain names (Lerman, 2013).

## **CONCLUSIONS**

Determination the relationship between domain names and TRIPS agreement depends on pinpoint the nature of domain names per se, on the other hand, domain names play the crustal rule in e-commerce and this fact is important based on that trips agreement came as a result to protect intellectual rights related to different section of business and trade. If domain names have been adopted as trademark or digital trademark (as author believes), it would be enough to make domain names enjoy the protection given by Trips agreement. Another correlation might be found between new domain names that might be subjected to protection of geographical indications offered by the WTO's TRIPS Agreement. On the other hand, it can be argued that domain names may be ruled by intellectual property law due to the fact that domain names often match with trademarks and, therefore, bring trademark legislation right into play in solving disputes concerning trademark enrollment as well as usage. This study has concluded that Trips agreement would provide protection to trademark as well as to domain name. In this regard, the study concluded that domain names are intangible property as well as the study has approved that domain names are eligible to be adopted as trademarks. Furthermore, the study has analyzed the relationship between domain names and TRIPS agreement and, based on the analytic approach, it can be argued that domain names can be protected according to three levels: first - domain names as intangible property, second - domain names as trademarks and third level - according to general provision of TRIPS agreement such as article 41, 14, along with the Alternative Dispute Resolution and domain names' international practices.

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