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## **Defining Domain: Higher Education's Battles for Cyberspace**

### **IHELG Monograph**

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# Defining Domain: Higher Education's Battles for Cyberspace

JACOB H. ROOKSBY\*

## INTRODUCTION

Romeo famously mused, “[W]hat’s in a name? that which we call a rose / By any other name would smell as sweet.”<sup>1</sup> The same cannot be said for Internet domain names.<sup>2</sup> One’s inability to own a specific domain name has delayed product launches, caused companies to change names, and led to disputes with alleged cybersquatters.<sup>3</sup> The cachet of domain names has led to a robust secondary market of buyers and sellers, where domain names that encompass generic words, or are comprised of very few letters or numbers, often change hands for hundreds of thousands of dollars, or more.<sup>4</sup> In short, domain names matter in the eyes of producers and consumers: the difference of one letter in a URL can mean the difference between an online visit that leads to a sale, or a distraction that leads to annoyance, confusion, or worse.<sup>5</sup>

Higher education as an industry is not immune to these market considerations. Prospective and current students, faculty, administrators, alumni, and policymakers all have an interest in ensuring they can easily identify their college or university online. Separating the authentic from

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<sup>1</sup> William Shakespeare, *Romeo and Juliet*, Act II, Scene 2, line 47.

<sup>2</sup> Domain names are alphanumeric character strings that substitute for the numerical addresses actually used by Internet host computers to locate one another and provide requested information to end users. *See infra* note 13. <amazon.com> is an example of a domain name.

<sup>3</sup> *See, e.g.*, Microsoft Files Dispute Over XboxOne.com and XboxOne.net Domain Names, FUSIBLE, May 23, 2013 (noting that Microsoft failed to register <xboxone.com> and <xboxone.net> before unveiling new console called Xbox One, leading to arbitration contest over those domain names).

<sup>4</sup> Short domain names and generic word domain names consistently have topped the list of the most expensive domain names sold on the secondary market. For example, <sex.com> sold for \$13 million in 2010, while <casino.com> and <slots.com> each sold for \$5.5 million in 2003 and 2010, respectively. For a list of the top-15 most expensive domain names known to have changed hands on the secondary market, see Ben Woods, *15 of the Most Expensive Domain Names of All Time*, THE NEXT WEB, Aug. 13, 2013, <http://thenextweb.com/shareables/2013/08/13/15-of-the-most-expensive-domains-of-all-time/>. For an example of a secondary market for domain names, visit <sedo.com>.

<sup>5</sup> *See* Jacqueline D. Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 WAKE FOREST L. REV. 1361, 1365 (2005) (“Clearly, a domain name can be a very valuable business asset in that it can operate like a combination trademark and shopfront that both assists customers in locating a commercial Web site and can develop goodwill in the sense of attracting customers over a period of time.”).

the inauthentic perhaps is even more important in the cyberworld than the brick-and-mortar world—after all, few are likely to set foot on the University of New Haven, believing it to be Yale, but how do we know for sure if a given domain name belongs to or is affiliated with the institution it appears to reference?<sup>6</sup>

Fortunately for colleges and universities, the Internet’s founding authorities gave higher education an advantage in defining its metes and bounds in cyberspace. From the beginning of the creation of the domain name system, colleges and universities were not forced to compete with the open market in registering a domain name. The generic top-level extension .EDU was created with the understanding that only colleges and universities could own second-level extensions in that space. While governing authorities have changed the requirements for registration over time, to this day the .EDU extension remains restricted, unlike the first-come, first-served nature of the popular .COM, .NET, and .ORG extensions.<sup>7</sup>

The rationale for giving colleges and universities their own domain name space, uncluttered by competing claims of others outside of higher education, is consonant with society’s historic conception of higher education as a different type of industry, detached from the market, and allegiant to its own unique, public-serving norms and academic values.<sup>8</sup> Higher education once was viewed as a commercially sheltered industry that needed to be protected from the unseemly aspects of the market, and the creation of the restricted .EDU extension arguably reflects such a romantic ideal.

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<sup>6</sup> *C.f.* EDUCAUSE, *7 Things You Should Know About . . . DNSSEC* (2010), available at [www.educause.edu/ir/library/pdf/est1001.pdf](http://www.educause.edu/ir/library/pdf/est1001.pdf), at 2 (“Because users tend to trust certain domains, including the .edu domain, more than others, expectations for the reliability of college and university websites are high.”). Take as an illustration <gibill.com>, <gibillamerica.com>, and <armystudyguide.com>. Until these domain names were transferred to the U.S. government’s Department of Veterans Affairs (“VA”) as part of a settlement with state attorneys general, web sites operated at these domain names that made them look like official online outposts of the VA. Libby A. Nelson, *Attorneys General Announce Settlement with For-Profit College Marketer*, INSIDE HIGHERED, June 28, 2012, <http://www.insidehighered.com/news/2012/06/28/attorneys-general-announce-settlement-profit-college-marketer>. But instead of providing general information about the GI Bill and the array of educational opportunities available to veterans, the web sites promoted enrollment in just 15 colleges, most of them for-profit institutions. *Id.*

<sup>7</sup> Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 HASTINGS COMM. & ENT L.J. 359, 382-385 (2003) (describing restricted versus unrestricted domain name extensions).

<sup>8</sup> For one description of this historic conception of higher education, see DAVID L. KIRP, SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION 7 (2003) (“[E]mbedded in the very idea of the university—not the storybook idea, but the university at its truest and best—are values that the market does not honor: the belief in a community of scholars and not a confederacy of self-seekers; in the idea of openness and not ownership; in the professor as a pursuer of truth and not an entrepreneur; in the student as an acolyte whose preferences are to be formed, not a consumer whose preferences are to be satisfied.”).

Yet American higher education in modern times is very familiar with the market, and using intellectual property to create or capture value is one method institutions have pursued in response to heightened budgetary pressures.<sup>9</sup> Previous work in this line of research, by myself and others, has noted an increasing fixation with intellectual property acquisition and protection by colleges and universities, chiefly with respect to patents, copyrights, and trademarks.<sup>10</sup>

Notwithstanding the contributions of these previous works, the nature of higher education's intellectual property interests online—driven in particular by its trademark interests—has not been fully considered until now. Historical and empirical understanding of domain name registration behavior and related disputes in higher education are uncharted territory in intellectual property scholarship and higher education law scholarship. This Article situates within and makes contributions to those two fields.

As walls between the academy and the market erode, and institutions place more emphasis on intellectual property acquisition and enforcement in light of growing resource constraints, how colleges and universities conceptualize their space online has emerged as an unexamined question ripe for consideration. This Article provides historically and empirically supported data points in response to that inquiry, mining and analyzing records concerning higher education's use of the Uniform Domain-Name Dispute-Resolution Policy (“UDRP”)—essentially an arbitration vehicle for resolving rights disputes concerning domain names—and specialized

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<sup>9</sup> See, e.g., ELIZABETH POPP BERMAN, *CREATING THE MARKET UNIVERSITY: HOW ACADEMIC SCIENCE BECAME AN ECONOMIC ENGINE* (2012) (describing how academic science, protected by intellectual property, has fueled economic growth); Liza Vertinsky, *Universities As Guardians of Their Inventions*, 2012 UTAH L. REV. 1949 (2012) (discussing the traditional methods by which universities use intellectual property to harness the economic power of their faculty's inventions); Arti K. Rai, *The Increasingly Proprietary Nature of Publicly Funded Biomedical Research: Benefits and Threats*, in *BUYING IN OR SELLING OUT? THE COMMERCIALIZATION OF THE AMERICAN RESEARCH UNIVERSITY* (Ronald G. Stein ed., 2004) (discussing how higher education's use of intellectual property protection is turning publicly-funded science into proprietary science); SHEILA SLAUGHTER & GARY RHOADES, *ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION* (2004) (describing the rise of intellectual property in higher education as reflecting the industry's move to the market).

<sup>10</sup> See, e.g., Jacob H. Rooksby, *UniversityTM: Trademark Rights Accretion in Higher Education*, 27(2) HARVARD J. L. & TECH. 349 (2014) (tracking rise in college and university trademark activity); Jacob H. Rooksby, *Innovation and Litigation: Tensions Between Universities and Patents and How to Fix Them*, 15 YALE J.L. & TECH. 312 (2013) (tracking rise in university enforcement of patents); Peter Lee, *Patents and the University*, 63 DUKE L.J. 1 (2013) (describing the growth of university patenting and a decline in judicial inclination to treat higher education differently with respect to the patent laws); Brian J. Love, *Do University Patents Pay Off? Evidence from a Survey of University Inventors in Computer Science and Electrical Engineering*, 16 YALE J. L. & TECH. 285 (2014) (noting rise in university patent emphasis in the high-tech fields of computing and telecommunications); CORYNNE MCSHERRY, *WHO OWNS ACADEMIC WORK? BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY* (2001) (describing contention between universities and their faculty regarding the treatment of copyrights and patents).

federal court litigation concerning domain names.<sup>11</sup> These fields of exploration are rich points of entry for understanding how colleges and universities navigate intellectual property laws and harness their rights in furtherance of institutional policy objectives.

The history of the .EDU domain name extension and domain name ownership disputes in higher education may seem an esoteric and picayune topic to many, if noticed at all. Even within legal circles, few tend to focus on the practical and legal issues implicated by domain name ownership and rights contests, let alone by institutions of higher education. Perhaps the primary explanation for the dearth of scholarly attention to this Article's topic is that the cyberworld—although now omnipresent in Western democracies—still is in its infancy. With respect to domain names in particular, the average consumer only has been able to buy such property for roughly 15 years.<sup>12</sup>

Yet despite the lack of robust academic or practitioner attention to this area, research into domain name ownership disputes by colleges and universities provides a timely window into the evolving thinking of higher education leadership over questions of intellectual property and institutional identity, brand formation and protection, and commercial involvement. Intangible rights that institutions are willing to spend time

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<sup>11</sup> This Article, by design, does not focus directly on the equally interesting question of how colleges and universities have chosen to use and regulate their online spaces, although this question has received some popular and academic attention from the .EDU's earliest days through the present. *See, e.g.*, Larry Lange, *A Tour of University Web Sites Is Quite An Education – What the Devil's Going on at .edu?*, ELEC. ENG'G TIMES, 1996 WLNR 2634588 (Feb. 5, 1996) (describing the use of .EDU space by students to post pornography and other forms of provocative speech); Kem Saichai & Christopher C. Morphew, *What College and University Websites Reveal About the Purposes of Higher Education*, 85(4) J. HIGHER EDUC. 499 (July/Aug. 2014) (analyzing textual and visual elements on 12 college and university web sites).

<sup>12</sup> This Article treats *domain names* as effectively synonymous with *domain name registrations*, although this slight semantic difference is not without an important distinction: the former conceptualizes domain names as some combination of personal and real property, whereas the latter connotes a contractual right. Although domain names have many characteristics that make them seem less like property and more like contract rights (namely, one never owns a domain name in fee simple), one cannot ignore the connection Internet users make between online space and physical space. On some level, we expect the physical and virtual worlds to coalesce, and often are disappointed, confused, or even humored when they do not (anyone visiting <whitehouse.com>, intending to find information about the White House, will readily agree). I recognize the hybrid property-contractual nature of domain names for this reason. *Accord* Xuan-Thao N. Nguyen, *Cyberproperty and Judicial Dissonance: The Trouble with Domain Name Classification*, 10 GEO. MASON L. REV. 183, 192, 205 (2001) (concluding that “the bundle of rights resides in domain names and consequently, domain names should be recognized as property . . . or more precisely, intangible property”); JACQUELINE LIPTON, *INTERNET DOMAIN NAMES, TRADEMARKS AND FREE SPEECH* 5, 295 (2010) (“domain names are arguably the first truly global Internet analog to real property. They are an example of something that is like real property, but that exists in the borderless realm of cyberspace,” and later arguing that “the property model” is the best way to conceptualize domain names); *see also* *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003) (analyzing domain name as property for purposes of state-law tort of conversion).

and money to fight over on some level reflect institutional values and priorities. Research revealed in this Article provides unique and fresh understanding of what those values and priorities may be, as well as provides footing for analyzing these activities from a policy standpoint.

Part I of the Article provides relevant background and history on the workings of the domain name system and the .EDU extension, arbitration and litigation vehicles available for resolving domain name disputes, and college and university activity in these realms. Part II discusses the methods and limitations of the original study undertaken for this Article. Part III presents findings. Part IV discusses policy concerns related to higher education's domain name acquisition efforts, including the activity's bearing on institutional reputation and commitment to free speech, the delicate relationship between brand protection and brand expansion, and the extent to which the studied activity reflects mature legal strategy on the part of colleges and universities pursuing such actions. Part IV closes by reflecting on the study's findings and contributions to offer a cautious view of higher education's cyber future. Here, from a normative perspective, I offer a provisional set of critical questions that college and university decision makers ought to consider before determining whether to harness the power of one of their trademarks to capture an already registered domain name. Finally, in the Conclusion, I summarize the Article's contributions and comment on how contentious efforts to acquire domain names situates within larger contests over rights and space in higher education.

## I. BACKGROUND ON INTERNET DOMAIN NAMES AND COLLEGE AND UNIVERSITY DOMAIN NAME ACTIVITY AND DISPUTES

This Part begins by introducing the Domain Name System (“DNS”) and its workings, as well as other important lexicon concerning domain names. It then provides a history of the .EDU extension—including its genesis, management, and key operating premises and rules—and explains how the extension has helped shape higher education's identity, reflecting the industry's twin goals of establishing authenticity and legitimacy online. This section then moves to a legal discussion of the arbitration and litigation avenues available to those wishing to challenge a third-party's ownership or use of a domain name. The section concludes with a survey of the limited literature available concerning college and university use of the UDRP and specialized federal court litigation to resolve domain name disputes.

### A. *The Domain Name System Explained*

Domain names are alphanumeric character strings that substitute for the numerical addresses, or Internet Protocol (“IP”) addresses, actually used by Internet host computers to locate one another and provide

requested information to end users.<sup>13</sup> The DNS essentially is a directory or lookup system that allows users to interact with online information in relation to alphanumeric strings, as opposed to IP addresses whose numbers are seldom memorable.<sup>14</sup> Like real property, every domain name is unique, and thus their scarcity means that their branding function is important.<sup>15</sup> As Professor Burk recognized in 1995, as consumers came to recognize and use domain names, domain names are “*both* names and addresses; they both locate and identify Internet sources.”<sup>16</sup>

While the technical locating function of domain names is the reason for their existence, the identifying importance of domain names is their feature that receives trademark and brand interest. If your brand is Coke, owning <coak.com> but not <coke.com> will not do. General rules of thumb dictate that “the more memorable a domain name, the more value it enjoys. Also, less is more; a short domain name is worth more than a long domain name.”<sup>17</sup>

The Internet Corporation for Assigned Names and Numbers (“ICANN”)—a nonprofit corporation based in Marina del Ray, California—has technical oversight authority over most of what we think of as the functioning Internet.<sup>18</sup> ICANN’s primary mission consists of keeping the Internet secure, stable, and interoperable across countries and platforms.<sup>19</sup> ICANN accomplishes these goals by engaging in multi-stakeholder, transnational, consensus-driven approaches to policy promulgation.<sup>20</sup> Key technical coordinating functions—such as IP address space allocation, protocol parameter assignment, and management of the DNS and root server functions of the Internet—ICANN delegates to a

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<sup>13</sup> James M. Jordan, III, *Domain Names: Basics, Pointers, and Current Events*, 2 NO. 1 ELEC. BANKING L. & COM. REP. 12, 12 (1997).

<sup>14</sup> Compare the ease with which one can remember <cnn.com> versus its corresponding IP address, 157.166.226.26.

<sup>15</sup> Wayde Brooks, Note, *Wrestling Over the World Wide Web: ICANN’s Uniform Dispute Resolution Policy for Domain Name Disputes*, 22 HAMLIN J. PUB. L. & POL’Y 297, 304 (2001).

<sup>16</sup> Dan L. Burk, *Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks*, 1 RICH. J.L. & TECH. 1, 30 (1995). In this regard, Professor Burk noted how some monikers in the analogue world also perform location and identification functions, such as mnemonic 1-800 numbers (e.g., “1-800-FLOWERS”) and personalized mailing addresses (e.g., “1 Coca-Cola Plaza”).

<sup>17</sup> Nguyen, *supra* note 12 at 187-188.

<sup>18</sup> Prior to the founding of ICANN, oversight authority was shared by a variety of entities, including the National Science Foundation, NASA, the U.S. Army, the University of Southern California, Stanford Research Institute, the University of Maryland, the Internet Software Consortium, PSINet, and InterNIC. See Bill Frezza, *A Top-Level Domain By Any Other Name*, NETWORK COMPUTING, 1997 WLNR 2822440 (Feb. 1, 1997).

<sup>19</sup> See *Bylaws for Internet Corporation for Assigned Names and Numbers*, Art. I, Sec. 2(1), <https://www.icann.org/resources/pages/bylaws-2012-02-25-en> (last visited May 15, 2014).

<sup>20</sup> For a comprehensive description of ICANN and its functions, see *Welcome to ICANN! How does ICANN work?*, <https://www.icann.org/resources/pages/welcome-2012-02-25-en> (last visited May 15, 2014).

California-based subsidiary, the Internet Assigned Numbers Authority (“IANA”).<sup>21</sup> Together, these two entities play important roles in promoting the fair and manageable use and functioning of the global DNS, most particularly as it relates to the creation and maintenance of new Internet root zones (i.e., the space after the period furthest to the right in a URL address). While ICANN, by necessity, promulgates policies to effectuate its mission, technically the non-governmental organization does not enjoy global policymaking authority over the Internet.<sup>22</sup> This virtual power vacuum means that various national and state legislatures, as well as non-profit organizations, contribute significantly to the formation of what we might think of as global Internet policy.<sup>23</sup>

Name space on the Internet is parceled out into distinctly manageable top-level domains (called TLDs), or root zones, which are demarcated with the final period in the string, or root. TLDs are further separated into generic TLDs (called gTLDs) and TLDs distinguished by a two-letter country code (called ccTLDs).<sup>24</sup> Originally only seven gTLDs (i.e., .COM, .ORG, .NET, .EDU, .INT, .GOV, and .MIL.) and 236 ccTLDs existed.<sup>25</sup> ICANN introduced seven additional gTLDs in November of 2000 (i.e., .BIZ, .MUSEUM, .PRO, .INFO, .NAME, .AERO, and .COOP), although none of these proved as popular as the original seven gTLDs.<sup>26</sup> More gTLDs were soon added, including .CAT, .JOBS, .MOBI, .XXX, and .TRAVEL.<sup>27</sup>

Space within TLDs may be further parceled out and registered to end users, creating what we think of as domain names (which technically are second-level domain names), like <nike.com>.<sup>28</sup> Records of space allocation in a given TLD are kept by one entity, called a registry. Registries permit entities called registrars (e.g., GoDaddy), which meet certain criteria established by each registry, to sell rights to space in the TLD that the registry controls. Registration in some TLDs, such as the .COM, is open to all-comers willing to pay the yearly registration price (often less than \$10.00 per year, with multi-year registrations permitted),

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<sup>21</sup> See *Introducing IANA*, <http://www.iana.org/about> (last visited July 25, 2014).

<sup>22</sup> LIPTON, *supra* note 12 at 304.

<sup>23</sup> *Id.* at 305.

<sup>24</sup> Although ccTLDs primarily were intended for use by people within the country that controls a given ccTLD, “[t]he commercial value of domain name country codes [. . .] caused at least some nations with attractive two-letter initials such as Tuvalu [.tv] to open registration beyond their country to anyone willing to pay a registration fee.” Scott Bearby & Bruce Siegal, *From the Stadium Parking Lot to the Information Superhighway: How to Protect Your Trademarks from Infringement*, 28 J.C. & U.L. 633, 654-655 (2002).

<sup>25</sup> *Id.*

<sup>26</sup> Nguyen, *supra* note 12 at 197. See also Ellen Whyte, *Domain Name Functions*, NEW STRAIGHT TIMES, 2005 WLNR 28851839 (Sept. 22, 2005).

<sup>27</sup> See Brett R. Harris, *Internet Update: Milestone Changes To The Domain Name System Underway*, N.J. LAWYER, Dec. 2008, at 70.

<sup>28</sup> *Id.* After the second level, additional levels can be created within the same second-level domain name without further registration. For example, <mail.duq.edu> is a third-level domain name.

whereas registration in other TLDs—particularly ccTLDs—is restricted and available only to those who meet certain eligibility criteria (e.g., registration of a trademark in the corresponding country, citizenship in the corresponding country, etc.).<sup>29</sup> Registries require registrars to collect contact information from registrants and make that information publicly available through what is called a WHOIS database. These databases are accessible through registrar web sites and allow browsers to determine the name, email, and mailing address for the registrant of any given domain name registered through that registrar.<sup>30</sup>

Dissatisfaction with the limited array of TLDs, and a monopoly on the control of the root, led some companies in the late 1990s and early 2000s to experiment with ways to bypass the DNS system.<sup>31</sup> Based on buy-in from some Internet service providers and end consumers (who downloaded and installed required software), these companies provided mechanisms by which Internet users could visit what appeared to be domain names not otherwise available for registration to the general public.<sup>32</sup> ICANN and related leaders of the nascent Internet resisted these developments, which informally were known as the AlterNIC movement.<sup>33</sup> Detractors argued that a stable and authoritative DNS, coordinated through a single root system, was required in order to provide reliability and universal resolvability of domain names. Ultimately, these arguments won out.

The movement for more and different Internet space, however, did eventually gain traction within ICANN. In 2012, after a period of lengthy consideration and discussion, the organization began accepting applications for the creation of new gTLDs, including ones in non-Latin characters (Cyrillic, Arabic, Chinese, etc.).<sup>34</sup> These new domain name extensions were intended to serve a variety of Internet users. ICANN contemplated that products (such as .IPAD), companies (such as .MICROSOFT), industries (such as .BANK), and regions (such as .SOUTH), among others, might all be reflected in the new root space. The application process was not designed to be easy, however. Applicants had to pay \$185,000 to ICANN and satisfy a variety of criteria the

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<sup>29</sup> See Manheim & Solum, *supra* note 7.

<sup>30</sup> Rampant inaccuracies exist in these databases, however, as the information submitted by registrants is not independently verified, nor is there any penalty for providing incomplete, inaccurate, or fraudulent information. For further description of WHOIS databases and searching, see text accompanying *infra* note 208.

<sup>31</sup> See generally MILTON L. MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE 50-56 (2004).

<sup>32</sup> See Neil Batavia, Comment, *That Which We Call a Domain By Any Other Name Would Smell As Sweet: The Overbroad Protection of Trademark Law As It Applies to Domain Names on the Internet*, 53 S.C. L. REV. 461, 479-481 (2002) (explaining how a URL like <dell.computer> did not actually exist in the DNS, but was instead <dell.computer.xs2.net> in the DNS).

<sup>33</sup> See Frezza, *supra* note 18 (describing AlterNIC).

<sup>34</sup> See Press Release, ICANN, *Internet Domain Name Expansion Now Underway*, Oct. 23, 2013, <https://www.icann.org/resources/press-material/release-2013-10-23-en>.

organization established, mainly aimed at ensuring the applicant's financial and technical viability to serve as registry for a domain name extension.<sup>35</sup>

After the application period ended, ICANN revealed that it had received 1,930 applications, all of which were randomly assigned lottery numbers to determine in which order ICANN would review them.<sup>36</sup> A public comment period followed. Google applied for 101 new extensions, although the most sought by any one company were the 307 applications filed by Donuts, Inc., a company created to specialize in the sale of space in new generic domain name extensions.<sup>37</sup> New extensions were approved, and registrars began selling registrations in these extensions to the public, beginning in October of 2013.<sup>38</sup> The first seven new gTLDs made available to the public were .BIKE, .CLOTHING, .GURU, .HOLDINGS, .PLUMBING, .SINGLES, and .VENTURES.<sup>39</sup>

One of the motivating concepts behind the gTLD expansion is that space in the traditional gTLDs was artificially scarce, and that the capacity for online identity formation suffers as a result.<sup>40</sup> With more than 90 million domain names registered in the .COM extension alone, one's ability to register a descriptive, memorable, yet pithy domain name increasingly is limited. Proponents of the new domain name extensions argue that online space is infinite—unlike real property—and so no compelling rationale for artificially constraining it exists. On its web site, Donuts, Inc.—a leading supporter of the new domain names—analogyzes the movement as going from black-and-white to color:

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<sup>35</sup> See Elizabeth Herbst Schierman, *.Com and .Net, Make Room for .Trademark: What You Should Know About the New Global Domain Names*, 53(2) THE ADVOCATE 26 (Feb. 2010), available at <https://isb.idaho.gov/pdf/advocate/issues/adv10feb.pdf>. Once a new top-level extension is created, the registry operator must pay \$25,000 a year to ICANN simply to maintain it. David J. Kappos, *New Internet Domain Name Options Are Coming: Is Your Organization Ready?*, INSIDE COUNSEL, Aug. 16, 2013, <http://www.insidecounsel.com/2013/08/16/new-internet-domain-name-options-are-coming-is-you>.

<sup>36</sup> See New gTLD Application Submission Statistics, <http://newgtlds.icann.org/en/program-status/statistics> (last visited May 15, 2014).

<sup>37</sup> See Michael Berkens, *Google Applies for 101 New gTLD's; Amazon 77; Microsoft 11; Apple 1*, THE DOMAINS, June 13, 2012, <http://www.thedomains.com/2012/06/13/google-applies-for-101-new-gtlds-amazon-77-microsoft-11-apple-1/>; Andrew Allemann, *Donuts Raises \$100 Million, Applies for 307 New TLDs*, DOMAIN NAME WIRE, June 5, 2012, <http://domainnamewire.com/2012/06/05/donuts-raises-100-million-applies-for-307-new-tlds/>. Some of the new extensions managed by Donuts, Inc. include .EMAIL, .TOYS, .FINANCIAL, .FLORIST. See <http://www.donuts.co/tlds/> (last visited Dec. 8, 2014).

<sup>38</sup> For a listing of the new extensions, and the dates on which they were created, see <http://newgtlds.icann.org/en/program-status/delegated-strings>.

<sup>39</sup> See Stuart Fuller, *Why Are Brands Yet to Wake Up to the Dawn of the New Internet?*, WORLD INTELL. PROP. REV. (May/June 2014), at 64.

<sup>40</sup> See Bob Samuelson, *A Level Playing Field Required*, WORLD INTELL. PROP. REV. (May/June 2014), at 55.

This new taxonomy will allow domain names to be instantly recognizable and understood. You'll start to see—and be able to purchase—domain names like soho.boutique or diva.boutique, instead of divaboutiquesohonyc.com. And you'll know exactly what you're going to find on smiths.plumbing and smiths.dental. These short, specific domain names will offer improved navigation, increased diversity, and expanded choice.<sup>41</sup>

Others are less optimistic about the utility of these new extensions, arguing that the only people likely to benefit from the expansion are attorneys and marketers, who stand to earn fees based on their ability to help their clients understand and navigate these new virtual spaces.<sup>42</sup> For brands that have carefully cultivated their image online, detractors argue that the new extensions simply create more boundaries to police, patrol, and manage. Should Coca-Cola apply to create the extension .COKE?<sup>43</sup> What about registering second-level domain names in seemingly relevant new extensions, like <coke.beverage> or <coke.drink>? ICANN's founding chairperson, and a critic of the expansion, voiced her concern as follows: "The problem is not the shortage of space in the field of all possible names, but the subdivision of space in Coca-Cola's cultivated namespace."<sup>44</sup>

This concern touches on an inescapable reality regarding domain name space: just like trademarks, domain names convey meaning to Internet users, and thus people expect trademarks to be predictably reflected in domain names. Mischief often results, however, for quite simple reasons: (1) anyone willing to pay a minimal registration fee can register his own domain name in unrestricted TLDs, such as the .COM, .NET, or .ORG extensions, and (2) registrars in unrestricted extensions require no proof from applicants that applicants are within their legal rights to register a given domain name incorporating a trademark.<sup>45</sup> In light of these features of the DNS, savvy companies often defensively register a variety of domain names that consumers might use to locate them online, and then seek to capture any other domain names they believe they have claim to, but that already are registered by others.<sup>46</sup> Otherwise, companies risk ceding domain name space that references them or incorporates their

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<sup>41</sup> See <http://www.donuts.co/tlds/> (last visited May 15, 2014).

<sup>42</sup> Esther Dyson, *What's In a Domain Name?*, PROJECT SYNDICATE, Aug. 25, 2011, <http://www.project-syndicate.org/commentary/what-s-in-a-domain-name-> (arguing that "The problem is that expanding the namespace – allowing anyone to register a new TLD such as .apple – doesn't actually create any new value.").

<sup>43</sup> In fact the Coca-Cola company did not apply for .COKE, or any other extension, as of the first round of applications. See <https://gtdresult.icann.org/application-result/applicationstatus/viewstatus>.

<sup>44</sup> *Id.*

<sup>45</sup> See Manheim & Solum, *supra* note 7.

<sup>46</sup> See *infra* note 322.

trademarks to other entities, whose claims to that space may only grow in strength over time.

With these realities in mind, the allure of having but one domain name registration in a restricted, dedicated space that at once conveys authenticity and legitimacy seems compelling. Unlike purely commercial concerns, forced to proactively register dozens of domain names across a variety of unrestricted domain name extensions, registrants in restricted extensions do not face the same compulsion to cover-the-board with proactive domain name registrations. Only those who meet eligibility criteria can register space in restricted extensions, and registrations outside of a restricted extension may be superfluous, given that the value of a restricted extension is the sense of authenticity and legitimacy it conveys, by virtue of its exclusivity, to those with space within the extension. Incidentally, authenticity and legitimacy are what many in higher education were given, in the form of the .EDU extension, from the beginning days of the Internet, well before others lobbied ICANN to expand the root zone to better define their commercial domains.

*B. The History of the .EDU Extension: Identity Formation and the Quest for Authenticity and Legitimacy*

The generic top-level domain name extension .EDU was born in April of 1985, when the fledgling Internet's technical architects delegated registrations in the space to six American universities: Carnegie Mellon University, Columbia University, University of California-Berkeley, Purdue University, Rice University, and University of California-Los Angeles.<sup>47</sup> Originally, educational institutions anywhere in the world were permitted to register in the .EDU extension, although these requirements would change over time. By July 1994, 1,292 .EDU domain names existed.<sup>48</sup> That number grew to 2,463 by February 1996.<sup>49</sup> As of 2014, 7,434 domain names exist in the .EDU extension—only seven more than were registered in 2004.<sup>50</sup> These domain names represent less than 1% of all domain names registered in the world, in any extension.<sup>51</sup>

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<sup>47</sup> Bill Toland, *How Pittsburgh Avoided the Same Fate As Detroit. It Was A Sometimes Rough Transition, But the City Has Made the Transition from Heavy Industry to Its New Place as the Silicon Valley of the East*, PITTSBURGH POST-GAZETTE, 2013 WLNR 25660755 (Oct. 13, 2013).

<sup>48</sup> MUELLER, *supra* note 31 at 110.

<sup>49</sup> *Id.*

<sup>50</sup> See Average Counts of .EDU Domains by Status and Year, [http://net.educause.edu/edudomain/report\\_graph.asp?Type=DOMAIN](http://net.educause.edu/edudomain/report_graph.asp?Type=DOMAIN). Only approximately one-third of all .EDU domain names have been registered since EDUCAUSE took over management of the .EDU extension in 2001. See Policy Proposals for the .edu Domain, [http://net.educause.edu/edudomain/policy\\_board\\_2\\_28\\_2012.pdf](http://net.educause.edu/edudomain/policy_board_2_28_2012.pdf), at 1.

<sup>51</sup> See Fuller, *supra* note 39, at 64 (noting that there were 265 million domain names registered in the world through the end of September 2013).

The National Science Foundation (“NSF”) was the first governmental entity with oversight function over the .EDU extension.<sup>52</sup> As it did with some of the other gTLDs then in existence (i.e., .COM, .NET, and .ORG), the NSF contracted with a company called Network Solutions to maintain the registry and assign space in it.<sup>53</sup> Colleges and universities did not even have to pay a registration fee for registering extensions in the .EDU space, as the NSF paid these fees on institutions’ behalf.<sup>54</sup> This arrangement lasted through 1998, even after oversight of the DNS had passed from the NSF to the U.S. Department of Commerce.

Meanwhile, the federal government actively was looking to hand off responsibility for the DNS to a non-profit entity, partly in response to critics of the monopoly over registration services held by Network Solutions and the U.S. government.<sup>55</sup> ICANN filled that role, beginning with a memorandum of understanding signed between it and the federal government in November of 1998.<sup>56</sup>

Incidentally, ICANN’s ties to academe run deep. Jonathan B. Postel, formerly a computer scientist at the University of Southern California, was a driving force behind the formation of ICANN, and Tamar Frankel, a law professor at Boston University, oversaw early meetings designed to respond to the federal government’s request that a not-for-profit entity be created to perform the technical functions the government no longer wished to coordinate.<sup>57</sup> As a news article in 1998 noted, “Since the Internet’s earliest days, control of some network functions has rested largely with a small circle of technical experts like Mr. Postel – most of them at universities.”<sup>58</sup> However, Mr. Postel’s untimely death required a leadership change, and Michael M. Roberts became ICANN’s first president and chief executive in November of 1998.<sup>59</sup> Mr. Roberts was

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<sup>52</sup> See Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 198-199 (2000).

<sup>53</sup> *Id.*; see also Brooks, *supra* note 15 at 311.

<sup>54</sup> See David L. Wilson, *Colleges Won’t Have to Pay New \$50 Fee for Internet Addresses*, CHRON. HIGHER EDUC., Sept. 22, 1995, <http://chronicle.com/article/Colleges-Wont-Have-to-Pay-New/96300/>. See also *ITU to Serve As ‘Depository’ for Internet Domain MOU*, TR DAILY, 1997 WLNR 6830785 (Apr. 25, 1997) (noting that “NSF has continued to pay the fees for the ‘.gov’ and ‘.edu’ domain names”).

<sup>55</sup> See Brooks, *supra* note 15 at 312.

<sup>56</sup> Jay P. Kesan & Andres A. Gallo, *The Market for Private Dispute Resolution Services—An Empirical Re-Assessment of ICANN-UDRP Performance*, 11 MICH. TELECOMM. TECH. L. REV. 285, 290 (2005).

<sup>57</sup> See John Postel, [http://en.wikipedia.org/wiki/Jon\\_Postel](http://en.wikipedia.org/wiki/Jon_Postel) (last visited July 23, 2014); MUELLER, *supra* note 31 at 3.

<sup>58</sup> Jeffrey R. Young, *Debate Flares Over Group That Hopes to Oversee the Internet*, CHRON. HIGHER EDUC., Nov. 27, 1998, <http://chronicle.com/article/Debate-Flares-Over-Group-That/27491/>; see also MUELLER, *supra* note 31 at 103 (noting that “the technical community deferred to Jon Postel when it came to names and numbers”).

<sup>59</sup> Young, *supra* note 58. Professor Milton Mueller describes Roberts’s ascendancy as ICANN’s first president as preordained by Postel. See MUELLER, *supra* note 31 at 179, 181. When Postel died of a heart attack in October of 1998, Mueller writes that ICANN

himself a former academic-network leader, a founder of the Internet Society and the Internet2 project, and a former vice president of a predecessor to EDUCAUSE.<sup>60</sup>

The Louisville, Colorado-based EDUCAUSE was formed in 1998 when two groups—Educom and CAUSE—merged.<sup>61</sup> From its earliest days, EDUCAUSE represented a consortium of colleges, universities, and businesses involved with academic computing. The organization urged the federal government, as early as December of 1997, to allow it to operate the .EDU extension.<sup>62</sup> But the government delayed peeling off operation of the .EDU registry from Network Solutions until it had finalized its deal with ICANN. This delay meant that Network Solutions was left to enforce government regulations of the .EDU space from 1993 that dictated that only “four-year, degree-granting colleges and universities” could register .EDU domain names.<sup>63</sup>

Most four-year institutions had claimed .EDU domain names by the late 1990s.<sup>64</sup> Facing more than 1,500 requests to register .EDU domain names in 1999, Network Solutions permitted registration of fewer than 10% of the requests.<sup>65</sup> However, eligibility criteria were not applied evenly, which led to some .EDU domain names being registered to individuals or organizations that did not meet the stated criteria.<sup>66</sup> For example, even though it did not offer four-year degrees, Miami-Dade Community College was able to secure a .EDU registration, as were about 200 other community colleges.<sup>67</sup> However, the majority of the over 1,000 community colleges operating at that time used other top-level extensions, like .US or .COM, for their institution’s web site, either because they were

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was “robbed [. . .] of its moral center, a good part of its institutional memory, and most of what remained of its legitimacy.” *Id.* at 181.

<sup>60</sup> See *Leader Named for Group Likely to Assume Internet-Address Registrations*, CHRON. HIGHER EDUC., Nov. 6, 1998, <http://chronicle.com/article/Leader-Named-for-Group-Likely/17222/>. See also MUELLER, *supra* note 31 at 95.

<sup>61</sup> See CAUSE HISTORY, EDUCAUSE, <http://www.educause.edu/about/mission-and-organization/history/cause-history> (last visited July 23, 2014).

<sup>62</sup> Jeffrey R. Young, *Academic-Technology Consortium Continues to Push to Take Charge of ‘.edu’ Domain*, CHRON. HIGHER EDUC., Sept. 3, 1999, <http://chronicle.com/article/Academic-Technology-Consortium/1904/>.

<sup>63</sup> *Id.*

<sup>64</sup> See, e.g., Mark Edelen, *Campus Info Is Just a Tap Away for Parents*, VA. PILOT & LEDGER STAR, 1997 WLNR 2196974 (Aug. 25, 1997) (noting that “[u]niversities claimed early territory on the Web”).

<sup>65</sup> Young, *supra* note 62.

<sup>66</sup> Gwendolyn Bradley, *Community Colleges to Get ‘.edu’ Domain Name*, 87(3) ACADEME 8 (June 2001) (noting that Network Solutions was criticized “for applying the rules inconsistently”).

<sup>67</sup> Young, *supra* note 62. See also Kenneth J. Cooper, *Community Colleges Fight for Net Legitimacy*, CHICAGO SUN TIMES, 2000 WLNR 10679074 (Nov. 27, 2000).

unable to obtain a .EDU registration or because the eligibility criteria dissuaded them even from trying.<sup>68</sup>

Being forced to use a .COM extension for a community college's web site, instead of .EDU, may seem like a minor concern, but in reality many students, faculty, and administrators within those institutions acutely felt the distinction. As one faculty member at a community college expressed at the time, use of the .COM instead of .EDU made her feel as though she worked for a business, not a college.<sup>69</sup> Compounding this sense of misalignment was the fact that while most community colleges were kept out of the .EDU space, some entities that were not even colleges at all had been permitted to register a .EDU domain name, due to error or oversight by Network Solutions in reviewing applications. For example, to this day, <australia.edu> resolves to a web page that provides information to non-Australians about study abroad options in the Down Under.<sup>70</sup> EDUCAUSE itself—which indubitably is not a degree-granting institution—was permitted a domain name in the .EDU extension, even before it assumed control of the registry.<sup>71</sup> Whether entirely accurate or not, an official with Network Solutions told a reporter for the *Chronicle of Higher Education* in 1997 that a .EDU address “is given to anyone who asks for it.”<sup>72</sup> Eventually, however, EDUCAUSE purged from the root zone some, but not all, of the domain names that had been registered in blatant violation of the criteria, such as <allison.edu>, <geraldine.edu>, <oracle.edu>, and <jedi.edu>.<sup>73</sup>

Flummoxed by the seemingly capricious nature of who was permitted to register in the .EDU extension, the American Association of Community Colleges wrote to the Department of Commerce in October of 2000, stating that it was “extremely frustrated by [its] inability to routinely access the .edu domain,” which it alleged conveys extraordinary symbolic resonance.<sup>74</sup> As the group's president observed to a national newspaper reporter, “Some people have not given community colleges the kind of

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<sup>68</sup> Jeffrey R. Young, *Community Colleges Step Up Fight to Use '.edu' Internet Address*, CHRON. HIGHER EDUC., Dec. 8, 2000, <http://chronicle.com/article/Community-Colleges-Step-Up/7411/>.

<sup>69</sup> Jeffrey R. Young, *Community Colleges Want a More Eminent Domain*, CHRON. HIGHER EDUC., Jan. 26, 2001, <http://chronicle.com/article/Community-Colleges-Want-a-More/14025/>.

<sup>70</sup> EDUCAUSE has described <australia.edu> this way: “[its] sole functions are to offer free .edu email addresses to anyone and to link to various public documents about student travel to Australia.” Policy Proposals for the .edu Domain, [http://net.educause.edu/edudomain/policy\\_board\\_2\\_28\\_2012.pdf](http://net.educause.edu/edudomain/policy_board_2_28_2012.pdf), at 2.

<sup>71</sup> Joseph Georges, *Putting the 'Education' Back Into '.edu.'* CHRON. HIGHER EDUC., Oct. 4, 2002, <http://chronicle.com/article/Putting-the-Education-Back/16174/>.

<sup>72</sup> Lisa Guernsey, *Is the Internet Becoming a Bonanza for Diploma Mills?*, CHRON. HIGHER EDUC., Dec. 19, 1997, <http://chronicle.com/article/Is-the-Internet-Becoming-a/101045/>.

<sup>73</sup> Dough Mehus, *EDUCAUSE Prepares Mass Purge of .EDU Domains*, CIRCLEID, Oct. 9, 2003, [http://www.circleid.com/posts/educause\\_prepares\\_mass\\_purge\\_of\\_edu\\_domains/](http://www.circleid.com/posts/educause_prepares_mass_purge_of_edu_domains/).

<sup>74</sup> Young, *supra* note 68.

status they deserve. This is sending the same message.”<sup>75</sup> The group also reiterated the call to turn operation of the .EDU registry over to EDUCAUSE.<sup>76</sup> However, a year later, community colleges continued to be excluded from the .EDU extension, which community college leaders continued to find infuriating and insulting.<sup>77</sup>

Finally, on October 29, 2001, the Department of Commerce engaged EDUCAUSE to operate the .EDU registry.<sup>78</sup> EDUCAUSE’s current agreement with the Department of Commerce to operate the .EDU registry extends through September 30, 2016.<sup>79</sup> Under the terms of the agreement, EDUCAUSE can determine eligibility criteria for institutions of higher education seeking to register in the extension.<sup>80</sup> Soon after taking over management of the extension, the group opened up the .EDU space for registration to two-year institutions, or community colleges.<sup>81</sup> From the beginning of its management of the extension, EDUCAUSE recognized the power of the .EDU to signify authenticity and legitimacy for those operating within higher education. As the organization’s vice-president wrote at the time,

The .edu domain name of a campus is important as a way of stating that an institution is a recognized member of the higher education community and that the institution meets the community’s standards of degrees and accreditation. This sign of recognition will be all the more critical as more and more teaching and learning is conducted through the Internet via “e-learning.”<sup>82</sup>

EDUCAUSE also promulgated a rule that no eligible institution could register more than one .EDU domain name, which only underscored the scarcity and importance of each individual domain name registration.<sup>83</sup>

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<sup>75</sup> Cooper, *supra* note 67.

<sup>76</sup> Young, *supra* note 68.

<sup>77</sup> Jeffrey R. Young, *Educause Will Gain Control of the ‘.edu’ Internet Domain*, CHRON. HIGHER EDUC., Apr. 27, 2001, <http://chronicle.com/article/Educause-Will-Gain-Control-of/33006/>.

<sup>78</sup> Jeffrey R. Young, *Commerce Department Hands Over ‘.edu’ Domain to Educause*, CHRON. HIGHER EDUC., Nov. 9, 2001, <http://chronicle.com/article/Commerce-Department-Hands-Over/20208/>.

<sup>79</sup> See Policy Information, <http://net.educause.edu/edudomain/policy.asp>.

<sup>80</sup> *Id.*

<sup>81</sup> See Mark Luker, *The .edu Domain and EDUCAUSE*, EDUCAUSEREVIEW, Sept./Oct. 2001, at 64.

<sup>82</sup> *Id.* See also *Dot Who? They Say They Want to Use .edu, Too, Which Is Reserved for Four-Year Colleges*, THE GRAND RAPIDS PRESS, 2001 WLNR 10069248 (Feb. 28, 2001) (noting that many community college leaders felt .EDU extension is “necessary for educational legitimacy,” and that the .EDU extension has a kind of prestige associated with it).

<sup>83</sup> However, EDUCAUSE’s policy board recently endorsed a proposal that would permit eligible institutions that do not currently have more than one .EDU domain name to register a second domain name, provided it is “associated with the entire entity and not just a subunit” (e.g., a school or department within a university). See Policy

The handoff of .EDU operations from VeriSign (the corporate successor to Network Solutions) to EDUCAUSE was not without its glitches. In December of 2001, .EDU registrants received errant renewal notices from VeriSign, asking registrants to pay \$70 to renew their .EDU domain name registrations.<sup>84</sup> EDUCAUSE, which initially charged no registration or renewal fees, had to assuage the concerns of network administrators at institutions receiving the mistaken bills, many of whom were alarmed by them and took them as a sign that the new registry operator was inept.<sup>85</sup>

EDUCAUSE's agreement with the Department of Commerce was amended in several important ways during the early years of the relationship. For example, in 2003, operating policies were established that "[n]ames in the .edu top-level domain, regardless of when issued, may not be transferred in any way," effectively eviscerating any secondary markets for the buying, trading, or selling of .EDU space.<sup>86</sup> In 2006, the agreement again changed, this time to permit EDUCAUSE to charge registrants a \$40 annual fee to help cover its administrative expenses in managing the extension.<sup>87</sup>

As EDUCAUSE worked to fortify the legitimacy of the .EDU extension, questions continued to arise as to which types of institutions should be eligible to register domain names in the space. EDUCAUSE's initial policy, promulgated in 2001, was that would-be registrants had to (1) grant degrees, and (2) be accredited by one of six major regional accrediting bodies.<sup>88</sup> These rules, however, excluded educational institutions or entities that do not grant degrees (such as paralegal certificate programs, or state university systems or coordinating bodies), or that grant degrees but are accredited by a national accrediting group (such as for-profit, online-only institutions) or other accrediting organizations (such as bible colleges, chiropractor schools, and midwifery institutes).<sup>89</sup> Advocates for opening the doors of the .EDU extension to such institutions argued that the public associates a .EDU address with legitimate institutions, whereas .COM domain names used for educational purposes connote diploma mills and fly-by-night operations.<sup>90</sup>

Advocates for loosening the .EDU eligibility requirements also rightfully pointed out that many institutions not affiliated with American

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Recommendations for the Domain,

[http://net.educause.edu/edudomain/policy\\_board\\_9\\_26\\_2012.pdf](http://net.educause.edu/edudomain/policy_board_9_26_2012.pdf), at 1.

<sup>84</sup> Jeffrey R. Young, *Colleges Incorrectly Billed for Domains*, CHRON. HIGHER EDUC., Jan. 25, 2002, <http://chronicle.com/article/Colleges-Incorrectly-Billed/31487/>.

<sup>85</sup> *Id.*

<sup>86</sup> Policy Information, <http://net.educause.edu/edudomain/policy.asp>.

<sup>87</sup> *Id.*

<sup>88</sup> Dan Carnevale, *Educause Considers Letting More Colleges Use '.edu' Addresses*, CHRON. HIGHER EDUC., July 19, 2002, <http://chronicle.com/article/Educause-Considers-Letting/35361/>.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

higher education had been able to register .EDU domain names when Network Solutions controlled the extension, in contravention of then-existing registration eligibility requirements.<sup>91</sup> These domain names were grandfathered in to the new eligibility requirements established by EDUCAUSE, causing “great complexity at the borders of .edu policy enforcement.”<sup>92</sup> Thus, high schools, foreign universities, and even entities with no tie to education at all were found to be operating in the .EDU space once EDUCAUSE took over, even though official policy stated that American institutions that granted degrees, but were not accredited by one of six regional accrediting agencies, were prevented from registering domain names in the extension.<sup>93</sup>

After extensive public comment on the eligibility requirements, EDUCAUSE and the Department of Commerce changed them in February of 2003. The new rule, which continues to apply, permits any U.S. institution that is accredited by an agency recognized by the U.S. Department of Education to register a domain name in the .EDU extension.<sup>94</sup> This rule change effectively opened the door for midwifery institutes, cosmetology schools, funeral service schools, and other vocational training institutions to enter the extension. Many considered this development an equalizing force for postsecondary education, or in short, “a wonderful way of leveling the playing field.”<sup>95</sup> Additionally, since 2004, “University system offices, state coordinating offices or boards, community college district offices, or equivalent entities located within the United States which have as their principal activity the management and governance of a collection of ‘Accredited Institutions’ that themselves meet the eligibility criteria for .EDU” have been permitted to register a domain name in the .EDU extension.<sup>96</sup>

The question of legitimacy of .EDU domain names continued to plague EDUCAUSE, perhaps in part because of the broadening of the eligibility requirements for registering in the extension. In November of 2004, the *Chronicle of Higher Education* published an article highlighting the plight of a would-be student who almost wrote a \$5,000 check to an

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<sup>91</sup> See text accompanying *supra* notes 70-73.

<sup>92</sup> See Policy Proposals for the .edu Domain, [http://net.educause.edu/edudomain/policy\\_board\\_2\\_28\\_2012.pdf](http://net.educause.edu/edudomain/policy_board_2_28_2012.pdf), at 2.

<sup>93</sup> See Georges, *supra* note 71 (noting that, as of 2002, <deerfield.org> was used by a high school, <oxford.edu> was used by Oxford University, and <orchestra.edu> was used by an Italian jazz orchestra, among other examples).

<sup>94</sup> Dan Carnevale, *Education Will Open '.edu' Domain to a Wide Range of Specialized Institutions*, CHRON. HIGHER EDUC., Feb. 28, 2003, <http://chronicle.com/article/Educause-Will-Open-edu/25060/>. However, “institutional accreditation is required for .edu eligibility; program accreditation is not sufficient.” Policy Information, <http://net.educause.edu/edudomain/policy.asp>.

<sup>95</sup> Anick Jesdanum, *Schools Get .edu Sites*, DESERT MORNING NEWS, 2003 WLNR 135119206 (Feb. 12, 2003).

<sup>96</sup> Policy Information, <http://net.educause.edu/edudomain/policy.asp>.

alleged diploma mill operating a web site in the .EDU extension.<sup>97</sup> She mistakenly perceived the institution's .EDU address as a sign of proper accreditation.<sup>98</sup> Others perpetuated the belief that organizations operating in the .EDU are bona fide schools that do not sell fake degrees.<sup>99</sup>

EDUCAUSE defended the status quo in response to requests that it audit all existing .EDU domain names and delete registrations if the registrant did not meet current eligibility requirements.<sup>100</sup> The organization pointed out that institutions' accreditation status can change (i.e., an accredited college could lose accreditation, then gain it back), as can the status of accrediting agencies (i.e., approval by the Department of Education could exist one day, then be lost the next).<sup>101</sup> In light of the fluid nature of accreditation, EDUCAUSE decided not to strip institutions of their domain name when they might actively be trying to regain their accredited status.

Others continued to criticize EDUCAUSE for this position. As one critic pointed out, "There's a widespread belief that .edu means something."<sup>102</sup> The concept of the .EDU meaning something was not lost on individual colleges and universities. Many sought to fully capture that meaning, offering their alumni access to their own personal .EDU email address for life.<sup>103</sup> Some institutions have found that providing lifetime email addresses to alumni is "a powerful tool" for keeping graduates engaged.<sup>104</sup> Those proud of their alma maters also consider the email addresses as a signaling device, or "subtle resume."<sup>105</sup>

While lifelong affiliation with one's alma mater has its price (namely, the four-year or more cost of tuition), the associational value between the institution and users of its domain name has a price of its own. Indeed, some profiteers in China sell .EDU email addresses on an eBay-like auction site for hundreds of dollars each, thereby capitalizing on the perceived value and authenticity that accompanies emails sent from high-prestige universities reflected in the .EDU space.<sup>106</sup>

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<sup>97</sup> Dan Carnevale, *Don't Judge a College by Its Internet Domain Address*, CHRON. HIGHER EDUC., Nov. 26, 2004, <http://chronicle.com/article/Dont-Judge-a-College-by-Its/8748/>.

<sup>98</sup> *Id.*

<sup>99</sup> *C.f.* Whyte, *supra* note 26 ("understanding domain names will help you distinguish between bona fide schools and companies selling fake degrees. If the organization does not have a .edu domain name, be very wary!").

<sup>100</sup> Carnevale, *supra* note 97.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Universities Offer Graduates an E-Mail Place to Call Home*, MILWAUKEE J. SENTINEL, 2001 WLNR 2942169 (May 8, 2001).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Carl Straumsheim, *University Email Accounts for Sale in China*, INSIDE HIGHERED, Sept. 9, 2014, <https://www.insidehighered.com/quicktakes/2014/09/09/university-email-accounts-sale-china>.

Regardless of these practices, as online infrastructure has matured—and users’ comfort level with the medium has deepened—some within the higher education community have questioned whether the tail end of a web address really matters all that much.<sup>107</sup> Web browsers now are programmed to complete common URL addresses even before the user has finished typing them, and colleges and universities themselves have bought up various .COM, .ORG, and .NET domain names to serve particular programmatic or marketing-related needs.<sup>108</sup> The new gTLDs approved by ICANN will require institutions to continue to evaluate how they wish their presence to be reflected online, and to what extent the .EDU will remain used as it was intended: not only as special space, but also the primary space in which colleges and universities operate online.

### C. *Adjudicating Domain Name Disputes Under the UDRP and the ACPA*

Two primary legal vehicles exist for trademark holders to resolve claims related to the allegedly improper ownership and use of domain names by third parties: the UDRP action and federal court litigation. Both provide remedies for mark holders aggrieved when a third party—often labeled a “cybersquatter” by the mark holder—registers and uses a confusingly similar domain name in bad faith.<sup>109</sup> While federal court litigation over domain names may include traditional claims of trademark infringement and trademark dilution, this subsection discusses only the statutory cause of action for cybersquatting that Congress created in the late 1990s specifically to address the problem.<sup>110</sup>

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<sup>107</sup> Josh Fischman, *Trading In ‘.edu’ for ‘.com,’* CHRON. HIGHER EDUC., Sept. 2, 2011, <http://chronicle.com/blogs/wiredcampus/trading-in-edu-for-com/33033>.

<sup>108</sup> *Id.* (noting Weber State University’s use of <getintoweber.com> for recruitment and admissions purposes).

<sup>109</sup> See Lipton, *supra* note 5 at 1363-1364 (arguing that “[w]hile ACPA and the UDRP are extremely useful and effective in protecting trademark interests in the ‘bad faith’ cybersquatting context, they are very limited in their ability to deal with disputes between two legitimate holders of similar trademarks with respect to a corresponding Internet domain name”); see also MUELLER, *supra* note 31 at 67 (“[T]he application of trademark law, which was national in scope and industry- and use-specific, to domain names, which were global in scope and were governed primarily by a uniqueness requirement, created as many conflicts as it resolved.”).

<sup>110</sup> See LIPTON, *supra* note 12 at 24 (noting that trademark infringement, dilution, and ACPA claims often are pleaded in the alternative). Professor Lipton also notes that “the awkwardness of applying existing trademark doctrines to cybersquatting” prompted Congress to enact ACPA, and for ICANN to promulgate the UDRP. *Id.* at 272. The awkwardness stems from the fact that bad faith registration and use of a domain name may not confuse consumers (the *sine qua non* of trademark infringement actions), nor does such activity necessarily constitute use of a trademark in commerce. For an example of one known instance involving a university suing a defendant for trademark infringement and violation of the ACPA, see *Ohio St. Univ. v. Thomas*, 738 F.Supp.2d 743, 748 (S.D. Ohio 2010) (granting preliminary injunction and temporary restraining

## 1. The UDRP

Procedurally, a UDRP action is initiated when a complainant mark holder submits a formal complaint to an ICANN-approved dispute resolution provider.<sup>111</sup> Complainants may choose which provider to use, a critical option that some have alleged creates “an incentive for providers to favor complainants in their decisions.”<sup>112</sup> The provider’s initial task is to determine if the complaint complies with applicable administrative rules and any supplementary rules of the provider.<sup>113</sup> For example, the UDRP only applies to domain names existing in one of 16 gTLDs (the .EDU is not one of them).<sup>114</sup> Assuming all basic filing requirements are met, the provider submits the complaint to the respondent, who then has 20 days to respond.<sup>115</sup> If a timely response is submitted, the provider submits the complaint and response to the appointed panel (which consists of one arbitrator or a three-arbitrator group, depending on the complainant’s election).<sup>116</sup> Even if no response is submitted, the complaint is forwarded to the appointed panel, which need not consider UDRP precedent in reaching its decision.<sup>117</sup>

Substantively, in order to prevail under the UDRP, a complainant must show that (1) the domain name at issue is identical or confusingly similar to a mark in which the complainant has rights (these rights need not be in the form of a federal trademark registration, but often and ideally are); (2) the respondent has no rights or legitimate interests in the domain name; and (3) the domain name has been registered and is being used in bad faith.<sup>118</sup> Evidence of registration and use in bad faith, which often is the

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order to university on trademark infringement claim while declining to address university’s ACPA claim).

<sup>111</sup> Kesan & Gallo, *supra* note 56 at 298. Currently, five ICANN-approved providers exist. The first two authorized providers were the World Intellectual Property Organization and the National Arbitration Forum, which both were approved in December of 1999. *Id.* at 312. Two additional providers, eResolution and CPR Institute for Dispute Resolution, were approved in 2000, but each of these subsequently lost its approval. In 2002, ICANN approved a new provider, Asian Domain Name Dispute Resolution Centre. Additional providers include the Czech Arbitration Court Arbitration Center for Internet Disputes (approved 2009) and the Arab Center for Domain Name Dispute Resolution (approved 2013). *See* ICANN List of Approved Dispute Resolution Service Providers, <http://www.icann.org/en/help/dndr/udrp/providers>.

<sup>112</sup> Kesan & Gallo, *supra* note 56 at 299.

<sup>113</sup> *Id.* at 303.

<sup>114</sup> *See* Domain Name Dispute Resolution Policies, <https://www.icann.org/resources/pages/dndr-2012-02-25-en> (last visited July 24, 2012).

<sup>115</sup> Kesan & Gallo, *supra* note 56 at 303.

<sup>116</sup> *Id.* The single person arbitrator is selected randomly from a pool of candidates, while three-person panels are selected with input from the complainant, the respondent, and the provider.

<sup>117</sup> *Id.*; Bearby & Siegal, *supra* note 24 at 656.

<sup>118</sup> *See* Uniform Domain Name Dispute Resolution Policy [UDRP Policy], Section 4(a), <http://www.icann.org/en/help/dndr/udrp/policy>.

most hotly disputed of the three elements, can take many forms, including circumstances suggesting that: the respondent registered the domain name in order to prevent the complainant from reflecting the mark in a corresponding domain name; the respondent registered the domain name primarily for the purpose of disrupting the complainant's business; in using the domain name, the respondent intentionally attempted to attract Internet users to an online web site by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the web site.<sup>119</sup>

ICANN created the UDRP in 1999, with an effective date of January 3, 2000, after months of consultation with various interest groups, including the World Intellectual Property Organization.<sup>120</sup> The UDRP was promulgated against the background of an existing dispute settlement policy administered by Network Solutions that stakeholders widely considered inadequate.<sup>121</sup> The UDRP has been described as “a decentralized regime for dispute resolution in which ICANN created the general rules and authorized a series of competing private providers to manage and resolve disputes.”<sup>122</sup> ICANN required gTLD registries to adopt the UDRP.<sup>123</sup> In order to effectuate this, the registries, in turn, were made to require registrars selling domain name space within their extension to incorporate the UDRP into the standard registration agreement between registrars and end-purchasers of domain names.<sup>124</sup> Jurisdiction is therefore contractual: by purchasing a domain name, a registrant agrees that any dispute concerning the registrant's rights in the domain name is subject to UDRP arbitration.<sup>125</sup> Registries agree to

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<sup>119</sup> *Id.*

<sup>120</sup> See Final Report of the First WIPO Internet Domain Name Process, Apr. 30, 1999, available at <http://www.wipo.int/amc/en/processes/process1/report/>.

<sup>121</sup> Roberta L. Horton & Seth I. Heller, *What's In a Name? Trade Name Protection Under the Uniform Domain Name Dispute Resolution Policy*, PATENT, TRADEMARK & COPYRIGHT LAW DAILY, May 12, 2014, available at

[http://www.arnoldporter.com/public\\_document.cfm?u=WhatsinaNameTradeNameProtectionUndertheUniformDomainNameDisputeResolutionPolicy&id=23637&key=12H1](http://www.arnoldporter.com/public_document.cfm?u=WhatsinaNameTradeNameProtectionUndertheUniformDomainNameDisputeResolutionPolicy&id=23637&key=12H1).

Essentially, Network Solutions's dispute policy was “to stay out of domain name disputes except to the extent necessary to protect [the company's] interests.” Julia B. Strickland & Scott M. Pearson, *Internet Litigation-Domain Names-Trademarks-Cyberlaw: Resolution of Disputes Over Internet Domain Names*, MONDAQ BUS. BRIEFING, 1999 WLNR 5130021 (Apr. 6, 1999) (describing how the policy functioned); see also MUELLER, *supra* note 31 at 121 (stating that “the policy routinely produced blatant injustices”).

<sup>122</sup> Kesan & Gallo, *supra* note 56 at 293.

<sup>123</sup> See A. Michael Froomkin, *ICANN's 'Uniform Dispute Resolution Policy' – Causes and (Partial) Cures*, 67 BROOKLYN L. REV. 605, 612 (2002) (“[ICANN's] power to make and break registries allows ICANN to require registries (and also registrars) to promise to subject all registrants to a mandatory third-party beneficiary clause in which every registrant agrees to submit to ICANN's UDRP upon the request of aggrieved third parties who believe they have a superior claim to the registrant's domain name.”).

<sup>124</sup> See Lipton, *supra* note 4 at 1372 (“all domain name registrants are contractually bound to submit to a mandatory arbitration under the UDRP”).

<sup>125</sup> See MUELLER, *supra* note 31 at 192.

enforce UDRP decisions by approved providers no sooner than ten days after issuance.<sup>126</sup> The ten days affords a losing respondent the opportunity to file a lawsuit in court. If such action is taken, the registry will not act on the panel's decision, pending resolution of the court case.<sup>127</sup>

The UDRP, as a form of alternative dispute resolution, filled a void created by the inadequacy of courts to predictably handle disputes over domain name ownership. With disputing parties often not subject to the same legal jurisdiction, enforcement of court verdicts posed difficulties.<sup>128</sup> Furthermore, the expense and slow speed of litigation made it an unattractive dispute resolution vehicle for many parties wishing to resolve Internet domain name disputes cheaply and quickly.<sup>129</sup> In contrast to litigation, UDRP proceedings do not involve discovery or in-person hearings, and no money damages are available for prevailing complainants.<sup>130</sup> A decision is rendered within 60 days of filing.<sup>131</sup> According to a 2012 survey conducted by the American Intellectual Property Law Association ("AIPLA"), the mean cost to clients in legal fees to have a lawyer prepare a UDRP complaint is \$1,876, although the cost can be as high as \$5,000 for some firms and in some markets.<sup>132</sup> Others choose to proceed without the aid of an attorney, which the UDRP rules permit.<sup>133</sup> The UDRP's chief selling points, therefore, are that it is an international, non-governmental, relatively inexpensive, fast, and essentially online-only dispute resolution vehicle.<sup>134</sup>

Providers have seen an uptick in the number of UDRP actions filed each year.<sup>135</sup> Critics of the UDRP, however, allege that the process is too favorable to complainants.<sup>136</sup> A common critique is that arbitration panels

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<sup>126</sup> See UDRP Policy, Section 4(k).

<sup>127</sup> *Id.*

<sup>128</sup> Kesan & Gallo, *supra* note 56 at 292.

<sup>129</sup> *Id.* For a detailed description of the general procedure providers follow in adjudicating UDRP disputes, see *id.* at 303.

<sup>130</sup> *Id.*

<sup>131</sup> Horton & Heller, *supra* note 121.

<sup>132</sup> AIPLA, REPORT OF THE ECONOMIC SURVEY, 2013, at I-107. Additionally, the cost of using the arbitration provider can be \$1,300 to \$2,250 for a single-member panel, depending on the number of domain names in dispute. See, e.g., The National Arbitration Forum's Supplemental Rules, at 10, available at <http://domains.adrforum.com/resource.aspx?id=1556>.

<sup>133</sup> See <https://www.icann.org/resources/pages/rules-be-2012-02-25-en>, Section 3 (noting that complaints may be initiated by the complainant or the complainant's authorized representative).

<sup>134</sup> See Lipton, *supra* note 5 at 1372. That said, one may seek remedy through the UDRP while simultaneously pursuing federal court litigation; the two avenues are not mutually exclusive. See Bearby & Siegal, *supra* note 24 at 655.

<sup>135</sup> See, e.g., *Total Number of WIPO Domain Name Cases and Domain Names by Year*, World Intellectual Property Association, available at [http://www.wipo.int/export/sites/www/pressroom/en/documents/pr\\_2014\\_756\\_a.pdf#annex3](http://www.wipo.int/export/sites/www/pressroom/en/documents/pr_2014_756_a.pdf#annex3) (showing the trend in cases from 1,857 filed in 2000, to 2,585 filed in 2013).

<sup>136</sup> See, e.g., MUELLER, *supra* note 31 at 193 ("Procedurally, the UDRP is heavily biased in favor of complainants.").

are too lenient in finding bad faith on the part of respondents.<sup>137</sup> Whatever factors come into play in a given arbitration panel's decision, one macroscopic empirical data point merits consideration: respondents win less than 20% of the UDRP proceedings that result in a ruling.<sup>138</sup>

## 2. The Anticybersquatting Consumer Protection Act

The Anticybersquatting Consumer Protection Act ("ACPA") creates federal court jurisdiction for a civil cause of action aimed to punish cybersquatters. In order to succeed under the ACPA, a plaintiff must establish that a defendant (1) has a bad faith intent to profit from using a distinctive mark owned by the plaintiff, and (2) has registered, trafficked in, or used a domain name that is identical or confusingly similar to the plaintiff's mark, or dilutive of the plaintiff's mark if the mark is famous.<sup>139</sup> ACPA identifies ten non-exclusive statutory bases for finding bad faith intent to profit, including the defendant's bona fide noncommercial or fair use of the mark in a site accessible under the domain name, the defendant's offer to sell the domain name for financial gain without having used it, and the defendant's provision of material and misleading false contact information when applying to register the domain name.<sup>140</sup> To be actionable, the registrant's bad faith need not have been present at the time of registration, but simply must have been present at some time during the registrant's ownership of the domain.<sup>141</sup>

President Bill Clinton signed the ACPA into law on November 29, 1999.<sup>142</sup> Congress enacted the ACPA against a landscape of increased online activity that was hurting established businesses in a way that traditional trademark law was not well equipped to resolve.<sup>143</sup> The ACPA aimed to address the problem of "bad faith and abusive registration of distinctive marks as Internet domain names with the intent to profit from the goodwill associated with such marks."<sup>144</sup> The specific problem boiled down to individuals—often located outside the U.S., and thus beyond its courts' jurisdiction—who would register domain names containing the trademarks of American companies, then offer to sell them the domain name in a private transaction at a cost well above the seller's minimal expense in obtaining the registration and renewing it. While brand owners

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<sup>137</sup> See, e.g., Brooks, *supra* note 15 at 326 ("panels have expanded the strict language of the policy when their arbitration panelists have reached the conclusion that a registrant is a 'bad actor'").

<sup>138</sup> *Id.* at 328; see also Horton & Heller, *supra* note 131.

<sup>139</sup> See 35 U.S.C. § 1125(d)(1)(A).

<sup>140</sup> See 35 U.S.C. § 1125(d)(1)(B)(i).

<sup>141</sup> Bad faith even can occur after a dispute arises, should the registrant offer to settle the dispute by selling the domain name to the complainant for profit. See LIPTON, *supra* note 12 at 115.

<sup>142</sup> Karen Kaplan, *Clinton Signs Cybersquatting Law*, L.A. TIMES 3, 1999 WLNR 6617883 (Nov. 30, 1999).

<sup>143</sup> See LIPTON, *supra* note 110.

<sup>144</sup> S. Rep. No. 106-140 at 4 (1999).

contemplated legal action, or the cybersquatter's offer to sell, the domain name often was put to nefarious use, such as automatically redirecting visitors to the web site of the mark owner's prime competitor. In some cases the actual registrant could not be identified, as the registrant had provided false name and contact information to the registrar at the time of registration.<sup>145</sup>

These thorny problems of personal jurisdiction led Congress to include an *in rem* provision in the legislation, in addition to the *in personam* jurisdiction typical of most enabling statutes. Under the *in rem* provision, courts may adjudicate claims to a given domain name provided that the domain name registrar or registry that registered or assigned the domain name is physically present in the court's judicial district.<sup>146</sup> Additionally, in order to proceed under the ACPA's *in rem* prong, the court must be satisfied that the mark owner is not able to obtain *in personam* jurisdiction over a person who otherwise would be the named defendant, or through due diligence was not able to find such a person by (1) sending notice to the registrant at his address listed in WHOIS information for the domain, and (2) publishing notice as the court may direct.<sup>147</sup>

Not only does ACPA's *in rem* provision provide a statutory basis for declaring domain names property (instead of simply contractual rights),<sup>148</sup> the only relief contemplated under this provision—i.e., cancellation, forfeiture, or transfer of the domain name<sup>149</sup>—often is what matters most to mark owners, even more than the prospect of obtaining money damages.

On the subject of money, and in contrast to the UDRP, pursuing an ACPA claim is more expensive because a claimant must use the federal courts to advance such claims. While statistics on the costs of ACPA litigation are not specifically maintained, AIPLA's 2012 survey of intellectual property law firms does provide average lawsuit cost data for trademark infringement lawsuits. These data provide the best basis for insight into the costs associated with pursuing an ACPA claim through trial. For a trademark infringement lawsuit with less than \$1,000,000 at risk (likely the case for most domain name disputes), the average cost to pursue such a case to completion was \$375,000 in 2012.<sup>150</sup>

Although the UDRP is a significantly cheaper vehicle than an ACPA lawsuit for potentially resolving a dispute over a domain name, neither

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<sup>145</sup> *Id.*

<sup>146</sup> See 15 U.S.C. § 1125(d)(2)(A).

<sup>147</sup> See 15 U.S.C. § 1125(d)(2)(A)(ii)(II).

<sup>148</sup> See 35 U.S.C. § 1125(d)(2)(C) (“In an in rem action under this paragraph, a domain name shall be deemed to have its situs in the judicial district in which (i) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located; or (ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court.”).

<sup>149</sup> See 35 U.S.C. § 1125(d)(D)(i) (“The remedies in an in rem action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.”).

<sup>150</sup> AIPLA, REPORT OF THE ECONOMIC SURVEY, 2013, at I-161.

vehicle is easy to pursue without significant planning and time investment in the adversarial process. With this reality in mind, the following subsection explores those known instances when the news media or other commentators publicized college and university battles for cyberspace, focusing in particular on their uses of the UDRP and the ACPA.

#### D. *College and University Battles for Cyberspace*

Colleges and universities quickly learned that the availability of the restricted .EDU extension did not mean that they were immune from cyberattack by squatters in other TLDs. As two authors writing in 2002 advised, “Institutions should be on guard against a wide variety of domain name registrants, including offshore gambling entities, adult entertainment operators, ticket brokers, entrepreneurs trying to make a quick dollar and even fans and alumni.”<sup>151</sup> Indeed, higher education waged battles with all variety of these types of squatters, and news of these efforts soon made their way into the headlines of popular and academic outlets.

In the first reported use of the ACPA by a university, Harvard University sued the operators of the web site <harvardyardsale.com> in December of 1999.<sup>152</sup> The site’s operators were using it to offer for sale 65 different domain names incorporating the word “Harvard,” such as <harvard-lawschool.com>, <harvardfaculty.com>, and <virtualharvard.com>.<sup>153</sup> Harvard University declined an offer from the site’s operators to purchase the domain names, electing instead to sue them in federal court. A spokesman for the university said at the time, “We cannot allow the public to be misled into believing that a site is officially linked to the university [when it is not].”<sup>154</sup> The university’s lawyer in the case called universities “latecomers to the world of trademark and domain-name protection.”<sup>155</sup>

The case settled in March of 2000, with the site operators agreeing to transfer the domain names to Harvard.<sup>156</sup> Fresh off this success, the university soon had reason to turn to the ACPA again, when it sued an online course provider operating a web site at <notharvard.com> in

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<sup>151</sup> Bearby & Siegal, *supra* note 24 at 653-654.

<sup>152</sup> Wendy R. Leibowitz, *Harvard Sues 2 Men Under New Law Aimed at Cybersquatters*, CHRON. HIGHER EDUC., Dec. 9, 1999, <http://chronicle.com/article/Harvard-Sues-2-Men-Under-New/113762/>.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* For more details about the case, see Alayne E. Manas, Note, *Harvard As a Model in Trademark and Domain Name Protection*, 29 RUTGERS COMPUTER & TECH. L.J. 475, 484-486 (2003).

<sup>155</sup> Wendy R. Leibowitz, *As ‘Cybersquatters’ Multiply, Colleges Try to Protect Their Good Names*, CHRON. HIGHER EDUC., Jan. 21, 2000, <http://chronicle.com/article/As-Cybersquatters-Multiply/14231/>.

<sup>156</sup> See Andrea L. Foster, *Plans for New Domain Suffixes Haves Colleges Girding for Fresh Trademark Fights*, CHRON. HIGHER EDUC., July 7, 2000, <http://chronicle.com/article/Plan-for-Domain-Suffixes-Has/22238/>.

August of 2000.<sup>157</sup> The university alleged various Lanham Act claims, including the ACPA violations related to the registration and use of <notharvard.com>, <notharvarduniversity.com>, <notharvardu.com>, and <notnotharvard.com>.<sup>158</sup> After Harvard obtained a preliminary injunction, the case settled on the eve of trial in Harvard's favor.<sup>159</sup>

Harvard was not alone among elite universities forging a path as a fierce protector of their names and identities online. Stanford and Duke both were cited in 2000 as aggressively pursuing cybersquatters, and the University of North Carolina ("UNC") sued the owners of <uncgirls.com>, which featured photographs of naked women on a web site using UNC colors.<sup>160</sup> Despite these successful enforcement activities, at least one elite university—and presumably many more non-elite institutions—decided to pursue a more cautious strategy. In 2000, a spokeswoman for Cornell University stated that the institution viewed domain name battles as a hassle, noting that her institution often preferred to coexist rather than fight with similarly-named commercial web sites.<sup>161</sup>

Whatever a given institution's online strategy, what soon became certain was that no college or university could fully protect itself by buying up all domain names that could potentially reference the institution. The permutations of the English language are simply too many, the array of gTLDs and ccTLDs are too great, and the costs of maintaining unused domain names are too expensive, for colleges and universities to justify defensively registering any more than a handful or few dozen domain names. Reed College learned this lesson in 2002, when it discovered someone had registered <reedcollege.com> and was using it to redirect visitors to an anti-abortion web site. Reed College apparently had paid to register <reed.com>, <reed.org>, and other domain names, but not <reedcollege.com>. As the institution's chief technology officer said at the

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<sup>157</sup> See Andrea L. Foster, *Facing Lawsuit, NotHarvard.com Changes Name*, CHRON. HIGHER EDUC., Oct. 6, 2000, <http://chronicle.com/article/Facing-Lawsuit-NotHarvardcom/2400/>.

<sup>158</sup> The case filed by Harvard in federal court in Massachusetts came after the site operators preemptively sued Harvard in Texas, seeking a federal court there to declare its use of <notharvard.com> permissible under trademark law. See Manas, *supra* note 154 at 486-496 (discussing the case in detail).

<sup>159</sup> *Id.* at 495; Foster, *supra* note 158.

<sup>160</sup> Leibowitz, *supra* note 155; Jennifer Jacobson, *Sexually Explicit Web Site Sued by U. of North Carolina*, CHRON. HIGHER EDUC., June 8, 2011, <http://chronicle.com/article/Sexually-Explicit-Web-Site/24618/>. See also Glenn Bacal & David Andersen, *Domain Name Dispute Resolution: Proving Bad Faith*, Bacal Law Group, <http://ipdepartment.net/articles/SunDevils.comUDRPDecision.pdf> (describing UDRP victory for Arizona State University against owner of <sundevils.com>, which the owner used at one time to redirect visitors to a pornographic web site); Andrew-Allemand, *NC State University Loses Domain Name Dispute for Wolfpack.com*, DOMAIN NAME WIRE BLOG, Jan. 31, 2014, <http://domainnamewire.com/2014/01/31/nc-state-wolfpack-domain/> (describing UDRP defeat for North Carolina State University against owner of <wolfpack.com>, who alleged to have registered it for use in connection with a snowshoe project).

<sup>161</sup> Leibowitz, *supra* note 155.

time, “it’s impossible to imagine every variation of the name and how it could be used – although in hindsight, [[reedcollege.com](http://reedcollege.com)] was an obvious one.”<sup>162</sup>

Less obvious may be domain names in obscure or seldom-trafficked extensions, like the ccTLD for the country of Montenegro, .ME. Brandeis University, Babson College, the University of Vermont, and Tufts University all fell prey to the same cybersquatter who registered four domain names in the .ME extension, each confusingly similar to those institutions’ names, in order to solicit donations from unsuspecting donors and sell to students purported access to personalized apps.<sup>163</sup> The institutions claimed the activity was a scam, filed a UDRP action, and were awarded transfer of the domain names.<sup>164</sup>

News outlets in higher education continued to highlight the occasional squabble by colleges or universities upset with a third-party’s use of space online.<sup>165</sup> Louisiana State University (“LSU”) even went so far as to sue a current student for his ownership and use of a domain name, [lsulaw.com](http://lsulaw.com).<sup>166</sup> The law student created a web site at the domain out of apparent dissatisfaction with LSU’s own web presence, and his desire to have an email address that would be easy to remember.<sup>167</sup>

Groups affiliated with higher education also turned to adversarial channels to resolve disputes over domain names. For example, the National Collegiate Athletic Association (“NCAA”) filed a UDRP complaint against the owner of 32 domain names containing “ncaa” in them (some in conjunction with gambling terms).<sup>168</sup> The NCAA was awarded transfer of all of the domain names except the ones that referenced gambling.<sup>169</sup> The NCAA subsequently challenged those same

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<sup>162</sup> Jeffrey R. Young, *Anti-Abortion Group Uses a Web Address Similar to Reed College’s*, CHRON. HIGHER EDUC., Feb. 15, 2002, <http://chronicle.com/article/Anti-Abortion-Group-Uses-a-Web/115980/>. Interestingly, as of June 2014, [reedcollege.com](http://reedcollege.com) redirects to Reed College’s main .EDU web site, whereas the other two domain names clearly are not affiliated with the institution.

<sup>163</sup> Scott Jaschik, *Victory for Colleges in Cybersquatting Case*, INSIDE HIGHERED, Aug. 7, 2012, <http://www.insidehighered.com/quicktakes/2012/08/07/victory-colleges-cybersquatting-case>. See also Babson Coll. et al. v. Mark (Omar) Quevillon, WIPO Case No. DME2012-0005 (decided July 23, 2012).

<sup>164</sup> *Id.*

<sup>165</sup> See, e.g., Brock Read, *Ball State U. Threatens to Sue the Creator of a Web Site Using a Campus Logo*, CHRON. HIGHER EDUC., Apr. 29, 2002, <http://chronicle.com/article/Ball-State-U-Threatens-to-Sue/115853/> (noting dispute between Ball State University and owner of domain name [bsupolice.com](http://bsupolice.com), who used the domain to criticize the university).

<sup>166</sup> Katherine S. Mangan, *Louisiana State U. Takes Law Student to Court Over Use of Domain Name*, CHRON. HIGHER EDUC., May 8, 2002, <http://chronicle.com/article/Louisiana-State-U-Takes-Law/115488/>.

<sup>167</sup> *Id.*

<sup>168</sup> See Andrea L. Foster, *NCAA Loses Domain-Name Dispute Involving Sports-Betting Sites*, CHRON. HIGHER EDUC., Dec. 8, 2000, <http://chronicle.com/article/NCAA-Loses-Domain-Name-Dispute/107176/>.

<sup>169</sup> *Id.*

domain names in an ACPA action in federal court.<sup>170</sup> The NCAA's success with the UDRP continued to be spotty in future actions: an arbitrator awarded the organization transfer of <finalfourmerchandise.com>, but not <finalfourseats.com>.<sup>171</sup>

Also active was the Institute for the International Education of Students, commonly known as the study abroad group IES. IES filed a UDRP complaint against the owner of <iesabroad.com>, which a for-profit competitor had registered and attempted to sell to IES.<sup>172</sup> A panel awarded the domain name to IES.<sup>173</sup> Foreign universities, too, found the UDRP useful, with the University of Oxford being awarded transfer of <university-of-oxford.com> by a WIPO arbitration panel in 2001.<sup>174</sup>

By the early- to mid-2000s, cybersquatting had emerged as an established, lucrative venture, with many highjacked mark owners—not just colleges and universities—preferring to resolve disputes for their settlement value, rather than arbitrating or litigating. Perhaps with that goal in mind, one entity went so far as to register a reported 23,000 domain names, each designed to call to mind a college or university, usually by incorporating college or university trademarks in the domain name.<sup>175</sup> The owner of these domain names viewed them as being useful spaces for selling college-related merchandise, but the envisioned use of the domain names never came to fruition, likely because the institutions that were targeted did not condone the business model.<sup>176</sup>

The cybersquatting problem has become so widespread that institutions now commonly receive watch notices from consulting companies that notify them when new uses of their trademarks appear online.<sup>177</sup> Others turn elsewhere for help. For example, institutions that contract with the Collegiate Licensing Company (“CLC”) to handle the

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<sup>170</sup> Bearby & Siegal, *supra* note 24 at 657.

<sup>171</sup> *Id.* at 656-657.

<sup>172</sup> See Andrea L. Foster, *International-Study Group Is Awarded Copycat Domain Name*, CHRON. HIGHER EDUC., Dec. 6, 2000, <http://chronicle.com/article/International-Study-Group-Is/12895/>.

<sup>173</sup> *Id.*

<sup>174</sup> David Cohen, *Oxford Wins Domain-Name Case Against Man Named 'Oxford University'*, CHRON. HIGHER EDUC., Sept. 5, 2001, <http://chronicle.com/article/Oxford-Wins-Domain-Name-Case/107733/>.

<sup>175</sup> Andrea L. Foster, *Company Buys Web Addresses Echoing College Names*, CHRON. HIGHER EDUC., July 8, 2005, <http://chronicle.com/article/Company-Buys-Web-Addresses/36300/>; Jean Marie Angelo, *Evicting Cybersquatters: Colleges and Universities Have to Protect Their Websites from Those Who Try to Poach Traffic*, 10(3) UNIV. BUS. 79 (Mar. 1, 2007).

<sup>176</sup> *Id.*; see also Gary T. Brown, *Institutions Interpret Purchase of Domain Names As Illegal*, NAT'L COLL. ATHLETIC ASSOC., Nov. 21, 2005, <http://fs.ncaa.org/Docs/NCAANewsArchive/2005/Association-wide/institutions%2Binterpret%2Bpurchase%2Bof%2Bdomain%2Bnames%2Bas%2Bill%2Begal%2B-%2B11-21-05%2Bncaa%2Bnews.html>.

<sup>177</sup> Julia Love, *Despite Colleges' Efforts, Brands Can Escape Their Bounds*, CHRON. HIGHER EDUC., Oct. 1, 2012, <http://chronicle.com/article/Colleges-Brands-Escape-Their/134764/>.

licensing of their trademarks to sportswear companies and others have found an ally in the organization. CLC's general counsel states that each quarter his legal department shuts down hundreds of web sites selling counterfeit college merchandise.<sup>178</sup> These enforcement activities help institutions protect their brand in the often messy world of cyberspace.

Online space continues to be a site of contest for higher education. Of continued concern are authenticity and legitimacy, and the fear that consumers of higher education will be confused or misled by a domain name or web site they encounter. Those who wish to profit off of colleges and universities have gone so far as to establish web sites for sham institutions (they copy content from legitimate college web sites),<sup>179</sup> pretend to be the official web site of a university,<sup>180</sup> and exploit campus tragedy.<sup>181</sup>

When ICANN approved the new gTLD extension .XXX in 2011, some colleges and universities took advantage of a pre-purchase window for trademark holders, to make sure that no one could register the institution's name in the extension.<sup>182</sup> Others did not pre-purchase any .XXX domain name, believing that such defensive effort—the cost of which was \$200 per domain name purchased—would be fruitless.<sup>183</sup> The University of Hawaii was one institution that declined to take preemptive action. Leaders there soon became dismayed to find that someone had registered <universityofhawaii.xxx> and was using it to display photos of nude

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<sup>178</sup> *Id.*

<sup>179</sup> See, e.g., Ben Wieder, *Reed College Seeks to Stop Copycat Web Site*, CHRON. HIGHER EDUC. WIRED CAMPUS BLOG, Feb. 24, 2011, <http://chronicle.com/blogs/wiredcampus/reed-college-seeks-to-stop-copycat-web-site/29999> (describing how an unaccredited college had created a web site with material copied from Reed College's web site).

<sup>180</sup> See, e.g., Ben Wieder, *Fake Web Site Pretends to Be Youngstown State U.'s*, CHRON. HIGHER EDUC. WIRED CAMPUS BLOG, Apr. 21, 2011, <http://chronicle.com/blogs/wiredcampus/fake-web-site-pretends-to-be-youngstown-state-u/31048> (describing how someone used <ysu.com> to masquerade as Youngstown State University's official web site).

<sup>181</sup> See Brock Read, *After the Virginia Tech Shootings, Profiteers Rush to Buy Domain Names*, CHRON. HIGHER EDUC. WIRED CAMPUS BLOG, May 9, 2007, <http://chronicle.com/blogs/wiredcampus/after-the-virginia-tech-shootings-profiteers-rush-to-buy-domain-names/3017> (describing how one man purchased more than 40 domain names intended to call to mind the 2007 campus shootings at Virginia Tech University, including <bloodbathinblacksburg.com> and <virginiatechthemovie.com>).

<sup>182</sup> Jennifer Howard, *QuickWire: Colleges Buy Up .XXX Domain Names to Sidestep Pornographers*, CHRON. HIGHER EDUC. WIRED CAMPUS BLOG, Nov. 16, 2011, <http://chronicle.com/blogs/wiredcampus/quickwire-colleges-buy-up-xxx-domain-names-to-sidestep-pornographers/34334> (discussing the purchase of <missouri.xxx> and <missouritigers.xxx> by the University of Missouri); Steve Kolowich, *Universities Preempt Pornographers by Buying Up "Dot-XXX" Domains*, INSIDE HIGHERED, Nov. 30, 2011, <http://www.insidehighered.com/news/2011/11/30/universities-preempt-pornographers-buying-dot-xxx-domains> (discussing the purchase of <texasports.xxx>, <hookemhorns.xxx>, and <texasboxoffice.xxx> by the University of Texas, as well as other .XXX domain names preemptively purchased by other colleges and universities).

<sup>183</sup> Kolowich, *supra* note 182.

couples engaged in sexual intercourse.<sup>184</sup> After the university sent the registrant a cease-and-desist letter, the matter was resolved.<sup>185</sup>

What has not been resolved is just how broad a presence colleges and universities should seek to stake out in the online world. As EDUCAUSE's vice president of policy stated in 2012, the opening of each new domain name extension exposes colleges and universities to risks and costs without offering them much value in return.<sup>186</sup> ICANN's latest expansion of the generic top-level domain space—which permits virtually any eligible entity willing to pay a hefty fee and serve as registry to operate its own generic top-level extension—seems to suggest that there is a limit to institutions' willingness to establish their online identities through domain name acquisition. Only three universities in the world, all located in Australia, opted to apply for an extension.<sup>187</sup> In January of 2014, Monash University in Melbourne became the first to receive ICANN approval to operate its extension.<sup>188</sup> According to a press release, the university viewed acquisition of .MONASH as reflective of its presence as a “global institution,” and a tool for helping the university develop a new “customer-focused University web presence.”<sup>189</sup>

Meanwhile, in 2012, EDUCAUSE's vice president stated that no American university he was aware of was proceeding to obtain its own gTLD,<sup>190</sup> which ICANN's publicly-available listing of first-round applicants confirms.<sup>191</sup> However, the extensions .COLLEGE and .UNIVERSITY both were approved in April of 2014.<sup>192</sup> Neither is operated by an accredited higher education institution. The marketers behind the .COLLEGE extension see it as innovative space capable of challenging the traditional .EDU extension that they claim “does not allow for the full spectrum of education-based services to establish an internet

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<sup>184</sup> Steve Kolowich, ‘Dot-XXX’ Sites May Pose Real Risks to University Brands, INSIDE HIGHERED, Feb. 22, 2012, <http://www.insidehighered.com/news/2012/02/22/dot-xxx-sites-may-pose-real-risks-university-brands>.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Carl Straumsheim, *YourUniversityHere*, INSIDE HIGHER ED, Feb. 3, 2014, <http://www.insidehighered.com/news/2014/02/03/icanns-personalized-domain-names-attracts-little-interest-higher-education#sthash.pxTVcz3y.dpbs>. The other two Australian universities that applied were Bond University and La Trobe University.

<sup>188</sup> *Id.*

<sup>189</sup> *Monash First in the World to Acquire a New Brand Top-Level Domain*, Monash University Press Release, Jan. 20, 2014, <http://monash.edu/news/releases/show/monash-first-in-the-world-to-acquire-a-new-brand-top-level-domain>.

<sup>190</sup> See Kolowich, *supra* note 184.

<sup>191</sup> See New gTLD Current Application Status, <https://gtldresult.icann.org/application-result/applicationstatus/> (last visited May 14, 2014).

<sup>192</sup> Konstantinos Zournas, *24 More New gTLDs Were Delegated: .college, .engineering, .media, .university, .gop, .yokohama*, ONLINEDOMAIN.COM, Apr. 22, 2012, <http://onlinedomain.com/2014/04/22/news/24-more-new-gtlds-were-delegated-college-engineering-media-university-gop-yokohama/>.

presence.”<sup>193</sup> Which institutions may seek registrations within these two new extensions, and how domain names registered in the extensions will be used, remain to be seen.

## II. A STUDY OF COLLEGE AND UNIVERSITY INVOLVEMENT IN UDRP ACTIONS AND ACPA LITIGATION INVOLVING DOMAIN NAMES

This Part describes the methods I used to compile original datasets consisting of information about college and university involvement in UDRP actions and ACPA litigation over domain names. The section concludes with a description of the study’s limitations.

### A. *Methods*

#### 1. UDRP Research

The UDRP portion of the study proceeded in two stages: (1) data collection concerning UDRP actions, and (2) analysis of individual domain names identified from the collection of data concerning UDRP actions.

The objective of the first phase of the project was to obtain data concerning all UDRP actions filed by American colleges and universities, in order to better understand how they conceptualize their space online. To obtain those data, a structured search of several databases containing information about UDRP actions was conducted. As of the time of data collection in late 2013, ICANN had approved five arbitration providers to conduct UDRP actions.<sup>194</sup> Each of the five current providers maintains a publicly searchable database containing information about UDRP filings made with the arbitration provider. Each of these five databases was searched to identify all UDRP filings by an American college or university. Databases of UDRP providers formerly approved by ICANN were searched as well.<sup>195</sup> Independent searches for the words *college*, *university*,

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<sup>193</sup> *New Unrestricted Domain Extension .College Approved by ICANN*, SBWIRE, 2013 WLNR 20912378 (Aug. 22, 2013).

<sup>194</sup> *See supra* note 111.

<sup>195</sup> Two arbitration providers formerly enjoyed ICANN approval to conduct UDRP proceedings, but by the time of data collection, no longer were approved by ICANN. eResolution was a UDRP arbitration provider from 2000 through 2001, when it quit the business due to disputes with ICANN. Kieren McCarthy, *eResolution quits domain arbitration*, THE REGISTER, Dec. 4, 2001, [http://www.theregister.co.uk/2001/12/04/eresolution\\_quits\\_domain\\_arbitration/](http://www.theregister.co.uk/2001/12/04/eresolution_quits_domain_arbitration/). It no longer operates. Meanwhile, the International Institute for Conflict Prevention & Resolution, Inc. (“CPR”) was an approved UDRP arbitration service from 2000 through 2006; it continues to provide other dispute resolution services. Records of UDRP actions resolved through CPR and eResolution are maintained online at [www.cpradr.org/FileaCase/CPRsNeutrals/DomainNameICANNDisputes.aspx](http://www.cpradr.org/FileaCase/CPRsNeutrals/DomainNameICANNDisputes.aspx) and [www.disputes.org](http://www.disputes.org), respectively. While the search functionality of these records is limited, manual review of the records did return one UDRP action that met the study’s search

and *regent* in the complainant field were used to identify potentially relevant UDRP actions.<sup>196</sup>

The first three databases searched—the Asian Domain Name Dispute Resolution Centre, the Czech Arbitration Court Arbitration Center for Internet Disputes, and the Arab Center for Domain Name Dispute Resolution—yielded no results. Searches of the databases maintained by WIPO and NAF yielded hundreds of unfiltered results. Records reflecting UDRP actions filed by foreign institutions or non-university business institutions were filtered from the results, yielding 225 responsive records.

The responsive records were examined individually and relevant information was extracted for inclusion in my dataset. Extracted information included the name of the complainant, the respondent, the disputed domain name(s), and the case number; the decision date, outcome,<sup>197</sup> and PDF copy of the panel’s decision; and the number of domain names that were the subject of the given UDRP action. Phase one data collection and refinement occurred over several weeks in late 2013.

Phase two of the project entailed further analysis of the domain names involved in the UDRP actions identified in phase one. The domain names were placed in a separate dataset for individual analysis.<sup>198</sup> Each domain name was categorized as falling into one of three researcher-generated categories, based on analysis of its second-level alphanumeric domain name string. The mutually-exclusive categories were “name,” “name-plus,” and “other.” Domain names were coded as follows:

- In order to be labeled “name,” the second-level alphanumeric domain name string had to include the college or university name, and no other lettering, although abbreviations of the institution’s name, hyphens, branch campus names, and inclusion of the letters “edu” into the second-level portion of the domain name were permitted.<sup>199</sup>
- In order to be labeled “name-plus,” the second-level alphanumeric domain name string had to otherwise be appropriately categorized as “name,” except for the existence of additional words or terms in

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criteria. *See* Southwest Texas State University v. Mike Flynn, CPR Case No. 0231 (decided Jan. 23, 2003) (concerning <southwesttexasstateuniversity.com>).

<sup>196</sup> For purposes of the study, both 4-year and 2-year, non-profit and for-profit institutions were included, provided they enroll students in degree programs in the United States.

<sup>197</sup> Possibilities for outcome included “transferred,” “cancelled,” “claim denied,” and “split decision” (i.e., the arbitrator awarded transfer of some, but not all, domain names subject to the UDRP action).

<sup>198</sup> Five domain names—i.e., <baylorcollegemedicine.com>, <baylorjobs.com>, <baylormedicalcenter.com>, <baylormedicalschool.com>, and

<baylorhospitaljobs.com>—were each the subject of two successful UDRP actions.

These domain names only were included once in the second database. One domain name, <wharton.com>, was the subject of two unsuccessful UDRP actions. *See* Wharton Sch. of the Univ. of Penn. v. Motherboards.com, NAF Claim No. FA0306000161274 (July 24, 2003); Trs. of the Univ. of Penn. v. Moniker Privacy Services, Motherboard.com, WIPO Case No. D2007-0757 (Oct. 5, 2007).

<sup>199</sup> *E.g.*, <johnjaycollege.com>.

the second-level string (e.g., the name of a department, school, or program within the institution, or a service related to the institution).<sup>200</sup>

- Domain names not fitting into either of the aforementioned categories were labeled as “other.” Domain names categorized as “other” have in common that they make no reference to the identity of the college or university complainant.<sup>201</sup>

Additionally, the TLD extensions of the domain names were reviewed to determine which TLDs, and how many of each type, were represented in the dataset.

A web browser was used to visit each of the domain names in the dataset created in phase two. The results of these visits were coded in a separate field in the dataset entitled “visit.” A variety of outcomes resulted from these site visits, and were categorized according to the way in which the web page resolved upon visit. The various outcomes were identified as: “fails to resolve,” “parked page,” “forwards with masking,” “forwards without masking,” “functioning web site,” and “other.” Visits were coded as follows:

- Visits to web sites that led to no content being displayed in the web browser, and/or an error message indicating that no server could be found, or no page would resolve, resulted in labeling the domain name “fails to resolve.”<sup>202</sup>
- If upon visit a web site displayed a parked page, the domain name was labeled “parked page.”<sup>203</sup>
- If upon visit a web site redirected to another domain name owned by the institution, without changing the URL displayed in the web browser, the domain name was labeled “forwards with masking.”<sup>204</sup>
- “Forwards without masking” was used for instances where a visit to a given web site redirected the browser to another domain name owned by the institution.<sup>205</sup>
- “Functioning web site” was used to denote functioning, standalone web sites that did not appear to forward to a different institution-controlled site (such as its main .EDU page).<sup>206</sup>

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<sup>200</sup> *E.g.*, <universityofchicagopress.com>.

<sup>201</sup> *E.g.*, <uhealth.org>.

<sup>202</sup> *See, e.g.*, <sarahlawrencecollege.com> (last visited Apr. 29, 2014).

<sup>203</sup> *See, e.g.*, <universityofidaho.com> (last visited Apr. 29, 2014). A “parked page” for purposes of this study means a domain name that resolved upon visit to a web page containing advertising listings and links. Often these links are targeted to the predicted interests of the visitor, and the domain name registrant (or its registrar) receives payment from the advertisers for each click of a hyperlink that a visitor makes on a parked page.

<sup>204</sup> Few fit this description, but for an example of one, see <baylormedicalhospital.com>, which resolves to a page identical to <baylor.edu> (last visited June 10, 2014).

<sup>205</sup> For example, visitors to <sundevils.com> are redirected to <thesundevils.com> (last visited June 10, 2014).

- “Other” was used to denote a visit that resulted in something other than one of the above-described situations.<sup>207</sup>

Additionally, WHOIS searches were conducted for each domain name listed in the dataset created in phase two. Registrars collect certain identifying information from registrants at the time of registration. This information includes the name and physical address of the registrant, as well as the names of and contact information for administrative and technical contacts for the registrant. The veracity of this information is unverified by registrars, and many registrants choose to enter false, misleading, or incomplete information. However, all registrars must make this information searchable through what is called a WHOIS database, located on each registrar’s web site.<sup>208</sup>

The purpose of the WHOIS searches was to determine who currently owns each domain name that was transferred to a college or university by virtue of a UDRP decision. Categories that emerged from the data include: “institution-owned,” “institution-controlled,” “other entity owns,” “free for registration,” and “privately registered.” Ownership of domain names was coded as follows:

- “Institution-owned” was used when the WHOIS data for a given domain name indicated that the college or university that prevailed in the UDRP concerning the domain name was the domain name’s registrant.
- “Institution-controlled” was used when the WHOIS data for a given domain name referenced in some way the college or university that prevailed in the UDRP concerning the domain name, but the registrant was a different entity that likely controlled the domain name on the college or university’s behalf. For example, WHOIS data might show a law firm as the domain name’s registrant, but list a university-affiliated e-mail address as the administrative contact, indicating beneficial ownership.
- “Other entity owns” was used when an organization or individual not affiliated with or believed to be controlled by the college or university that prevailed in the UDRP action concerning the domain name was identified in WHOIS data as the domain name’s registrant.

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<sup>206</sup> See, e.g., <nymakesworkpay.org> & <arizonawildcats.com> (last visited Apr. 29, 2014).

<sup>207</sup> For example, a visit to <tufts.biz> resulted in a page that displays “”)”; dy>” in the upper left-hand corner of the screen (last visited June 10, 2014). A visit to <bellevuecommunitycollege.com> displayed a site that led one to wonder whether it was the official site for Bellevue College (it is not) (last visited June 10, 2014).

<sup>208</sup> Some registrars’ web sites feature search engines that allow one to search for WHOIS information for domain names registered across registrars. See, e.g., <http://www.networksolutions.com/whois/index.jsp>. However, sometimes the most accurate information only can be obtained by searching the WHOIS database of the registrar with whom the domain name in question was registered.

- “Free for registration” was used when a WHOIS search revealed that the domain name was available to register or for sale by the registrar.
- “Privately registered” was used when a private registration service appeared in WHOIS data as the registrant, effectively preventing any inference as to the identity of the actual owner of the domain name or its affiliation *vel non* with the college or university that prevailed in the UDRP action concerning the domain name.<sup>209</sup>

## 2. ACPA Litigation Research

The ACPA litigation phase of the project aimed to locate all lawsuits brought by colleges and universities under the ACPA that resulted in a written ruling by a court. Lawsuit data were located by running a search and refinement in the databases of reported federal court decisions maintained by Westlaw and Lexis Advance.<sup>210</sup> Returned records were reviewed by hand to verify that they met the inclusion criteria. Results were then reviewed in full for further discussion in Parts III and IV below.

### B. Limitations

The study’s limitations are minimal. All databases used for data collection are reasonably believed to be accurate, and the search methodologies deployed were sound, although not infallible. First, some colleges and universities—like Massachusetts Institute of Technology—do not contain the words *college*, *university*, or *regent* in their official titles. Therefore, if anything, the findings might be slightly under-inclusive.<sup>211</sup> Second, research into ACPA lawsuits was limited by the fact that the researched databases only contain information about lawsuits that resulted in at least one written opinion; an ACPA lawsuit that a college or

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<sup>209</sup> Private registration is an additional service offered by many registrars at the time of registering a domain name. Private registration effectively means that the registrar lists the name of an entity affiliated with the registrar in the registrant name field. Anyone wishing to reach the beneficial owner of the domain name has to contact the private registration company, using its standard contact information located in the domain name’s WHOIS record. Private registration offers beneficial domain name owners the protection of keeping their identities and contact information out of publicly searchable WHOIS records for a small yearly fee. Private registration also complies with ICANN requirements that registrars collect and maintain registrant information for domain names registered through them.

<sup>210</sup> The ALLFEDS database in Westlaw was searched in May 2014 for “anticybersquatting consumer protection act.” Searching these results for the words *college*, *university*, and *regent* returned 72 records. A similar search in Lexis Advance returned 96 records for review.

<sup>211</sup> The additional burden of sifting through the false positives that would have been generated by searching, for example, for *institute* did not justify the undertaking. If all colleges and universities without *college*, *university*, or *regent* in their corporate name were known, they could be searched for specifically to enhance the accuracy of the findings reported here.

university filed, but that did not result in a written opinion (for example, because the case settled), would not be included in the dataset.<sup>212</sup> Additionally, disputes between colleges and universities and others over domain names that did not involve an ACPA claim would not be included in the dataset.<sup>213</sup> Finally, inadvertent errors may have been introduced in the human review process, although reasonable steps were deployed to faithfully execute the research design.<sup>214</sup>

A larger concern is the construct validity of the study. Domain name ownership and use are not static, and much of the data reported in Part III below simply reflects findings at a given moment in time. A domain name that failed to resolve to a university web page on Tuesday could have been set to forward to the university's main web page on Wednesday. However, this limitation always will exist, given the fluid and changeable nature of web pages on the Internet, and provides no compelling reason for discounting any of the reported findings.

### III. FINDINGS

This Part describes the main findings of the original research projects undertaken for this Article.

#### A. *Overview of UDRP Research Findings*

Research into UDRP actions conducted for this Article found that, through the end of the year 2013, 100 different colleges and universities had filed 233 UDRP complaints involving 373 domain names since the UDRP was implemented in 2000. Arbitration panels awarded transfer or cancellation of 91.7% of the disputed domain names ( $n = 342$ ), denying transfer of the remainder ( $n = 31$ ).<sup>215</sup> Quantitative findings are further arrayed below by subheading.

##### 1. Most Active Colleges and Universities

One question of interest concerned the identities of the 100 institutions found to have brought one or more UDRP action: who are these colleges and universities? Table 1 below identifies the most active institutions based on number of UDRP actions filed.

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<sup>212</sup> PACER is the electronic docketing system maintained by the U.S. federal courts. While searching PACER for all lawsuit filings that meet given criteria is technically feasible, the system has many limitations that makes use of it for an empirical study such as this one both cumbersome and costly.

<sup>213</sup> The case involving Ohio State referenced in *supra* note 110 is the only known case of this sort.

<sup>214</sup> Namely, two coders reviewed all data and verified the coding decision made by the other coder.

<sup>215</sup> Of the 342 domain names for which a panel awarded transfer or cancellation, 337 of them were distinct. *See infra* note 216.

**Table 1**  
**UDRP Activity by No. of UDRP Actions Filed**

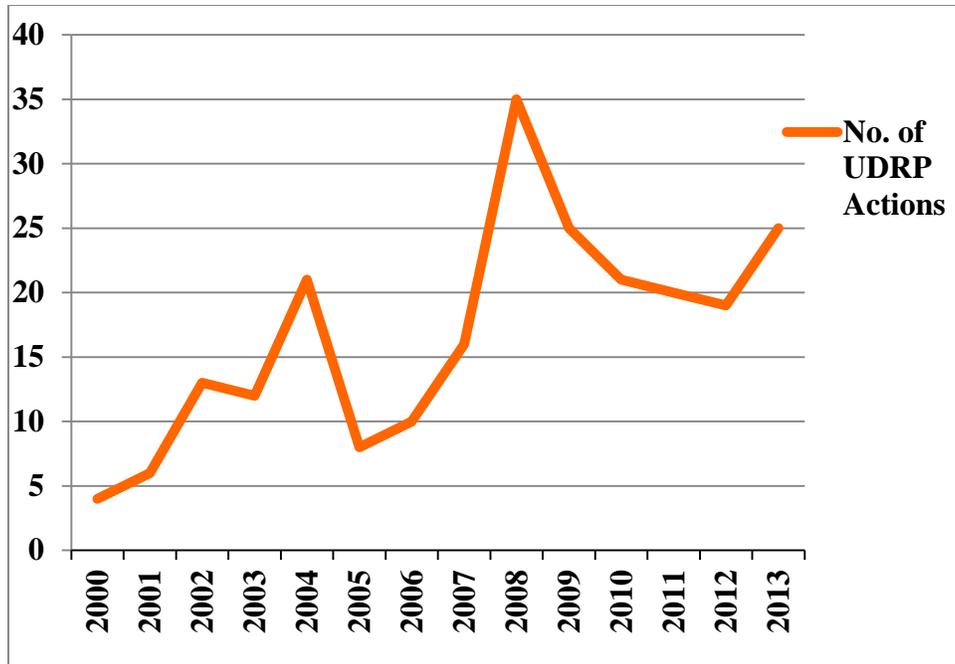
Institution Name	No. of UDRP Actions
Baylor University	62
University of Texas System	19
Harvard University	7
American University	6
Bob Jones University	6
University of Michigan	5
West Coast University	5
Tufts University	4
Yale University	4
Grand Valley State University	3
Southern California University	3
University of Utah	3
Stanford University	3

As noted, only a few institutions of those that have filed a UDRP action have filed three or more UDRP actions. Eighty-seven institutions (or 87.0% of all that filed UDRPs) have filed only one or two UDRP actions, compared to the 13 institutions identified in Table 1.

## 2. UDRP Actions by Year

The dataset also allowed for analysis of the number of UDRP actions filed by colleges and universities by year. The year 2008 witnessed the most filings, with 35. Unsurprisingly, the year 2000—the year the UDRP was implemented—saw the fewest UDRP filings by colleges and universities, with only four. Graph 1 depicts the activity, noting a general increase over time, but a tapering off in recent years.

**Graph 1**  
**UDRP Actions Filed by Colleges and Universities per Year**



### 3. Domain Names by Type

As described in Part II, the 373 domain names identified as being subject to UDRP actions brought by colleges and universities were categorized by type (name, name-plus, and other) as well as by TLD extension type (.COM, .ORG, etc.). Table 2 displays the different types of domain names that were subject to UDRP actions. As indicated, most ( $n = 204$ , or 54.7%) of the located domain names were “name-plus” domain names.

**Table 2**  
**Types of Domain Names Subject to UDRP Actions**

Type of Domain Name	No. of Domain Names ( $N = 373$ )
Name	140 (37.5%)
Name-plus	204 (54.7%)
Other	29 (7.8%)

Table 3 identifies the variety of TLD extensions of the domain names that were subject to UDRP actions brought by colleges and universities. As noted, approximately 75% of all disputed domain names ( $n = 283$ , or 75.9%) ended in .COM. Thirteen different types of TLDs were represented in the data.

**Table 3**  
**TLD Extensions at Issue in the UDRP Actions**

<b>TLD Extension</b>	<b>No. of Domain Names (N = 373)</b>
.COM	283 (75.9%)
.ORG	31 (8.3%)
.NET	21 (5.6%)
.US	9 (2.4%)
.INFO	8 (2.1%)
.MOBI	7 (1.9%)
.ME	4 (1.1%)
.BIZ	4 (1.1%)
.XXX	2 (0.5%)
.TV	1 (0.3%)
.NAME	1 (0.3%)
.CO	1 (0.3%)
.PA	1 (0.3%)

#### 4. Baylor University Domain Names

Baylor University is in many ways an outlier with respect to UDRP activity by colleges and universities. As noted in Table 1, data revealed that Baylor had filed 62 UDRP actions involving 130 domain names. Appendix A contains a table that identifies those 130 domain names.

#### 5. WHOIS Data

Of the 337 distinct domain names for which colleges and universities had achieved transfer or cancellation by virtue of a UDRP decision, I wanted to know who currently owned those domain names.<sup>216</sup> Accordingly, in spring of 2014, WHOIS searches were conducted for each of these domain names. A quarter of the domain names ( $n = 84$ , or 24.9%) were available to register, and approximately another 7% ( $n = 23$ ) were registered to an entity clearly not affiliated with the college or university that had prevailed in the UDRP action concerning the domain name. Another 26 domain names (7.7%) were privately registered, and 204 (60.5%) were owned or controlled by the institution. Table 4 depicts these findings.

**Table 4**  
**Ownership of Domain Names Cancelled or Transferred to Colleges & Universities in UDRP Actions**

<b>WHOIS Information</b>	<b>No. of Domain Names (N = 337)</b>
Available to register	84 (24.9%)

<sup>216</sup> Five domain names were the subject of two successful UDRP actions. *See supra* note 198. These five domain names only were analyzed once for purposes of the findings reported in Part III.A.5 and Part III.A.6.

Other entity owns	23 (6.8%)
Privately registered	26 (7.7%)
Institution-owned	141 (41.8%)
Institution-controlled	63 (18.7%)

## 6. Site Visit Data

I sought to know how the domain names transferred to the college or university that brought the UDRP were currently being used. Accordingly, each of the 227 domain names that was transferred and not clearly owned by another entity or available to register was visited and its contents surveyed pursuant to the methodology described in Part II.<sup>217</sup>

As depicted in Table 5, the plurality of the domain names ( $n = 98$ , or 43.2%) failed to resolve to a web page upon visit. Combined with the 31 domain names (13.7%) that resolved to a parked page, results show that nearly 60% of the domain names ( $n = 129$ , or 56.8%) effectively were not being used at all. Two domain names (0.9%) forwarded with masking, 78 (34.4%) forwarded without masking, and 7 (3.1%) displayed their own functioning web site. Another 11 domain names (4.8%) were labeled as “other” for reasons such as the following: the site requested a login and password in order to resolve,<sup>218</sup> the site displayed a blank page,<sup>219</sup> or the site displayed meaningless text.<sup>220</sup>

**Table 5**  
**Use of Institution-Owned or -Controlled, or Privately Registered, Domain Names Upon Visit**

Use	No. of Domain Names ( $N = 227$ )
Failed to resolve	98 (43.2%)
Parked page	31 (13.7%)
Forwards with masking	2 (0.9%)
Forwards without masking	78 (34.4%)
Functioning web site	7 (3.1%)
Other	11 (4.8%)

## B. Overview of ACPA Litigation Research Findings

<sup>217</sup> Six domain names—i.e., <lobobasketball.com>, <lobofootball.com>, <nittanylions.org>, <pennstatebookstore.com>, <pennstatestore.com>, and <wearpennstate.com>—were cancelled as opposed to transferred to the complainant. These domain names are not represented in Table 5, nor is any domain name that was coded as available to register or registered to another entity.

<sup>218</sup> See <mybaylor.com> (last visited June 10, 2014).

<sup>219</sup> See <baylordental.com> & <harvarduniversitypress.com> (last visited June 10, 2014).

<sup>220</sup> See <tufts.biz> (last visited June 10, 2014).

Research into judicial opinions where a court had been asked to decide an ACPA claim brought by a college or university returned very few cases. Indeed, research located only two district court cases and no appellate decisions.<sup>221</sup>

The first case was brought by Baylor University against a company and an individual who had registered <baylorbears.com>.<sup>222</sup> Shortly after registering the offending domain name, the defendants posted a web page at the domain that targeted Baylor University students and alumni.<sup>223</sup> Baylor sued the defendants for trademark infringement, dilution, unfair competition, and for violating the ACPA. After default was entered against the corporate defendant, the university moved for summary judgment on all claims against the personal defendant, who was a Baylor alumnus.<sup>224</sup> The court granted summary judgment to the university on all claims, and awarded it attorneys' fees.<sup>225</sup>

The second located case concerned Savannah College of Art and Design ("SCAD").<sup>226</sup> This case involved a defendant who had registered two domain names (<scad.info> and <scad-and-us.info>) incorporating the college's trademarks. The defendant used the domain names to display web sites airing negative commentary—penned by himself and others—about SCAD, which formerly employed him and his wife until she was fired and he resigned.<sup>227</sup> SCAD filed suit under the ACPA and other provisions of the Lanham Act, alleging trademark infringement; however, on the first day of trial, SCAD moved to dismiss its ACPA claim, and the court granted the motion.<sup>228</sup>

After a trial on SCAD's Lanham Act claims, the court ruled in favor of the defendant, finding that he had not made a commercial use of SCAD's marks, and that even if he had, such use did not pose a likelihood of

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<sup>221</sup> Two additional cases were located involving medical schools with domestic offices but with primary operations located abroad. *See Amer. Univ. Antigua Coll. Med. v. Woodward*, 837 F.Supp.2d 686 (E.D. Mich. 2011) (holding on plaintiff's motion for summary judgment that defendant's registration and noncommercial use of <aua-med.com> was not actionable under the ACPA because it constituted protected cyber-gripping); *Ross Univ. Sch. Med. v. Amini*, No. 13-6121, 2014 WL 29032 (D. N.J. 2014) (involving ACPA claim related to the domain names <rossu.net>, <rossmedicalschoo.org>, and <rossmedicalschoo.com>, among others). These were not further analyzed as they did not involve an American college or university. While Harvard University was involved in two ACPA cases initiated in 1999 and 2000, *see text accompany supra* notes 152-159, these cases resolved without any written judicial opinion, and thus were not located in the study described in Part II.

<sup>222</sup> *See Baylor Univ. v. Int'l Star, Inc.*, No. W-00-CA-231, 2001 WL 1796664 (W.D. Tex. 2001).

<sup>223</sup> *Id.* at \*1.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at \*4.

<sup>226</sup> *See Savannah Coll. Art & Design, Inc. v. Houeix*, 369 F.Supp.2d 929 (S.D. Ohio 2004).

<sup>227</sup> *Id.* at 935-936.

<sup>228</sup> *Id.* at 931 n.1.

confusion.<sup>229</sup> In its analysis of SCAD's trademark infringement claim, the court reviewed the similarity between SCAD's marks and the defendant's web site and domain names. Of interest is the court's following observation:

Is it conceivable that an Internet user searching for information on Savannah College may initially type the URL of scad.info in the address box? Of course. Is it likely? No. The .edu domain is universally used by schools of higher education while the .info domain is relatively new. Thus, a user who is inclined to start his or her search with a URL is more likely to input scad.edu rather than scad.info.<sup>230</sup>

The court's language substantiates the importance of the .EDU extension in the public's eye, while downplaying the likelihood that visitors to non-.EDU domain names will be confused into regarding them as replacements for .EDU domain names.

More details about SCAD's ACPA case are discussed in Part IV.A below.

#### IV. EXPANDING DOMAINS: POLICY CONCERNS RELATED TO HIGHER EDUCATION'S CONTENTIOUS DOMAIN NAME ACQUISITION EFFORTS

In light of findings from the original study conducted for this Article, this section discusses various policy concerns related to contentious efforts by colleges and universities to expand their domain name holdings through the UDRP and ACPA litigation. In particular, this section considers difficulties confronting institutions as they seek to build and protect their brands online while also being sensitive to the academic value of open discourse and the potential reputational harms that face institutions that engage in enforcement activity. This section also considers what insights may be drawn from the study concerning college and university approaches to fighting cyberbattles. I conclude with a discussion of what the future may hold for college and university battles for cyberspace, offering a suggested set of questions that college and university decision makers should consider before pursuing contentious acquisition of domain names.

##### A. *Free Speech and Reputational Concerns*

Because Internet domain names are rivalrous, registrations for online space raise the specter of conferring a virtual linguistic monopoly on their holders.<sup>231</sup> Linguistic monopolies can be dangerous because they risk constraining the freedom of language in the virtual commons, a restriction

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<sup>229</sup> *Id.* at 957.

<sup>230</sup> *Id.* at 952.

<sup>231</sup> LIPTON, *supra* 12 at 92-93.

that can alter public consciousness and memory in lasting ways.<sup>232</sup> Take for example the domain name <history.org>. One might expect a visit to that domain name to lead to information about world history, or provide resources to teachers and students who wish to understand various details about world wars or other momentous events. Instead, the domain name resolves to a web site that provides information about a very particular (albeit important) slice of history, the American Revolutionary War.<sup>233</sup> The Colonial Williamsburg Foundation's registration for this domain name means that anyone in the world who wishes to use the generic word *history* to drive traffic to a domain name about history must find a different extension in which to do so, or rely entirely on search engine optimization strategies to drive traffic to domain names other than <history.org>. If one considers the normative question of who should own domain names like <jesus.com>, or <holocaust.com>, or whether they should even be available to register at all, one immediately senses how Internet policy quickly intersects with social policy.

The symbolic force and social resonance of domain names in the .EDU extension are similar. <wm.edu> simply is a better domain name than <williamandmary.edu> because it is shorter and more incisive; fortunately for the College of William & Mary, it applied for <wm.edu> before William Mitchell College of Law sought its domain name (<wmitchell.edu>). Similar to other registries, EDUCAUSE follows a first-come-first-served policy with respect to registering domain names in the .EDU extension.

While not their primary purpose, domain names undeniably serve brand functions in higher education. For example, many at the University of Mississippi would prefer to see their institution use a more neutral-sounding, descriptive domain name, like <umiss.edu>, instead of <olemiss.edu>, which to some conjures mental associations with slavery and segregation.<sup>234</sup> In short, a simple domain name often conveys impressions to people as much as it identifies computers to users, and thus college and university battles for cyberspace also should be viewed through a critical cultural lens, as these efforts to control specific sites of speech can bear on institutional image and reputation in important and lasting ways.

Some of the battles identified in the research conducted for this Article raise the issue of institutional commitment to free expression, a quintessential academic value, as well as the consequences to an

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<sup>232</sup> *Id.*

<sup>233</sup> Visit <history.org>, owned by the Colonial Williamsburg Foundation (last visited July 15, 2014).

<sup>234</sup> See Scott Jashik, *Names, Symbols and Race*, INSIDEHIGHERED.COM, Aug. 4, 2014, <http://www.insidehighered.com/news/2014/08/04/u-mississippi-tries-new-approach-its-history-race-and-faces-criticism>.

institution's reputation that can come from battles for cyberspace.<sup>235</sup> Since at least the 19<sup>th</sup> Century, American colleges and universities have been regarded as metaphysical marketplaces of ideas, areas where no subject is off limits provided study or discussion of it might lead to better understanding of the world.<sup>236</sup> This quality, to many inherent in the very concept of higher education itself, may lead one to question what happens, or should happen, when an institution's interest in a domain name conflicts with the speech interests of a third party.

For purposes of my study, this hypothetical concern came to resolution in those few instances when institutions used the UDRP or the ACPA as a vehicle for capturing a domain name reflecting or capable of reflecting speech with which the institution may take issue or disagree, even if the university was within its trademark rights to do so. Illustrative UDRP actions from my study meeting this description include disputes over ownership of <tuftsgeek.com>, <harvardgirlschoo.com>, <ihatebaylor.com>, <baylorsucks.com>, and <baylorbearssuck.com>.<sup>237</sup> Each of these domain names, by virtue of their alphanumeric strings standing alone, calls to mind speech that is potentially unsavory or critical of the institution whose trademarked name is contained in the domain name. Critical questions that arise from these isolated incidents are several. Should Baylor seek to grab <ihatebaylor.com> from someone else, simply because the domain name's alphanumeric string standing alone is critical of the institution? To what extent should the use to which a given domain name is being put inform decision making about enforcement? If domain names containing critical word strings are used to display negative speech about an institution, should the affected institution always seek transfer of them?

Examination of the facts behind each UDRP complaint corresponding to the five domain names referenced above reveals complicated stories, only two of which seem to present—from a policy standpoint—compelling cases for enforcement action. In all of these cases, however, one notes the sensitivity and fact-specific nature of the undertaking when a college or university seeks to claim from another a domain name reflecting a message critical of, or unsavory to, the institution.

The UDRP action involving <tuftsgeek.com> represents an instance of justified enforcement activity, even though the domain name standing alone appears to be a potential vehicle for speech critical of the university. However, when Tufts University filed a UDRP action against the

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<sup>235</sup> *Accord* MUELLER, *supra* 31 at 231 (“measures to control [cybersquatting] are expanding property rights to names at the expense of free expression, privacy, and competition”).

<sup>236</sup> *See generally* ROBERT M. O'NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD: POLITICAL EXTREMISM, CORPORATE POWER, AND THE UNIVERSITY* (2008). Of course, this commitment to free inquiry does have limitations. Some modes of speech, such as plagiarism and other forms of cheating, are not tolerated in higher education, even though they may not be illegal or universally deemed immoral in any popular sense.

<sup>237</sup> *See infra* notes 238 and 240-242 for citations to these decisions.

registrant of <tuftsgeek.com>, the domain name was being used “to redirect Internet users to Respondent’s website that commercially offers advice services for an hourly rate.”<sup>238</sup> That is to say, instead of being used to criticize the institution, the domain name displayed speech of a commercial character that had a potential to confuse consumers. At no point did the record suggest that the domain name was used to criticize Tufts or the study habits of its students, although one could imagine its potential utility for such purpose. Because the domain name’s registrant essentially was usurping for its own purposes the value of the Tufts trademark, the arbitration panel rightfully found bad faith and transferred the domain name to the university.<sup>239</sup>

A similar story abides for <harvardgirls.school.com>, which displayed “pornographic pictures and videos, causing rotating banners to appear and generating hyperlinks to other pornographic websites of the same caliber” when Harvard University filed a UDRP action against its owner in 2005.<sup>240</sup> No doubt the use of the Harvard name in connection with such base speech, unrelated to any comment or criticism of the university, does nothing to further a compelling societal interest. However, just as with <tuftsgeek.com>, one easily can imagine a different set of facts where a hypothetical registrant of <harvardgirls.school.com> used the domain name to engage in speech critical of the institution. Would the institution have sought transfer of the domain name had it been used for non-pornographic speech of a critical nature, or no speech at all?

Baylor University’s decision to pursue transfer of <ihatebaylor.com>, <baylorsucks.com>, and <baylorbears.suck.com> via UDRP actions provide examples of an institution inappropriately acting in the face of such circumstances. Baylor University filed UDRP actions against the registrants of <ihatebaylor.com> and <baylorsucks.com> in 2008 and 2012, respectively.<sup>241</sup> Both sites resolved to parked pages at the time the UDRP actions were filed, meaning that they effectively were not being used in any fashion that might lead site visitors to be confused as to the university’s affiliation or endorsement of the sites (e.g., to advertise a person’s own goods or services), or to think poorly of Baylor for reasons unrelated to any criticism of the institution (e.g., to display pornography). They also contained no speech actually critical of the university, although their alphanumeric strings alone reflect their utility as vehicles for direct criticism. By seeking transfer of these domain names, Baylor effectively sought to control two forums for criticism of the institution, all within the legal trappings of protecting its trademarks.

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<sup>238</sup> Tufts University v. Stevan Obradovic, NAF Claim No. FA0701000881136 (decided Feb. 19, 2007), at 2.

<sup>239</sup> *Id.*

<sup>240</sup> President and Fellows of Harvard Coll. v. Nikolay, WIPO Case No. D2005-0120 (decided May 16, 2005), at 2.

<sup>241</sup> See Baylor University v. Sysadmin Admin c/o Balata.com Ltd., NAF Claim No. FA0802001153718 (decided April 11, 2008); Baylor University v. Andrew Makarov, NAF Claim No. FA1204001438498 (decided May 16, 2012).

Not only is such a motivation misguided, in my opinion—no university ever could control all possible online forums that could be used to criticize the institution—such efforts can prove perilous for the university’s image and reputation, as the disposition of <baylorbearssuck.com> helps illustrate. In the UDRP action concerning that domain name, the respondent claimed that he acquired the domain name (along with four others: <baylorbears.biz>, <baylorbears.name>, <baylorbears.net>, and <baylorbears.tv>) “with the intention of creating a social networking website akin to MySpace for Baylor University students and alumni. However, due to lack of funds, the website was never developed.”<sup>242</sup>

Shortly after Baylor filed the UDRP, the respondent set the disputed family of domain names to redirect visitors to the web site for Texas A&M University, one of Baylor’s chief rivals. While the respondent indicated he took this action as a joke, the panel was not amused and found the act to be further evidence of bad faith, writing that the respondent was “contemptuous” of the UDRP proceedings and viewed them merely as “an opportunity to harass Baylor University for his own amusement.”<sup>243</sup>

The respondent further attempted to persuade the panel that using the <baylorbearssuck.com> domain name in a manner critical of Baylor University should be considered protected noncommercial speech; however, the panel reasoned that “there is no indication that in this case the domain name is being used or at any time was being used for such a purpose.”<sup>244</sup> The panel overlooked the argument that causing a domain name such as <baylorbearssuck.com> to redirect to the web site of a competitor institution could itself be viewed as an act of criticism, or at least parody, and that some may view such act as speech that deserves protection, not evidence of bad faith. Regardless, the point remains that institutions committed to the free exchange of ideas should not be so quick to seek to claim ownership of a venue in which speech critical of the institution might be displayed.

In addition to serving as a cautionary tale for institutions considering action over other domain names similar in expressive character to <baylorbearssuck.com>, the UDRP dispute involving that domain name also stands as a vivid example of the potential reputational consequences of college and university battles for cyberspace. While Baylor University won that particular UDRP battle, one must question whether in doing so it provoked an unnecessary and damaging war. The respondent in the UDRP action was an alumnus of the university named John Stipe. Mr. Stipe felt aggrieved when his alma mater filed the UDRP, having only communicated with him once about the domain name, through a lawyer’s

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<sup>242</sup> Baylor University v. JS, NAF Claim No. FA0801001141911 (decided March 14, 2008).

<sup>243</sup> *Id.* at 3 & 5.

<sup>244</sup> *Id.* at 4.

cease-and-desist letter.<sup>245</sup> As he put it, “It went straight to the lawyers and it was entirely legal. They didn’t offer to help me or to buy the domain names or anything. [ . . . ] Lawyers are not cheap, so why do you pay a lawyer to present documents and file papers on someone? Their response was over 100 pages.”<sup>246</sup>

Thirteen days after losing the UDRP action, Mr. Stipe purchased five additional domain names incorporating “sucks” and “Baylor” in various extensions, stating in text displayed to visitors of those domain names that “I purchased these domain names to expose the tactics Baylor University used in order to take the [other] domain names from me.”<sup>247</sup> As he told me, “I played by the rules. I lost the case, and they said the web sites were not used as a free speech thing, so I said ‘Fine, I’ll show you,’ I made it free speech.”<sup>248</sup>

On the main web page displayed at the domain names he purchased after losing the UDRP, Mr. Stipe goes on to allege that Baylor, in an effort to prevent criticism of the university, owns at least seven other domain names that were not subject to the UDRP it filed against him, each of which contains “sucks” and “Baylor” in some configuration.<sup>249</sup> In addition to questioning the propriety of the university’s ownership of the other domain names, and conjecturing about the amount of legal fees Baylor University must have expended in the UDRP action it brought against him, Mr. Stipe describes what he views as the unfairness of the university’s domain name enforcement strategy:

I question why Baylor University chose to take my websites from me, but allow others to have theirs. BaylorBears.org was registered on Jan 29, 2001 and is owned by a person in New York. BaylorBears.mobi was registered on Oct 7, 2006 and is owned by a person in South Carolina. And while Baylor University was fighting me for my names, on Feb 29, 2008, a person in Germany purchased BaylorBears.info. Or how about SicEmBears.org that was registered on Jul 25, 2007 to someone in California? [ . . . ]

I would also like to point out, which goes unanswered by Baylor University officials, why is BaylorFans.com allowed to exist for the last 9 years? Baylor owns BaylorFans.org, but does NOT own BaylorFans.com or BaylorFans.net. Further, Baylor does not own InsideBaylorSports.com which has existed since 2003, but Baylor owns BaylorSports.com and BaylorSports.net.

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<sup>245</sup> See <baylorbearssuck.us> (last visited June 3, 2014).

<sup>246</sup> Transcribed telephone interview of John Stipe by the author, June 17, 2014.

<sup>247</sup> See <baylorbearssuck.us> (last visited June 3, 2014).

<sup>248</sup> Transcribed telephone interview of John Stipe by the author, June 17, 2014.

<sup>249</sup> See <baylorbearssuck.us> (last visited June 3, 2014).

It is interesting that the Baylor lawyers were arguing trademark violations in order to take my names from me when it is quite obvious they pick and chose who they want to go after. It is going to be interesting to see what Baylor University does with the names they took from me without compensation. We already know what Baylor University will do with the BaylorBearsSuck.com, but the truth can be told in BaylorBearsSuck.net, BaylorBearsSuck.org, BaylorBearsSuck.us, BaylorBearsSuck.info, and BaylorBearsSuck.biz.<sup>250</sup>

What is perhaps most intriguing about this saga is that, as of June 2014, <baylorbearssuck.com> still was owned by Baylor University, yet it displayed the same critical commentary quoted above that otherwise appeared on the domain names owned by Mr. Stipe.<sup>251</sup> I asked Mr. Stipe if he knew why this was. “I think that’s probably just a mistake on their part,” he said.<sup>252</sup> Mr. Stipe could be correct. Alternatively, Baylor may have intentionally changed the server settings for <baylorbearssuck.com> such that the domain name would display the content Mr. Stipe has on the critical domain names he owns, perhaps in recognition that the institution regrets including <baylorbearssuck.com> in the UDRP action it filed.

Mr. Stipe’s dispute with Baylor University is telling for many reasons. From a reputational standpoint, the university must question whether its enforcement effort against an alumnus was worth the counter-speech it incited.<sup>253</sup> More than six years after the UDRP was decided, Mr. Stipe’s critical domain names still exist and still are being used to display speech critical of Baylor, potentially raising attention disproportionate to the concern that motivated university action in the first instance.<sup>254</sup> To be sure, time heals some wounds, but not all. Mr. Stipe told me that he probably will continue to renew the registrations for the domain names he registered

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<sup>250</sup> *Id.*

<sup>251</sup> Of the five domain names subject to the UDRP, two (i.e., <baylorbears.net> and <baylorbears.tv>) now redirect to Baylor’s main .EDU web site, one (i.e., <baylorbears.name>) fails to resolve, and an additional one—<baylorbears.biz>—redirects to a domain name controlled by Mr. Stipe, which displays the criticism quoted above.

<sup>252</sup> Transcribed telephone interview of John Stipe by the author, June 17, 2014.

<sup>253</sup> This question is more rhetorical than actual. Baylor University recently sued the Baylor Alumni Association, seeking to stop it from using the Baylor name and trademarks after the formal relationship between the two broke down. *Baylor U. Sues to Stop Alumni Group From Using Its Marks*, INSIDEHIGHERED, June 11, 2014, <http://www.insidehighered.com/quicktakes/2014/06/11/baylor-u-sues-stop-alumni-group-using-its-marks>. This lawsuit, and the UDRP action against Mr. Stipe, suggest that the possibility of making headlines for suing its alumni may not be much of a deterring factor for the university as it considers trademark enforcement options.

<sup>254</sup> The dispute did make local headlines as it unfolded in 2008. See Travis Measley, *Revenge.com: Baylor Files Lawsuit Over Trademark Abuse in Websites Using Name, Mascot*, THE BATALLION ONLINE, Feb. 27, 2008, <http://www.thebatt.com/2.8485/revenge-com-1.1187296#.U43UrC8ozM0>.

after losing the <baylorbearssuck.com> UDRP, even though he no longer cares about the issue all that much.<sup>255</sup>

The university's dispute with Mr. Stipe also reasonably calls into question what institutions like Baylor hope to gain through a Whac-a-Mole-type approach to domain name enforcement. As displayed in Table A-1 in Appendix A, the array of domain names that Baylor has sought through UDRP actions is staggering, both in number and variety.<sup>256</sup> Baylor no longer owns many of these domain names, even though the university prevailed in UDRP actions that awarded their transfer to Baylor, and many effectively are not being used at all (i.e., they do not resolve to an active page upon visit).

While defenders of Baylor's enforcement efforts might point to Table A-1 as evidence of the university's strong position with respect to protecting its intellectual property, detractors might view these efforts as silly, wasteful, and unnecessarily chilling of potentially legitimate third-party speech.<sup>257</sup> Assuming enforcement is a value prized by the institution, one must question to what extent the intangible loss of goodwill among alumni is worth the price. As Mr. Stipe reflected to me,

I just felt that Baylor has all this money and power and they do whatever they want to do. That's the way I see it. [. . .]  
The main thing that I find that works in things like this in life is just be nice to people and talk to them. It was really not necessary to throw around the lawyers, get the lawyers involved in something like this. The money you spent on the lawyers, why not pay someone a reasonable amount for the domain name? It doesn't have to be thousands of dollars, it could be a couple hundred of dollars or something. Or free tickets to the football game.<sup>258</sup>

Of course, lawyers for colleges and universities would bristle at Mr. Stipe's reasoning, and rightfully so. If word spread that Baylor provided football tickets to those who arbitration panels are likely to view as cybersquatters, there soon would not be enough seats in Floyd Casey Stadium to accommodate all of those looking to strike a deal. Some institutions would rather pay thousands of dollars to their attorneys than pay one dollar to someone they view as using opportunistic or potentially coercive tactics.

But in Mr. Stipe's case, should his alumni status not have resulted in better treatment? Perhaps at least a phone call attempting to persuade him of the legal merits of the university's position? Likely some attempt at reaching an amicable settlement, before the university commenced the

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<sup>255</sup> Transcribed telephone interview of John Stipe by the author, June 17, 2014.

<sup>256</sup> See App. A, *infra*.

<sup>257</sup> Knowledge of these past efforts in the collective also might provide a handy roadmap for anyone looking to cause Baylor to incur more legal fees: simply register a domain name incorporating the university's name, then wait for the UDRP action to be filed.

<sup>258</sup> See App. A, *infra*.

legal processes, would have allowed the institution to protect its reputation while also protecting its trademarks. At the very least, <baylorbearssuck.com> could have been carved out of the UDRP filing involving the other four domain names, so as to avoid the question whether intellectual property protection was more important to the university than not being seen as an overzealous monitor of any market reference to the institution that might have a critical edge.

SCAD's ultimately unsuccessful ACPA lawsuit against one of its former professors provides a similar cautionary tale regarding the perils of enforcement, particularly when the targeted domain name resoundingly implicates expressive interests.<sup>259</sup> The case is instructive even though the university failed to take its ACPA claim to trial.<sup>260</sup> The speech at issue on the disputed domain names was directly critical of SCAD at various levels, including its hiring practices, treatment of students and employees, and academic policies.<sup>261</sup> The purpose of the defendant's web site, according to the court's assessment of the defendant's testimony in the case, was

to provide news and information to prospective students, parents and faculty members about Savannah College that they will not get from the College [ . . . ] to not only provide a site for [defendant's] "story" but to provide a site for others to report their experiences with the school, [including] information to foreign students on accreditation and other matters of concern, and to publicize little discussed problems such as crime on campus.<sup>262</sup>

The defendant posted on the primary disputed domain name approximately 200 emails from community members who had written him, sharing their criticism of SCAD.<sup>263</sup> Some of these communications were so harmful to SCAD that prospective students and faculty members decided not to join the institution because of them.<sup>264</sup> However, SCAD did not allege that any of the matter was defamatory, regardless of how unpleasant and damaging to its image the institution found the web site's contents. Allegedly not intending to confuse anyone as to the institution's sponsorship or affiliation with his critical web site, the defendant registered the disputed domain names, and used SCAD on the web site, not in reference to the institution, but as the acronym for "Share, Communicate, Announce, Disclose."<sup>265</sup>

The court ultimately agreed with the defendant that his expressive activities on the disputed domain name did not violate SCAD's trademark interests. Even though the speech was hurtful to SCAD, non-defamatory

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<sup>259</sup> Savannah Coll. Art & Design, Inc. v. Houeix, 369 F.Supp.2d 929 (S.D. Ohio 2004).

<sup>260</sup> The reasons for this determination are not readily apparent from the only written decision in the case. *Id.*

<sup>261</sup> *Id.* at 937.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 938.

<sup>264</sup> *Id.* at 939.

<sup>265</sup> *Id.* at 936.

speech of a critical and hurtful nature is not *per se* tantamount to speech that confuses consumers.

Encouraging is the fact that no ACPA lawsuits involving universities in scenarios such as the one presented in the SCAD case have surfaced since 2004. And while a handful of non-representative UDRP actions located in my study raise the prospect of how institutions deal with online criticism, the majority of UDRP disputes identified in the study provide no reason for concern on this point.

Those few, isolated cases described in this subsection, however, are instructive of the potential hazards that lurk for institutions considering contentious acquisition of domain names, particularly ones of a predominantly expressive character. The quintessential academic value of free expression risks being sidelined when a college or university's response to non-confusing online criticism of it—including in an alphanumeric domain name string otherwise not being used to display content—is to turn to trademark law and cyberdispute resolution mechanisms to attempt to capture the offending domain name. Using the UDRP or the ACPA to attempt to wrest control of a domain name from a critic—perhaps with the thought that the costs of involvement in the dispute will drive the defendant to settle—contradicts higher education's fundamental commitment to free expression, and for that reason alone should not be pursued.

#### B. *Brand Protection v. Brand Expansion*

Drawing on data from the study, in this subsection I provide a few examples of online enforcement activity by colleges and universities that makes sense from the perspective of brand protection.<sup>266</sup> However, the majority of the subsection focuses not on sensible brand protection efforts, but rather examples of what I deem senseless brand expansion by institutions of higher education, and the related harms this activity creates. While the line between online brand protection and brand expansion admittedly is a thin one, data discussed in this subsection illustrate why colleges and universities should be sensitive to the distinction. I provide examples of how some institutions seem lured into expanding their brand online when restraint might better serve them.<sup>267</sup> I conclude by conjecturing how higher education's accretion of trademark rights might help explain higher education's brand expansion activity online.

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<sup>266</sup> Brand and trademark technically are distinct concepts, although trademark law arguably recognizes and protects the interests of brands without explicitly acknowledging that it does so. See Deven R. Desai & Spencer W. Waller, *The Competitive Significance of Brands*, CPI ANTITRUST CHRONICLE, July 2014 (2), at 3.

<sup>267</sup> To be clear, data from the study do not provide the ability to make comprehensive conclusions regarding institutional brand protection versus brand expansion. Indeed, these concepts are themselves a bit subjective and subject to debate in any given instance. Instead, I use the data from the study as a starting point for giving voice to this critical, yet heretofore overlooked, aspect of higher education's construction of space online.

As noted in Part III above, over one-third of the UDRP disputes located in my study involved domain names that incorporated entirely a college or university name. Examples from the dataset include <westernwashingtonuniversity.com>, <americanu.com>, and <lomalinda.org>.<sup>268</sup> Enforcement of trademark rights in these cases easily is justified from the standpoint of brand protection. All institutions naturally want to see their names protected to some extent outside of the .EDU, if for no other reason than the .COM and other extensions are highly trafficked areas of the online world, and allowing those unaffiliated with higher education to use the name of a college or university for an unrelated commercial purpose understandably seems unfair.<sup>269</sup>

However, some examples of college and university brand protection in online space seem to be at the edges of the kinds of harm institutions should be concerned about. For example, who will navigate to the specific <baylorofdallas.com> before trying the general <baylor.edu>?<sup>270</sup> How many will try the lengthy <coloradomesauniversity.com> before trying the shorter <coloradomesa.edu>,<sup>271</sup> or the unlikely <indiana-edu.com> before trying the more likely <indiana.edu>?<sup>272</sup> Regardless, the propriety of seeking to reflect the institution's corporate name in online space is consistent with widely-recognized brand and trademark protection strategies in the non-profit and for-profit spheres. Additionally, to the extent that the original registrant of one of these domain names used it in a misleading or mischievous way—for example, the original registrant of <indiana-edu.com> “submitted e-mails to third parties misrepresenting that Complainant’s website was switching from the <indiana.edu> domain name to the disputed <indiana-edu.com> domain name”<sup>273</sup>—seeking to put an end to such use by filing a UDRP action is a reasonable and appropriate reaction.

Meriting more attention are some of the domain names involved in located UDRP actions that were categorized as “name-plus” (e.g., <stanford-talk.com>, <texaslonghornchecks.com>, <wvusports.com>, and <yale-explore.org><sup>274</sup>) and “other” (e.g., <uhealth.com>, <kuhf.com>,

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<sup>268</sup> See *Western Wash. Univ. v. aak / Azra Ari Khan*, WIPO Case No. D2004-0049 (decided April 5, 2004); *Amer. Univ. v. Nente.com*, NAF Claim No. FA0409000323761 (decided Oct. 15, 2004); *Loma Linda Univ. Adventist Sci. Ctr., et al. v. JM XTrade, Inc., Joseph Martinez*, WIPO Case No. D2009-0036 (decided March 11, 2009).

<sup>269</sup> *C.f.* AMY GAJDA, *THE TRIALS OF ACADEME* 115 (2009) (“universities seek legal protection not only for marketable inventions, but also for their marketable identity, with increasing attention paid to ‘branding’ and cyber rights”).

<sup>270</sup> See *Baylor Univ. v. Above.com Domain Privacy*, NAF Claim No. FA1306001504429 (decided Aug. 1, 2013).

<sup>271</sup> See *Mesa St. Coll. v. Don’t Panic Bus. Techs.*, NAF Claim No. FA1106001393045 (decided Aug. 8, 2011).

<sup>272</sup> See *Ind. Univ. v. Linh Wang*, NAF Claim No. FA0902001247095 (decided April 8, 2009).

<sup>273</sup> *Id.* at 2.

<sup>274</sup> See *Bd. of Trs. of the Leland Stanford Jr. Univ. v. Comp. Prod. Info. a/k/a Richard Leeds*, NAF Claim No. FA0302000146571 (decided Mar. 28, 2003); *Bd. of Regents, the*

<virtualhospital.info>, and <julecollinssmithmuseum.com><sup>275</sup>). Seeking ownership of these and other domain names often seems to reflect institutional attempts to expand brands and online footprints beyond the typical or expected uses of brands by institutions in relation to educational services, or what Samantha King and Sheila Slaughter, writing in 2004, described as “the increasing commodification of cyber properties and universities’ [. . .] growing vigilance in protecting them.”<sup>276</sup> For example, the University of Texas is not in the business of manufacturing personal or business checks, yet it deemed the registration and use of <texaslonghornchecks.com> as a parked page with pay-per-click advertising disruptive enough to its operations to seek transfer of the domain name via a UDRP action.<sup>277</sup> One might reasonably question why, even if Texas A&M licenses the use of its logos for use and sale by others on negotiable instruments. Is the institution prepared to pursue registrants of <texaslonghorncoffeemugs.com>, <gianttexaslonghorncoffeemugs.com>, or <dishwashersafetexaslonghorncoffeemugs.com>? What about typo variations of the aforementioned, or domain names incorporating even more obscure products licensed by the institution, such as <texaslonghorncoffins.com>? The point is that if the university’s brand is conceived in terms of everything on which its logos currently are affixed, or might be affixed, through a licensing arrangement, there is no articulable end in sight to the enforcement of institutional trademarks incorporated into domain names.

Similarly, what does West Virginia University’s decision to seek transfer of <wvusports.com> via a UDRP proceeding say about the institution’s conception of brand?<sup>278</sup> Would the institution have taken the same approach against the registrant of the hypothetical <wvuphysics.com> (for the physics department), or <wvuparking.com> (for the parking office)? As Baylor University’s UDRP forays exemplify (see Table A-1 in Appendix A), at some point seeking transfer of every domain name that

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Univ. of Tex. Sys. v. Domain Admin c/o Univ. of Tex., NAF Claim No. FA0806001208350 (decided July 31, 2008); W. Va. Univ. Bd. of Governors v. WV Sports Rep., WIPO Case No. D2011-2154 (decided Jan. 15, 2012); Yale Univ. v. Yale Explore and movcom, WIPO Case No. D2011-1367 (decided Oct. 3, 2011).

<sup>275</sup> See Univ. of Miami v. Marchex Sales, Inc., NAF Claim No. FA1301001478911 (decided Mar. 5, 2013); Univ. of Houston Sys. v. Salvia Corp., NAF Claim No. FA0602000637920 (decided Mar. 21, 2006); Univ. of Iowa v. Juraj Vyletelka, WIPO Case No. D2002-0349 (decided May 31, 2002); The Jule Collins Smith Museum of Fine Art at Auburn Univ. v. Khan, Zafar, NAF Claim No. FA1205001445535 (decided June 23, 2012).

<sup>276</sup> Samantha King & Sheila Slaughter, *Sports ‘R’ Us: Contracts, Trademarks, and Logos*, in SHEILA SLAUGHTER & GARY RHOADES, *ACADEMIC CAPITALISM IN THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION* (2004), at 272.

<sup>277</sup> See Bd. of Regents, Univ. of Tex. Sys. v. Domain Admin, NAF Claim No. FA0806001208350 (decided July 31, 2008).

<sup>278</sup> See W.Va. Univ. Bd. of Governors on and behalf of W.Va. Univ. v. WV Sports Report, WIPO Case No. D2011-2154 (decided Jan. 15, 2012).

adds a generic word to the institution's trademark becomes unreasonable, even if prevailing law permits this activity and the brand owner is likely to prevail if it pursues it. Consider, in particular, <baylorsalsa.com>, <bayloryellowpages.com>, <baylorstore.com>, <baylorbanks.com>, and <baylorflorist.com>, transfer of all of which Baylor University sought and achieved via UDRP actions.<sup>279</sup>

Auburn University's UDRP over <julecollinssmithmuseum.com> presents related questions. In the actual UDRP decision, the panelist noted that the respondent had been using the domain name to display content "designed to mimic Complainant's official website which featured links to the <ticketmayor.com> domain name that is owned by Respondent. The domain name currently resolves to Respondent's <lawperiscope.com> site that advertises legal services."<sup>280</sup> These uses to which the respondent put the disputed domain name no doubt were harmful to Auburn's art museum, but would Auburn have pursued the UDRP if only the domain name had been used to display a parked page with pay-per-click ads, as was the case when the University of Utah filed a UDRP against the registrant of <redbuttegardens.org>, or the University of Houston filed a UDRP against the registrant of <kuhf.com>?<sup>281</sup> What if no one else had registered <julecollinssmithmuseum.com> and it were available to register; would Auburn have sought to register it?<sup>282</sup>

The problem presented by enforcement efforts like these is that once an institution decides that uses of domain names like <julecollinssmithmuseum.com>, <redbuttegardens.org>, and <kuhf.com> merit filing a UDRP complaint, articulating a stopping point may be hard

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<sup>279</sup> See *Baylor Univ. v. Domains by Proxy, Inc., a/k/a Mark Felton a/k/a Thomas Bassett a/k/a William Bunn a/k/a Fertility Specialists of Dallas a/k/a Becky Chatham a/k/a Amanda Scott a/k/a Nathan Flaga a/k/a Lisa Payne a/k/a Victor Weir III*, NAF Claim No. FA0802001145651 (decided May 26, 2008) (concerning <baylorsalsa.com> and <baylorflorist.com>, among other domain names); *Baylor Univ. v. Earth Yellow Pages*, NAF Claim No. FA0907001274424 (decided Aug. 31, 2009) (concerning <bayloryellowpages.com>); *Baylor Univ. v. Baylor Univ. c/o Bob Hartland*, NAF Claim No. FA0611000841917 (decided Jan. 2, 2007) (concerning <baylorstore.com>, among other domain names); *Baylor Univ. v. Domain Park Ltd.*, NAF Claim No. FA0802001142634 (decided Mar. 25, 2008) (concerning <baylorbanks.com>, among other domain names).

<sup>280</sup> *The Jule Collins Smith Museum of Fine Art at Auburn Univ. v. Khan, Zafar*, NAF Claim No. FA1205001445535 (decided June 23, 2012), at 3.

<sup>281</sup> Red Butte Garden is the name of a botanical garden and arboretum operated by the University of Utah. See <redbuttegardens.org> (last visited June 13, 2014). KUHf are the call letters of a radio station affiliated with the University of Houston. See <kuhf.com> (last visited June 13, 2014).

<sup>282</sup> The most likely answer to this question seems to be "perhaps." Auburn University's library purchased three top-level domain names in the early 2000s, because it wanted "memorable and advertising-savvy URL[s]" to use for promotional purposes. See Robert H. McDonald, *Why Your Library Needs a .Org, .com, and .Net!*, SMALL COMPUTERS IN LIBRARIES, 2001 WLNR 13639837 (Sept. 1, 2001). Interestingly, as of this writing, the three domain names the library purchased and once used (i.e., <aublicrary.org>, <aublicrary.com>, and <aublicrary.net>) are available for registration.

to do given the array of activities in which colleges and universities are involved, and the multitude of programs sponsored by or units contained within any given institution. If the University of San Diego—whose sports teams are known as the Toreros (Spanish for *bullfighters*)—is willing to file a UDRP to obtain both <thetorerostore.com> and <my-torerostore.com>, which it did, which other domain names involving its team name would it or should it pursue?<sup>283</sup>

More to the point is that just because colleges and universities can seek to own domain names like these does not mean they should. In the referenced case involving the University of Houston and <kuhf.com>, the university enjoyed only common law rights in KUHF as used in relation to radio station services, and already owned registrations for both <kuhf.org> and <kuhf.net>. Apparently not satisfied that the non-profit, listener-supported radio station had two Internet domain name registrations in extensions commonly thought of as noncommercial, the university filed a UDRP action against the registrant of <kuhf.com>, who happened to be located in Riga, Latvia.<sup>284</sup> The registrant used the disputed domain name to display pay-per-click advertisements, or as the panelist put it, “links to competing and non-competing commercial websites from which Respondent presumably receives referral fees.”<sup>285</sup> Even though (i) the University of Houston owned no federal trademark registration for KUHF, (ii) domain names with four or fewer numbers or letters in them commonly sell on secondary markets for thousands of dollars, and (iii) KUHF literally could stand for many different things, in many different languages, the panelist found bad faith by the respondent, concluding that there was no “other possible explanation for Respondent choosing the letters KUHF, meaningless except as Complainant’s call letters.”<sup>286</sup>

To be sure, the respondent in this case was in the business of buying and selling domain names, many of which it uses only by displaying parked pages with pay-per-click advertising. But absent any offer to sell the domain name to the complainant, or active use of it by the respondent in a way that hurt the university—neither of which the panelist found to be present—the university’s interest in filing the UDRP seems questionable. The university appears to have pursued a legal process to obtain the domain name simply because it could, representing a vindication of the powerful apparatus of a public institution of higher education over an

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<sup>283</sup> Incidentally, as of June 2014, <my-torerostore.com> was available to register, and <thetorerostore.com> failed to resolve, not even four years after the UDRP decision awarding the transfer of those domain names to the university. *See Univ. San Diego v. Hot Nix Webs*, NAF Claim No. FA1010001355316 (decided Dec. 9, 2010).

<sup>284</sup> *See Univ. Houston Sys. v. Salvia Corp.*, NAF Claim No. FA0602000637920 (decided Mar. 21, 2006).

<sup>285</sup> *Id.* at 4.

<sup>286</sup> *Id.*

obscure foreign company whose business model few understand or respect.<sup>287</sup>

The motivation for brand expansion here may have been sound if the university contemplated using the domain name in a standalone, content-rich way, but even that explanation falls short. As of June 2014, a visit to <kuhf.com> redirects visitors to <houstonpublicmedia.org>, which suggests that the radio station's primary conception of brand no longer revolves around its call letters.<sup>288</sup> Regardless, the university has added to its arsenal of intangible rights a lightly-trafficked domain name it must pay to maintain, whose letters could mean anything, but whose availability to the rest of the world now is diminished, for as long as the university chooses to maintain the registration.

Also on the spectrum of brand expansion activity are efforts by two universities to wrangle control of domain names related to the field of healthcare, an increasing source of revenue for universities. In one case the university was successful, in the other it was not. The first dispute, brought by the University of Miami, involved the domain name <uhealth.com>.<sup>289</sup> The university owned only a design mark registration, registered in 2009, for a graphical rendering of the words UHEALTH UNIVERSITY OF MIAMI HEALTH SYSTEM, and enjoyed only common law rights in UHEALTH, when it filed the UDRP in 2013.<sup>290</sup> The disputed domain name was first registered in 2002, then acquired by the respondent in 2004, well before the university's claim of first use of the UHEALTH mark, in December of 2007.<sup>291</sup> Although the arbitration panelist was generous to the University of Miami in finding the institution had established rights in the mark UHEALTH, the panelist declined to find that the respondent had registered and used the domain name in bad faith, and therefore ruled in favor of the respondent.<sup>292</sup>

The second dispute dates back to 2002 and involved the University of Iowa's attempt to obtain ownership of <virtualhospital.info>, which it

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<sup>287</sup> Even presuming that the Latvian registrant had the University of Houston in mind when registering the offending domain name is questionable at best. Four-letter domain names are valuable precisely because four letters, not registered as a trademark, can stand for nearly anything in multiple languages (not just English) across the world.

<sup>288</sup> Some evidence exists that the university's branding objectives may have changed in 2010, when it acquired another radio station formerly operated by students at Rice University. See Karen Everhart, *Adding 2nd Service in Houston, KUHF Buys Rice U. Station*, CURRENT, Aug. 23, 2010, <http://www.current.org/wp-content/themes/current/archive-site/radio/radio1015houston.shtml>. Assuming for the sake of argument that the acquisition led the university to back away from touting KUHF as a brand, in favor of the umbrella term "Houston Public Media," notable is the university's decision to maintain the <kuhf.com> registration for four years as essentially unused property.

<sup>289</sup> See *Univ. of Miami v. Marchex Sales, Inc.*, NAF Claim No. FA1301001478911 (decided Mar. 5, 2013).

<sup>290</sup> *Id.*; see also U.S. Reg. No. 3,629,399.

<sup>291</sup> *Id.*

<sup>292</sup> *Univ. of Miami v. Marchex Sales, Inc.*, NAF Claim No. FA1301001478911 (decided Mar. 5, 2013).

accomplished.<sup>293</sup> In that case, the university actually owned a federal trademark registration for VIRTUAL HOSPITAL, dating back to 1997, as used in relation to “providing medical information, education, and instruction through database accessible by remote computer.”<sup>294</sup> The respondent, located in Zilina, Slovakia, registered the disputed domain name in 2001.<sup>295</sup> Prior to filing the UDRP complaint, the university wrote the respondent, asserted its trademark rights, and sought to purchase the disputed domain name from him.<sup>296</sup> The respondent replied that he “didn’t intend to break intellectual property rights of The University of Iowa. I have prepared another activities (sic) on my domain virtualhospital.info. With the stopping of those activities I shall lose 10,000 USD. This is my offer to sell my domain virtualhospital.info”<sup>297</sup> The respondent further alleged that the disputed domain name was the English-language equivalent of two domain names that he had registered in the ccTLD-extensions for the Slovak Republic and the Czech Republic (i.e., <virtualnanemocnica.sk> and <virtualninemocnice.cz, respectively).<sup>298</sup>

The university was unwilling to pay the respondent more than the price of registering the domain name. The university also alleged that it “is actively involved in trademark licensing activities that utilize the term VIRTUAL HOSPITAL.”<sup>299</sup> Although the nature of those activities was not specified by the university, the panelist rather generously did his own fact-finding and found that the university had licensed use of its mark to hospitals in various countries where the mark also was registered, including Australia, Iceland, Japan, and Venezuela.<sup>300</sup> Because of the registrant’s offer to sell the domain name to the university for \$10,000, the panelist found that the bad faith element of the UDRP had been met, notwithstanding the respondent’s plausible arguments that he intended to use the domain name for legitimate non-commercial purposes, and was not aware of the university’s trademark registration in the U.S.<sup>301</sup> In short, the panel found that the university had a more compelling claim to the disputed domain, although reading the panelist’s decision, one cannot help but conclude that the respondent’s inability to fluently communicate in English jeopardized his ability to mount what otherwise might have been an effective defense.<sup>302</sup>

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<sup>293</sup> See *Univ. of Iowa v. Juraj Vyletelka*, WIPO Case No. D2002-0349 (decided May 31, 2002).

<sup>294</sup> See U.S. Reg. No. 2,058,573.

<sup>295</sup> *Univ. of Iowa v. Juraj Vyletelka*, WIPO Case No. D2002-0349 (decided May 31, 2002).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> Others have noted the bias of some UDRP panels toward parties located in Western democracies, due to the abundance of domain name registries existing and operating in such countries. See, e.g., Julia Hörnle, *The Uniform Domain Name Dispute Resolution*

Both the University of Miami and the University of Iowa UDRP actions are remarkable in that they show the extent to which prominent universities are willing to go to seek reflection of ancillary trademarks of theirs in online space.<sup>303</sup> In the Miami case, even a poor set of facts did not dissuade the university from seeking control of a domain name that did not even explicitly reference the university. The university's cause was hurt by the fact that it waited over ten years from the registration of the disputed domain name before filing a UDRP action. Additionally, the university did not enjoy federal trademark rights in UHEALTH (and even then only in a design mark) until seven years after the domain name was registered, which also prejudiced its efforts.<sup>304</sup> The Iowa case shows that even far-flung international actors are not immune from the brand expansion and enforcement efforts of American universities.<sup>305</sup>

In another twist on brand expansion, at least one university has used the UDRP to claim rights in a domain name that it alleges references *an alumnus* of the institution. Of course, the alumnus is no typical graduate, but rather a professional football player who won the Heisman Trophy while playing for the institution in question, Baylor University. Baylor filed the UDRP in November 2013, nearly three years after Robert Griffin III—also known by his nickname, RG3—graduated from the university, and more than two years after he threw his last pass as quarterback of Baylor's football team and entered the NFL.<sup>306</sup> The university owns no trademark in RG3's legal name or nickname, yet felt aggrieved when a fantasy football enthusiast registered the domain names <rg3baylor.com> and <rg3bu.com> and began using them for fantasy football purposes.<sup>307</sup> Owning federal registrations for both the words BAYLOR and BU, the university asserted that the disputed domain names were confusingly

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*Procedure: Is Too Much Of A Good Thing A Bad Thing?*, 11 SMU SCI. & TECH. L. REV. 253, 274 (2008) (“For example, for the .com generic top-level domain, most registrars are based in the U.S., Canada, Western Europe, some Asian countries [ . . . ], Australia, and New Zealand. However, a .com domain name registrant in, for example, Poland or Thailand would have to sign a registration agreement in a foreign language and thus conduct the proceedings in that language, as well as bear the cost of translation.”).

<sup>303</sup> By *ancillary* I mean trademarks that do not consist of their name or the name of their athletic teams. My supposition is that few, even in Miami and Iowa City, are likely to associate UHEALTH and VIRTUAL HOSPITAL with the two respective institutions.

<sup>304</sup> See text accompany *supra* note 291.

<sup>305</sup> Both of these cases support the contention that academic medicine increasingly looks like commercial medicine, with more dollars being spent on branding strategies that might be more usefully funneled toward patient care. Accord Thomas E. Andreoli, *The Undermining of Academic Medicine*, 85(6) ACADEME 32 (Nov./Dec. 1999) (arguing that “academic values are losing out to mercantilism,” and that patient care has suffered as a result).

<sup>306</sup> Because he redshirted a season, RG3 played his final season at Baylor (in 2011) as a student pursuing a masters degree in communications. See [http://en.wikipedia.org/wiki/Robert\\_Griffin\\_III](http://en.wikipedia.org/wiki/Robert_Griffin_III) (last visited July 17, 2014).

<sup>307</sup> See *Baylor Univ. v. Justin Cox*, NAF Claim No. FA1311001530937 (decided Dec. 20, 2013).

similar to its trademarks.<sup>308</sup> The panelist agreed, finding that the addition of the descriptive term ‘rg3’—“likely meant as an allusion to Robert Griffin III, who achieved fame while playing for Complainant’s football team”—did not vitiate Baylor’s rights in the domains.<sup>309</sup>

One wonders whether RG3—whose nickname as a professional athlete clearly has commercial value *to him*—prompted this enforcement activity, or even is aware of it. Visits in summer 2014 to the two domain names, whose transfer Baylor successfully achieved in December 2013, showed that neither resolved to a web page, which may suggest that RG3 did not benefit from his alma mater’s enforcement of his name. To what use these domain names will be put in the future, if any, will be interesting to watch.<sup>310</sup>

Many of the UDRP actions described in this subsection reflect an expanding conception of the university, one whose metes and bounds no longer are contained by institutional name and athletic team names alone. As institutions’ conceptions of brand expand, so too will their perceived need to seek out more space online, and fight those who may have gotten there first.

Here, the interplay between trademarks and domain names merits reiteration and discussion. One must have rights in a mark in order to prevail in a UDRP action. Owning federal registration of a mark—while not necessary in order to prevail under the UDRP—enhances one’s prospects of winning a UDRP action when one finds the mark incorporated into a disputed domain name. Thus, a trademark-domain name feedback loop exists: the stronger and more robust rights in marks that institutions acquire, in the form of a federal trademark registration or multiple registrations for different versions of the mark (or in different

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<sup>308</sup> As is typical of UDRP proceedings, a federal trademark registration provides wide latitude to the complainant mark-holder in defining the extent of its ownership interest. Accordingly, the panelist seemed not to consider the fact that BU could mean anything, including Boston University, which owns the registration for <bu.edu>.

<sup>309</sup> Baylor Univ., *supra* note 307, at 5.

<sup>310</sup> Beyond Baylor, the RG3 UDRP action stands as an intriguing inflection point on the state of commercialization in higher education and intercollegiate athletics. As has come to light in recent litigation concerning the NCAA’s profiting from the use of student-athlete images and likenesses, institutional commercial interests in student athletes and the interests of the students themselves do not always co-align. See Brad Wolverton, *Documents in O’Bannon Case Raise Questions About Athletes’ TV Rights*, CHRON. HIGHER EDUC., June 13, 2014, <http://chronicle.com/article/Documents-in-O-Bannon-Case/147137/>; see also King & Slaughter, *supra* n. 276 (discussing deals that collegiate athletic coaches enter into with sportswear companies that may not be in the best interest of student-athletes). Sometimes they even compete. Indeed, as student athletes graduate or leave for professional leagues, the commercial interest of their alma maters in them grows, with universities channeling the graduates’ fame toward the institution’s own brand expansion and enforcement efforts, often without seeking their permission or providing them recompense. Baylor’s RG3 UDRP action stands as another example of this activity, beyond the now-familiar realm of the use of student-athlete images and likenesses in video games that financially benefitted the NCAA, member institutions, and their licensing agents to the exclusion of former student athletes.

classes), the more domain name enforcement efforts present themselves as options to pursue, and success in those efforts becomes more likely, and thus attractive, to institutional decision makers. In short, the more trademark rights an institution accumulates, the greater the online footprint the institution is able to claim in space outside of the .EDU, and the more attractive those spaces may appear to those charged with making enforcement decisions.

College and university behavior in the realm of trademark acquisition is relevant for this reason. Data indicate that lately institutions have shown great zeal in accumulating rights in descriptive terms and phrases associated with the institution, no matter how loosely.<sup>311</sup> Increasing numbers of college- and university-owned trademarks refer not to the institution as a whole (in the form of its official name, seal, logo, nickname, or athletic team name), but rather to constituent parts of the institution, such as schools, programs, or even curricular initiatives.<sup>312</sup> Higher education's online presence may soon reflect these trademark trends, if it does not already. Domain names like <harvardessays.org>, <cornellrentals.com>, <yaleparentingcenter.org>, and <stanfordevents.com>—all of which were identified in the study conducted for this Article—may be quite commonly registered by colleges and universities, without their ever rising to the level of a UDRP dispute.<sup>313</sup> We simply do not know because institutions do not divulge this information, and conducting a comprehensive search for all domain names owned by colleges and universities would be expensive and cumbersome.

To the extent colleges and universities are motivated to seek online space to further their brands, we do know that such efforts are far cheaper if carried out proactively as opposed to reactively. The cost of registering and maintaining a domain name is far less than pursuing arbitration or litigation to obtain the domain name once the institution realizes it does not own it. Whether we will see fewer UDRP actions filed by colleges and universities in the years to come, due to their becoming savvier and more proactive about domain name acquisition, will depend in part to what extent institutions have learned from the past and implemented internal procedures to help them systematically manage their acquisition and maintenance of domain names. As described in the following subsection,

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<sup>311</sup> See Rooksby, *supra* note 10 at 390 (depicting significant rise in trademark activity by colleges and universities in the past 15 years).

<sup>312</sup> *Id.* at 395.

<sup>313</sup> See Pres. & Fellows of Harvard Coll. v. A Happy DreamHost Customer/Cary Humphries, WIPO Case No. D2010-2184 (decided May 23, 2011) (concerning <harvardessays.org>); Cornell Univ. v. Steven Wells, NAF Claim No. FA0305000158423 (decided July 9, 2003) (concerning <cornellrentals.com>); Yale Univ. v. Whois Agent, Whois Privacy Protection Service, Inc. / john chow, imapa, WIPO Claim No. D2013-0405 (decided Apr. 25, 2013) (concerning <yaleparentingcenter.org>); The Bd. of Trs. of the Leland Stanford Jr. Univ. v. Comp. Prod. Info. a/k/a Richard Leeds, NAF Claim No. FA0303000146571 (decided Mar. 28, 2003) (concerning <stanfordevents.com>, among other domain names).

the data collected for this Article provide some basis for examining the cogency of institutional decision-making regarding domain name acquisition and management strategies, although many questions remain unresolved.

### C. *Mastering Domains?*

This subsection considers the extent to which higher education's construction and maintenance of online space, obtained using contentious dispute resolution mechanisms, seems to reflect coherent strategies and sensible goals. I focus in particular on the ownership and use of domain names acquired by colleges and universities through contentious processes.

First though, on a general level, findings from the study conducted for this Article provide useful preliminary insight into administrative decision-making and conceptualization of online space. For reasons of brand expansion and brand protection discussed above, many institutions of higher education place value on controlling spaces outside of the .EDU extension.<sup>314</sup> While the number of UDRP actions filed by colleges and universities since the UDRP's inception is not overwhelming compared to the number of such institutions, data do seem to indicate a rather steady comfort with the use of the dispute resolution mechanism by colleges and universities since its inception. These findings contrast sharply with the data concerning college and university involvement in ACPA lawsuits, which have been *de minimis* from the start.<sup>315</sup>

Salient from the standpoint of institutional decision-making concerning intellectual property is what institutions that win transfer of disputed domain names under the UDRP choose to do with those domains. Analysis of the disputed domain names located in my study revealed that fully one-third of them were available to register or not registered to the institution that had won transfer of the domain name, suggesting that the institution allowed the registration to lapse, whether intentionally or unintentionally.<sup>316</sup> This finding challenges any assumption that higher education's battles for cyberspace necessarily concern domain names that have some lasting value to the institution. In many cases, the data show that the institution no longer owns the domain name it once deemed important enough to fight over, not even five years after winning a UDRP action concerning the domain name.<sup>317</sup> While this finding may not be unique to higher education—other complainants, outside of higher education, often choose not to renew domain name registrations they win

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<sup>314</sup> See Part IV.B, *supra*.

<sup>315</sup> This finding is not unique to higher education. ACPA lawsuits take longer to resolve and are more expensive to pursue than UDRP actions, which likely explains in part why rights holders of all sorts choose to bring more UDRP actions than ACPA lawsuits.

<sup>316</sup> See *supra* Part III.A.5.

<sup>317</sup> For five domains, the institution that initially won their transfer did not hold on to them, yet deemed them important enough to go after again, in subsequent UDRP actions, once someone else registered them. See *supra* note 198.

through arbitration—the finding does raise the question to what extent the institution’s involvement in the UDRP action was motivated by what a decision maker might deem practical necessity, as opposed to mere legal opportunity.

Also insightful is what institutions choose to do with the domain names that they have won and still own. A visit to these domain names revealed that over 55% of them were not being used in any effective way.<sup>318</sup> That is to say, instead of displaying content, or redirecting visitors to another web site affiliated with the institution, the majority of domain names that colleges and universities have fought to win display no meaningful information at all—either they did not resolve to a web page, or they displayed a parked page upon visit.<sup>319</sup> This finding suggests that institutions sometimes pursue transfer of domain names that they do not intend to use.

Admittedly, good reason exists as to why institutions choose not to use some of the domain names they have won. For example, Baylor University understandably does not want to redirect visitors to <baylorgirls.xxx> to the university home page, or use it to display content concerning its female students. Nor does it want to see anyone else be able to register the domain name, so it continues to pay the registration fee and does not use it.<sup>320</sup> But why does Drexel University continue to pay to maintain its registration of <drexel.org>, which it won in a UDRP action in 2001, when it does not effectively use the domain name to display any content to the public? Other examples of non-used domain names, still owned as of July 2014 by the institutions that achieved their transfer through UDRP actions, include <tufts.mobi>, <notre-dame.com>, and <universityofcentralarkansas.com>.<sup>321</sup>

While one plausible explanation for the apparent non-use of these domain names by these institutions could be that they are using them for non-public facing purposes—namely, as domain names through which to route email—the more likely explanation seems to be that: (1) maintaining ownership of the domain name, but not effectively using it, provides some strategic value to the institution in that it blocks others from registering it, or (2) the domain name actually is of little importance to the institution, but the low cost of maintaining the registration means the institution faces no pressing reason to let go of it.

Regardless of the explanation, the result is the same: colleges and universities are willing to spend not insignificant sums of money to obtain

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<sup>318</sup> See *supra* Part III.A.6.

<sup>319</sup> *Id.*

<sup>320</sup> Harvard University must not feel the same way about <harvardgirls.school.com>; as of Spring 2014, it was available to register.

<sup>321</sup> See *Tufts Univ. v. Oneida Advisors LLC*, NAF Claim No. FA 0808001219154 (decided Sept. 29, 2008) (concerning <tufts.mobi>); *Univ. of Notre Dame v. 24/7*, WIPO Case No. D2001-1288 (decided Dec. 19, 2001) (concerning <notre-dame.com>); *Univ. of Central Ark. V. John Simms & John Barry*, WIPO Case No. D2002-0316 (decided May 31, 2002) (concerning <universityofcentralarkansas.com>).

and maintain domain names that they do not actually use in any traditional or meaningful sense. To the extent that the second explanation proffered above explains decision making more than the first, colleges and universities may be adrift in some of the cyberbattles they choose to wage, lacking facility when it comes to picking the kinds of fights that are worth fighting. The array of domain names located in my study that are of seemingly little consequence to higher education's core operations at least raises this question.

The competing explanation, reflected in the first explanation proffered above, is that colleges and universities show a savvy ability to acquire intellectual property for its strategic defensive value. For-profit corporations often amass domain name registrations for the purpose of holding them, not using them.<sup>322</sup> If an attorney comes to know of a client's trademark that is reflected in an existing domain name the client does not own, filing a UDRP action against the domain name's registrant is a common strategy if the domain name might plausibly find its way into the search bar of any would-be customer or fan of the client's. In short, preventing someone else from owning a domain name—the use or non-use of which potentially could hurt the brand owner, or distract its fans or customers—often has value to the brand owner.

Relevant to this perspective is the fact that as the Internet has matured and its users have become savvier about the nuances and functionalities of online space, prevailing business thinking in some quarters has shifted. A company cannot plausibly own every domain name that incorporates a company's trademarks. Variations of the English language are too many, as are the tools of the cybersquatter (such as using hyphens or common typos in the alphanumeric string of the domain name) and the trademark holdings of some companies, to make the mass acquisition of domain names an advisable or even feasible defensive business strategy. As the venerable computer science scholar Milton Mueller has noted, "it is impossible for a company to prevent someone from incorporating its name into a domain name in some way. [. . .] [T]he DNS supports too many

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<sup>322</sup> See, e.g., Todd Shields, *Expansion of Web Upsets Businesses*, THE JOURNAL GAZETTE, 2013 WLNR 9336541 (Apr. 16, 2013) (noting that risk-averse companies defensively register domain names); Mark S. Sparschu, *New Trademark and Copyright Protection Issues Impacting IP Attorneys and Brand Holder Clients*, ASPATORE, 2012 WL 697447, at \*2 (Feb. 1, 2012) (noting the struggle brand owners face in choosing which domain names to defensively register in view of limited budgetary resources); Taylor Buley, *Um.whatever*, FORBES, Oct. 30, 2008, <http://www.forbes.com/forbes/2008/1117/038.html> (citing a report that estimated the cost to businesses of defensive domain name registration in the new gTLDs to be \$1.6 billion); Karol A. Kepchar, *Next Generation Domain Name Strategies: .COM, .NAME, .BIZ, .INFO . . . Dot What?*, METROPOLITAN CORP. COUNSEL, 2002 WLNR 15012613 (Feb. 1, 2012) (noting the value to brand owners of defensive domain name registrations across TLDs).

variations to make it possible to preempt criticism or capture all possible references to a company or a product.”<sup>323</sup>

These realities, and the conflicting explanations for the trends identified in my study’s data, leads one to question whether college and university use of the UDRP reflects a mature understanding of brand protection in cyberspace, an outdated conception of brand protection in cyberspace, or something else? In short, in defining their domain outside of the .EDU space, have colleges and universities mastered when UDRP enforcement makes sense, and when it does not?

My study’s data, which did not account for the strategic goals of decision makers responsible for initiating the contentious actions identified, unfortunately are inconclusive on this point. Follow-up qualitative research into this question likely would find that the answer to when enforcement activity makes sense is without an objective answer across rights holders, with higher education being no different. Tolerance for risk and expense, and the value of perceived rewards that may come from enforcement, undoubtedly vary by institution. Nearly 15 years of UDRP and ACPA lawsuit data provide some illumination, but in the history of the Internet, these limited data may tell us little about enforcement strategies for the future. The fact that domain name enforcement may be styled as low stakes—compared to, say, patent infringement litigation, cases involving torts on campus, or a discrimination or tenure denial lawsuit—only adds weight to a hypothesis that decision making in this realm likely is more idiosyncratic than it is reflective of established policies.

#### D. *Higher Education’s Cyber Future*

What does the future hold for college and university battles for cyberspace? Informed by findings from the study, this subsection tenders some general prognostications, as well as offers modest considerations that should inform college and university decision making in this space.

##### 1. Future Battles for Online Space

Past behaviors by colleges and universities in the realm of cyberspace may not necessarily be predictive of tomorrow’s challenges. The advent and sudden ubiquity of apps and cloud-based user interfaces provide plausibly attractive reasons for thinking that fighting for ownership of domain names is a phenomenon of the past. Today’s Internet users seeking information about a given institution probably are just as likely to visit a virtual store on their smartphone or tablet device to see if “there is an app for that,” or to conduct extensive search engine searches or visit known

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<sup>323</sup> MUELLER, *supra* note 31 at 251 (further calling any attempt to protect massive clouds of names “pointless unless draconian and undesirable restrictions are placed on the use of DNS”).

third-party social media platforms, as they are to reach out into the .COM space and enter a precisely-worded domain name in a search bar involving an ancillary aspect of an institution. In short, students seeking housing in Ithaca know to go to Craigslist or Facebook; who cares about <cornellrentals.com>?<sup>324</sup>

But so long as institutions continue to listen to the advice of in-house counsel and outside counsel specializing in intellectual property, higher education's battles for cyberspace likely will continue, no matter the enduring strategic importance *vel non* of domain names. Institutions will battle those who register domain names that are being used in ways that could reflect poorly on the institution, or cause confusion as to the institution's endorsement, affiliation, or approval (as was the case for <cornellrentals.com>) of content displayed at the domain name.

And rightfully so from a practical and legal perspective. While the failure to enforce a trademark against a cybersquatter typically does not put the institution at risk of losing rights in its mark, the existence of a right and a technical grievance with a third party can make low-stakes enforcement look appealing. To the extent that institutions are too quick to take advantage of these proceedings signals not a shortcoming in the law—the cards are stacked generously in favor of all mark holders, not just colleges and universities—but rather an opportunity for institutional decision makers to focus on the implications of contentious domain name acquisitions.

The challenge contentious domain name acquisition presents for higher education is therefore mostly one of policy: articulating institutional interest in enforcing intellectual property online. Will the institution take a constrained approach, seeking to limit the domain name battles it chooses to wage, or will it view its trademark holdings as manifest destiny, seeking to reflect in online space all manner and variation of its intangible rights?<sup>325</sup>

What I call a constrained approach to this subject recognizes that trademark rights enforcement should be viewed with reluctance when identified harms are more theoretical than actual. This approach is more consistent with a public-facing, public-serving conception of higher education and its treatment of intellectual property, albeit one that policymakers increasingly find unsustainable in view of budgetary pressures and stiff market competition. Often in seemingly inevitable fashion, when policy makers consider institutional intellectual property, higher education's might makes right and individual institutions' legal rights make might. And so the cycle continues.

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<sup>324</sup> <cornellrentals.com> was the subject of a successful UDRP action brought by Cornell University in 2003. *See* Cornell Univ. v. Steven Wells, NAF Claim No. FA0305000158423 (decided July 9, 2003). Respondent was found to have used the domain name in connection with a web site “offering assistance to apartment seekers and landlords in locating housing in Ithaca, New York.” *Id.* at 2.

<sup>325</sup> Institutions face a similar choice when it comes to acquisition and enforcement of other forms of intellectual property.

Although protecting the brand does not require the institution to expand the brand, the former often elides into the latter, whether the institution intends that consequence or not. The problem stems in part from the fact that the modern college or university must be all things to all people. Its constituents are many, as are its purposes. In higher education's ever-expanding quest for revenue, hardly any activity, endorsement, or affiliation is unbelievable, meaning more cyberbattles likely wait to be fought. Colleges and universities no longer exist merely to provide educational services; their boundaries with all aspects of the commercial sphere are much more porous. In this new world order for higher education, protecting the brand first requires defining the brand, and the definition often seems to flow from the efforts at protection. In short, combining a college or university trademark in a domain name with nearly any descriptive word or phrase—be it a product, service, geographic place, or even a famous alumnus's nickname—may lead to legal action, no matter the actual extent of harm to the institution.<sup>326</sup>

A potential lesson to be drawn from this Article is a sense of when contentious acquisition of domain names is a path a college or university ought to pursue. Recognizing that every institution is different, as is every domain name, and coming from the perspective that a constrained approach to intellectual property enforcement better serves higher education than opportunistic enforcement, I offer the following nine questions as ones institutions should consider as they determine whether to pursue enforcement action to obtain a domain name:

1. **Does the disputed domain name incorporate a trademark that people outside of the institution actually associate with the institution?** If not, chances are the disputed domain name represents merely an enforcement opportunity, not an enforcement necessity, driven by the fact the institution owns registration of a trademark not central to its core operations. Not every trademark owned by the institution is of equal importance. Online enforcement opportunities should be viewed accordingly. Disputes over domain names not involving an institution's trademarked name, or the use of the institution's trademarked name in combination with something else, should be carefully considered and in most instances avoided.<sup>327</sup>
2. **Is the disputed domain name one that the institution envisions using in a meaningful sense (i.e., using it to display content), years into the future?** If not, chances are the disputed domain

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<sup>326</sup> Examples of this activity from the dataset, not previously mentioned in the Article, include <huskerfevercard.com>, <sufacebook.com>, and <ucfindie.com>. *See* Bd. of Regents of the Univ. of Neb. v. Karolke, WIPO Case No. D2003-0307 (decided Jan. 7, 2003); Syracuse Univ. v. Red Ant Hosting, NAF Claim No. FA0409000332354 (decided Nov. 9, 2004); Univ. of Central. Fla. V. Knight Publ'g, Inc., NAF Claim No. FA0505000485962 (decided July 13, 2005).

<sup>327</sup> In my study, I labeled as "other" the types of domain names involved in disputes of this nature. *See supra* Part II.A.1 & Part III.A.3.

name is not essential for the institution to own, and an enforcement proceeding should not be brought.

3. **Did the disputed domain name come to the attention of an internal decision maker because of a reasonable complaint of confusion by someone who encountered it?** If not, the institution should seriously question the extent of any harm perceived. Simply because the domain name registration exists, the domain name displays a parked page, or legal counsel brought the domain name's existence to the attention of someone internally does not mean that the institution should act.
4. **Is the disputed domain name being used to criticize or parody the institution in a way that is unlikely to confuse consumers into thinking that the institution is affiliated with the domain name?** If so, the institution should decline to act, recognizing that asserting trademark rights to obtain the domain name is inconsistent with the traditional academic commitment to free expression (and, in any event, would be futile in stopping the critical expression).
5. **Is the disputed domain name actively being used in a way that tarnishes the institution (e.g., by associating it with pornography, or illicit or illegal activity)?** If so, seeking to capture the domain name is reasonable, provided the tarnishment is actual and not merely hypothetical. Domain names merely capable of tarnishing the reputation of the institution, but not actively being used for such purpose, do not present a compelling case for action.<sup>328</sup>
6. **Is the disputed domain name being used in a commercial manner, in such a way that consumers reasonably may be confused into thinking that the domain name is affiliated, sponsored, or endorsed by the institution?** If so, enforcement action may be justified. However, decision makers should be sensitive to the nature of the trademark incorporated in the domain name. Common abbreviations or geographic descriptors arguably may reference things or places other than the institution.<sup>329</sup> Just because the institution owns a federal trademark registration for an abbreviation or term incorporating geographically descriptive language does not mean any unauthorized recitation of that character string should lead to enforcement activity. The existence

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<sup>328</sup> For example, Creighton University should decline to seek transfer of the hypothetical domain name <creightongirls.com>, unless it were actively being used to in a tarnishing fashion.

<sup>329</sup> To some, the letters UVA may call to mind the University of Virginia. To Spanish-speakers, *uva* means grape. The University of Virginia therefore should consider <uvaspain.com> an appropriate target for enforcement if the hypothetical domain name were being used to promote university study programs in Spain. Enforcement would not be appropriate if the hypothetical domain name were being used to advertise bike tours through Spanish wine country.

of confusion regarding the sponsorship, affiliation, or approval of the domain name by the institution should be actual, not hypothetical. Relatedly, and notwithstanding what UDRP case law permits, institutions should carefully consider any opportunity to enforce their rights online when the commercial use to which the disputed domain name is being put is merely as a parked page, displaying pay-per-click advertising. Domain names in common extensions that are exact replicas of the institution's trademarked name present perhaps the only compelling instances when taking such action is reasonable.<sup>330</sup>

7. **Is the disputed domain name in a commonly trafficked domain name extension, like .COM, .ORG, or .NET?** If not, institutions should have ample justification for deciding to pursue enforcement. Few Americans turn to web sites in esoteric extensions—such as .INFO, .BIZ, .MOBI, any of the non-US country-code extensions, or even the newly created gTLDs—in search of reliable information. Even domain names entirely reflective of an institution's name are not worth pursuing in non-mainstream extensions such as those previously mentioned, absent the presence of more compelling considerations. Institutions preemptively should seek registrations of domain names reflective of their names in those extensions commonly trafficked. Leave the esoteric extensions alone, and resist any temptation to be drawn into unnecessary battles over obscure spaces.
8. **Is the disputed domain name a typographical misspelling, broadly conceived, of one of the institution's trademarks?** If so, decline to pursue enforcement absent the presence of more compelling considerations.
9. **Is the disputed domain name owned by someone known to be affiliated with the institution (e.g., a current student or alumnus)?** If so, and enforcement otherwise is reasonable, attempt to resolve the dispute informally without resorting to initiating a UDRP or ACPA action. At the same time, beware of the precedent that may come from resolving the dispute extra-judicially, and refrain from paying or exchanging with the registrant anything of value in excess of the cost of registering the domain name.

The above questions may help college and university decision makers assess when seeking to capture a domain name registered to a third party is consistent with a constrained approach to intellectual property

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<sup>330</sup> Only first-time Internet users even conceivably could be confused into thinking that parked pages are sponsored, endorsed, or affiliated with any non-profit institution of higher education. However, when someone registers a college or university's trademarked name in a commonly trafficked extension (i.e., .COM, .ORG, or .NET), and uses it for pay-per-click advertising, the annoyance presented by this third-party registration and activity warrants enforcement action.

protection and enforcement.<sup>331</sup> These questions, however, are not meant to be exhaustive or contemplative of potentially all relevant considerations, nor is any one of them dispositive of the ultimate decision whether to act. Instead, these questions are meant to provide a checkpoint on an activity that can seem attractive because of expansive institutional trademark holdings, and because success in UDRP actions is statistically probable.<sup>332</sup> However, the leniency of most UDRP panels in deciding each factor in favor of the mark holder should not be an invitation to act.

## 2. Additional Considerations

One practical consideration bearing on higher education's cyber future concerns the limits of online space itself. As colleges and universities continue to grow in operation and complexity, amassing with them terabytes of digital data, funneling all aspects of their online identities and activities into one domain name may become technically unwieldy, if not downright unworkable. Simply put, the problem is one of breadth and depth: institutions generate too much content, reflective of thousands of people engaged in diverse activities and offerings, to effectively channel all of it through but one domain name. As additional, plausibly useful online space becomes available (like the .COLLEGE and .UNIVERSITY extensions, to name but two), the more attractive new digital corners of the cyberworld may become to colleges and universities looking to grow, both in terms of the audiences they reach and the network infrastructures they create to support their intangible webs and expanding market orientations.

One also must ponder the impact that online education and MOOCs might have on college and university conceptions of space online. Many students may never set foot on a traditional campus in the 21<sup>st</sup> Century, instead receiving their degrees and certifications in exchange for completing competency-based curricula online. For these students, higher education's online space may be viewed as treasured space, and the legitimatizing and authenticating functions of higher education's online domains are likely to be as important as ever. In this regard, online space promises to be the brick-and-mortar of the quintessential college quadrangle, and just as graffiti artists and vandals of those structures are prosecuted to the fullest extent of the law, cyberquatters also can expect to continue to face legal consequences for their actions.

Central to all of these visions of higher education's cyber future is the continued role of the university as a public sphere, a space that Professor Brian Pusser calls "at once physical, symbolic, cultural, political, and semantic, not in relation to the state or the broader political economy but

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<sup>331</sup> In this regard, the original goals of the UDRP and the ACPA—to prevent the bad faith registration and use of domain names, not to reward efforts at brand expansion—should always drive any decision to enforce.

<sup>332</sup> See text accompanying notes 138, 215, 311, & 312.

as a site of complex, autonomous contest in its own right.”<sup>333</sup> As our understanding of the contours of institutions increasingly become shaped by our virtual interactions and what we see online, the importance of higher education’s metaphysical existence cannot be understated. Battles for control and rights to domain names that a college or university views as its prerogative tap into a larger contest over competing orientations and views of higher education as serving public goods or existing for private gains. These battles cannot be divorced from the concept of ownership itself. Many seek to use actual or imagined affiliations with institutions of higher education for their own private advantage, and third party registration of domain names containing college and university trademarks often reflects this motivation. How higher education chooses to respond to these instances of outside claims of ownership or affiliation invites renewed reflection over the proper placement of higher education in society and stands to influence our perception of the industry as an instrument of public good. Domain names—themselves a hybrid creature imbued with symbolic, cultural, political, and semantic significance—do not just package the public sphere, but themselves reflect it. For this reason alone, I predict that contests over higher education’s cyber future may not soon diminish in number or importance as we enter the next chapter of the Internet’s history.

#### CONCLUSION

This Article’s historical examination of the .EDU extension and its empirical investigation of higher education’s battles for cyberspace is timely in view of the unprecedented expansion of the DNS root zone currently underway. Unlike so many other industries, higher education received from the Internet’s architects its own domain name extension, the .EDU. While the entity that has managed the extension has changed over the past 30 years, as have the rules for who may register domain names in the extension, the guiding premise of the extension remains the same: higher education is distinct from other industries, and that distinction merits recognition in virtual space.

But as data reported in this Article reveal, the allocation to higher education of distinct online space does not mean that institutions of higher education have not had to fight to define their domain. One hundred institutions have affirmatively harnessed the power of their trademark holdings to expand or defend the online space they claim as theirs. The purpose of this Article has been to reveal these efforts and examine their policy implications for higher education. Much of the activity is explainable as the necessary workings of the academic enterprise in the 21<sup>st</sup> Century. One inescapable fact is that colleges and universities have

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<sup>333</sup> Brian Pusser, *Reconsidering Higher Education and the Public Good: The Role of Public Spheres*, in *GOVERNANCE AND THE PUBLIC GOOD* (William G. Tierney, ed.) (2006), at 17.

powerful trademarks and brands, and many within and outside of those institutions would like to use those intangible items for their own private purposes and profits.

But not all battles for cyberspace by colleges and universities are so easily dismissed as the work of good lawyering for complex enterprises working in the knowledge economy. Some of the patterns and case-based anecdotes described in this Article raise questions regarding the types of battles various institutions have chosen to fight, and how they have chosen to fight them. While none of the illustrative cases discussed in Part IV was representative of the entire dataset, in some instances, constrained use of intellectual property rights in light of higher education's historical placement in the public sphere seems to have given way to a more corporate-influenced conception of intellectual property and its enforcement. In short, some of higher education's battles for cyberspace seem inessentially fought, leaving as the wounded those who believe that more intellectual property protection and enforcement do not always serve the public's interest when the ones wielding the rights are publicly-funded and public-serving. The questions I offered in Part IV.D.1 above for the consideration of college and university decision makers hopefully may serve as an initial line of defense in the face of such forces.

The story told in this Article is but one piece of a larger mosaic reflecting how higher education uses its intangible rights and assesses enforcement priorities. One might conclude that in defining their domain online, colleges and universities are making important choices that reflect the value they attribute to intangible rights and conceptions of space. Perhaps there is no perfect prescription for when to engage in battles for cyberspace; every institution's needs and constraints are different, as are their tolerances for risk. But one fact seems certain: online space is important space, increasingly so as entire degree programs move online, or even are born in the virtual world. These spaces go to the heart of how we conceptualize higher education in the public sphere, as a public-facing entity increasingly pulled in private, rights-rich directions, simultaneously influenced by concerns for commerce, brand, and academic missions. At this intersection of priorities and values, made all the more pronounced and visibly contested in cyberspace, we find an industry struggling to use private rights in service of a greater public good, an industry whose behaviors occasionally seem schizophrenic, as the dual motives of self-preservation and self-aggrandizement intermix.

As the venerable and late higher education leader Clark Kerr described American higher education, writing in 1963, well before the advent of the Internet, "it is not really private and it is not really public; it is neither entirely of the world nor entirely apart from it. It is unique."<sup>334</sup> And so it is with the important but often overlooked spaces that colleges and universities continue to forge for themselves online.

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<sup>334</sup> CLARK KERR, *THE USES OF THE UNIVERSITY* 1 (2001, 5th ed.).

APPENDIX A

This Appendix lists in Table A-1 all domain names subject to UDRP actions filed by Baylor University, as located in the study.

**Table A-1**  
**Domain Names Subject to UDRP Actions Filed by Baylor University**

baylor.com
baylor-university.com
baylorcollege.com
bayloruniversity.com
bayloredu.com
baylor.org
baylordallas.net
baylordallas.org
bayloreye.org
baylorhospital.com
bayloraids.com
baylorfan.com
baylorgrapevinehospital.com
baylorhospitaldallas.com
baylormedicalcenter.com
baylormedicalschool.com
baylormedicine.com
baylordentalschool.com
baylorhospitalindallas.com
baylorhospitaljobs.com
baylorplan.com
baylorschoolofnursing.com
baylorstore.com
baylorwaxahachie.com
baylorhospitals.com
baylor-alum.com
baylorcollegemd.com
baylorgrad.com
baylor-law.com
baylor-student.com
bayloralum.com
baylormba.com
baylorstudent.com
baylorbears.biz
baylorbears.name
baylorbears.net
baylorbearssuck.com

baylorbears.tv
baylormedicalcenteratirving.com
baylorhealthcaregarland.com
baylormedicalcenterhospital.com
baylorregionalmedicalcenter.com
baylorcollegemedicine.com
baylorschools.org
baylorbanks.com
baylorfrisco.com
ihatebaylor.com
baylorcommunity.com
baylorpsychiatrist.com
baylorpsychiatry.com
bayoralumniliving.com
baylorcrave.com
baylorflorist.com
baylorfriscoivf.com
baylorhospital.mobi
baylorhospitals.mobi
baylorkehoe.com
baylorlocators.com
baylorsalsa.com
baylorsportstalk.com
baylorsportstalk.net
baylormedicalhospital.com
baylorjobs.com
baylorhelth.com
baylorofirving.com
baylorhospitalgarland.com
baylornursery.com
baylorrivals.com
baylorumc.com
baylormedicalcenter.com
baylorgroup.com
baylorlambdas.com
cmebaylor.com
baylordentalcollege.com
baylordental.com
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