Legal Environment

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CLASS 10

Corporate Meetings
Limited Liability Companies;
Partnerships and Limited Partnerships;
Domain Names pt. 2
Corporate Meetings

• Ch. 15

Significant Corporate Meetings

• Annual Meetings – meetings that state statutes require corporations to hold for the board of directors to discuss corporate business with shareholders
• Special Meetings – meetings called to discuss urgent but non-regular business of the corporation

Consequence of No Meetings?

• Increased likelihood of piercing the corporate veil
Requirements

• **Quorum** – the minimum number of persons eligible to vote that must attend the meeting
  – Most corporations require at least 50%
• **Notice** – a legal requirement that corporate meetings must be announced and declared in such a way as to notify all persons eligible to attend the meeting

Limited Liability Companies

• Ch. 16

Taxation

• LLC does not directly pay taxes; income and losses are passed through to members
• Unincorporated taxed as partnership unless indicated otherwise on tax form
General Nature

- Formed and operated in compliance with state law
- Members (owners of the LLC) enjoy limited liability
- Separate legal entity under state law
- LLC can sue or be sued, enter into contracts, and hold title to property

LLC Formation

- Articles of organization must be filed with the state

Key Advantages

- Members are not personally liable for debts or obligations of the entity
- Entity exists beyond death or illness of its members
- With 2 or more members can be taxed as a partnership or corporation
LLC Operating Agreement

- Should at minimum outline responsibilities, voting rights, and how the LLC is to be managed
- If no agreement – state statute governs

LLC Management

- **Member** – owner of an LLC
- **Member Managed** – all members participate in management and all decisions are made by majority vote
- **Manager Managed** – a group of people manage

LLC Operating Procedure

- Specify how voting rights are apportioned
- If not specified, apportioned according to each member’s capital contributions
Disassociation

• Disassociated member:
  – Loses right to participate in management and the right to act as an agent
  – Generally has a right to have interest bought out
    • Operating agreement may have buyout provision
    • Otherwise, fair value

Dissolution

• When an LLC is dissolved, members who did not wrongfully disassociate may participate in windup
• Continuing members
  – Preserve assets
  – Perform reasonable acts
• Once assets are sold
  – Proceeds to creditors first
  – Members contributions are returned next
  – Remaining amounts returned to members in equal shares or in accordance with operating agreement

Special Business Forms
Joint Venture

- Relationship in which two or more persons or business entities combine their efforts or their property for a single transaction or project or a related series of transactions or projects
- Share profits and losses equally with equal voice unless agreed upon otherwise

Syndicate

- A group of individuals or firms that get together to finance a project
- Investment group

Joint Stock Company

- Like a corporation
  1) Ownership is represented by transferable shares of stock
  2) Usually managed by directors and offices of the company or association
  3) It can have a perpetual existence
- Like a partnership
  - Formed by agreement and not statute
  - Property is usually held in the names of members
  - Shareholders have personal liability
- Not treated as a legal entity for lawsuits
Business Trust

• Created by a written trust agreement
• Legal ownership and management of the trust’s property stay with one or more trustees
• Profits are distributed to beneficiaries

Cooperative

• Association that is organized to provide an economic service to its members
• Incorporated cooperatives distribute dividends, or profits, to its owners on the basis of their transactions with the cooperatives and not capital contributions

Partnerships and Limited Partnerships

• Ch. 17
Agency v. Partnership

- **Partnership** – profits and losses will be shared
- **Agent** – usually no ownership interest and not obligated to bear a portion of ordinary business losses

Uniform Partnership Act

- Governs the operation of partnerships in the absence of express agreement.
- Limited liability partners have limited liability

Essential Elements of Partnership

1. A sharing of profits or losses.
2. A joint ownership of the business.
3. An equal right to participate in the management of the business.
Partnership as an Entity

• **Common law** – never treated as a separate entity
• **States** – partnership can be treated as an entity for certain purposes
• Partnership may hold the title to real or personal property in its name rather than in the names of the individual partners.

Partnership Taxes

• Income and losses are passed through to the partners
• Partnership has no tax liability, only responsible for filing an informational return

Partnership Formation

• Oral
• Written
• Implied by Conduct
Duration of the Partnership

• **Partnership for a term** – until completion of a project
• **Partnership at will**
  – If no duration specified
  – Any partner can dissolve at any time without violating the agreement

Rights of Partners

• Management
• Interest in the Partnership
• Compensation
• Inspection of Books
• Accounting
• Property

Management

• All partners have equal rights in the management and conduct of partnership business
• Each partner has one vote in management matters
• Can delegate daily management responsibilities to a management committee
Interest

• Proportion of business profits and losses in the partnership agreement
• Profits not specified – shared equally
• Losses – unless specified, same as per profits

Inspection of Books

• Every partner is entitled to inspect all books and records on demand and can make copies of the materials

Property Rights

• Property acquired by a partnership is property of the partnership
• Partnership property
  – Property that was originally contributed to the partnership
  – Anything later purchased by the partnership
  – Anything purchased in the partnership’s name
Fiduciary Duties

• **Duty of care** – refraining from grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law
• **Duty of loyalty** – requires a partner to account to the partnership for “any property, profit, or benefit” device in conducting partnership business or from use of its property

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Breach of Duty of Loyalty

• Self-dealing
• Misusing partnership property
• Disclosing trade secrets
• Usurping a partnership business opportunity

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Authority of Partners

• When a partner is carrying on partnership business or business of the kinds with third parties in the usual way, apparent authority exists, and both the partnership and the firm share liability
• **Scope of Implied Powers** – ordinarily can exercise all implied powers reasonably necessary and customary to carry on that particular business
• **Authorized v. Unauthorized Actions** – within the scope of authority, partnership is bound
Liability

- Partners are personally liable for the debts of the partnership
- Liability is essentially unlimited

Joint Liability

- **Joint liability** – each partner is responsible for the full amount
- Each partner is jointly liable for the partnership’s obligations

Joint and Several Liability

- 3rd party can sue all of the parties together or one or more partners separately
Liability of Incoming Partners

• A newly admitted partner is not personally liable for any partnership obligation incurred before the person became a partner

Disassociation of a Partner

• When a partner ceases to be associated in the carrying on of the partnership business

Disassociation Events

1. Giving notice of an express will to withdraw
2. Occurrence of an event specified in the partnership agreement
3. Unanimous vote of the partners
4. Order of a court or arbitrator
5. Bankruptcy or death
Effect of Dissociation

- Right to participate in management, duty of loyalty, and duty of care terminate
- Interest in partnership must be terminated

Dissolution v. Winding Up

- **Dissolution** — termination of a partnership
- **Winding Up** — actual process of collecting, liquidating, and distributing partnership assets

Distribution of Partnership Assets

- Partnership assets are distributed according to the following priorities:
  1) Payment of debts to partner and nonpartner creditors
  2) Return of capital contributions and distribution of profits to partners
Partnership Buy-Sell Agreements

• Provides for one or more partners to buy out the others should the situation warrant
• To allow for a smooth transition

Limited Liability Partnerships

• Allows a partnership to continue to as a pass-through entity for tax purposes but limits the personal liability of the partners
• Typically for professional services and family businesses
• Allows liability for the malpractice of other partners

Limited Partnerships

• Consists of at least one general partner and one or more limited partners
• GP – management responsibility and full responsibility for the partnership and debts
• LP – contributes cash or property; not personally liable for partnership debts beyond amount of investment
Rights of Limited Partners

- Right of access to partnership books
- Return of contributions on dissolution

Liabilities of Limited Partners

- Limited to capital contributed or agreed to be contributed to the partnership

Limited Partners and Management

- Limited partners enjoy limited liability so long as they do not participate in management
Limited Liability Limited Partnerships

- Liability of all partners is limited to the amount of their investments in the firm

Domain Names pt. 2

CONFLICTING DOMAIN NAMES

- Conflicting domain names are domain names that are not owned by your company and that potentially infringe on the rights of your client.
- Clients may wish to engage your firm to monitor for conflicting domain names on a regular or periodic basis.
- Your firm may be asked to advise your client on various conflict.
CONFLICTING DOMAIN NAMES

- Locate conflicting domain names
- Investigate conflicting domain names
- Resolve domain name disputes

LOCATING CONFLICTING DOMAIN NAMES

Conflicting domain names may be identified in a number of different ways including:
- By the company
- By a customer or associate of the company
- By an infringer
- From a watch service
- From a WHOIS record search
- From a domain name term search
- From a reverse WHOIS search
- From a web search

DOMAIN NAME INVESTIGATIONS

- Determine ownership of the domain name
- Retain copies of the WHOIS record and content
- Determine whether the entity is associated with additional domain names
- View prior versions of the domain name content
- Check metatags and keywords
- Perform a trademark search
- Check for prior UDRP and court decisions
DOMAIN NAME DISPUTE RESOLUTION

- Domain name expiration/snapping service
- Settlement
- UDRP proceeding
- ACPA proceeding

SNAPPING SERVICES

- Upon expiration, a domain name does not immediately become available for registration. Rather, an expiring domain name typically goes through a delete cycle by which an existing registrant can still renew the domain name while paying the registrar an escalating fee of the renewal. At the end of the delete cycle, the domain name is released (i.e., purged) and it becomes available for registration to anyone.
- Snapping is the process by which a service attempts to register a domain name immediately upon completion of the deleted cycle when the domain name becomes available for registration.

Pre-ACPA

Pre-ACPA
- Trademark Infringement
  - Trademark owner must prove (1) ownership of a valid trademark, and (2) a likelihood of confusion between the registered mark and the alleged infringing use by the defendant.
- Trademark Dilution
  - To prevail on its federal dilution claim, Trademark owner must prove that:
    1. the Mark was famous before the Defendant began use of the domain names at issue; and
    2. Defendant’s use causes dilution of the distinctiveness of the mark.
    See 15 U.S.C. § 1125(c). Dilution is “the lessening of the capacity of a famous mark to identify and distinguish goods or services.” Id. § 1127

The Anticybersquatting Consumer Protection Act (ACPA)

• The ACPA was enacted in 1999 to address "a new form of piracy on the Internet caused by acts of 'cybersquatting,' which refers to the deliberate, bad-faith, and abusive registration of Internet domain names in violation of the rights of trademark owners." S. Rep. No. 106-140, at 4 (1999).

The Anticybersquatting Consumer Protection Act

• The ACPA provides a civil action in the U.S. court system against anyone who, with bad faith intent to profit, registers, traffics in or uses a domain name that is:
  – identical or confusingly similar to a mark that was distinctive when the domain name was registered;
  – identical, confusingly similar or dilutive of a mark that was famous when the domain name was registered; or
  – infringes marks and names protected by statute.

• Results from Successful Action: Entities proceeding under the ACPA can gain ownership or force deletion of the disputed domain name, costs (attorney's fees, filing fees, etc.), damages and injunction.

ACPA - Statutory Damages

• In cases involving cyberpiracy, violations of 15 U.S.C. §1125(d)(1), section 1117(d) allows a plaintiff to elect statutory damages of an amount between $1000 and $100,000, to be determined by the court, per domain name pirated. Plaintiff's undisputed allegations establish cyberpiracy under section 1125(d)(1) and allow it the option under section 1117(d). The Court finds $ 100,000 to be a just award and grants statutory damages in that amount to Plaintiff.

ACPA – Attorney’s Fees

• Section 1117(a) gives the Court discretion to award reasonable attorney's fees in "exceptional cases." The term “exceptional cases” is generally accepted to mean cases in which trademark infringement is "deliberate and willful." See Playboy Enterprises, Inc. v. Baccarat Clothing Co., Inc., 692 F.2d 1272, 1276 (9th Cir. 1982) (citing Quaker State Oil Refining Corp. v. Kooltone, Inc., 649 F.2d 94 (2d Cir. 1981)). The Court finds Defendants’ infringement deliberate and willful thereby making Plaintiff eligible to receive attorney’s fees.

Ford Motor Co. v. Catalanotte

• Peter J. Catalanotte
  – Registered FORDWORLD.COM
  – Relationship with Ford?
  – How did he use the domain name?

Ford Motor Co. v. Catalanotte

• How did Ford learn of the domain name registration?
• Did Mr. Catalanotte have any previous success of selling domain names to trademark owners?
Ford Motor Co. v. Catalanotte

• “The ACPA applies to a person who ‘registers, traffic in, or uses a domain name’ that is ‘identical or confusingly similar to’ a ‘distinctive’ mark or that is ‘identical or confusingly similar to or dilutive of’ a ‘famous’ mark. … Liability under the ACPA requires a ‘bad faith intent to profit,’ and the ACPA provides a list of factors that courts may consider in determining whether a person acts in bad faith.”

Ford Motor Co. v. Catalanotte

• Remedies under ACPA
  – Injunctive relief,
  – Actual damages,
  – Statutory damages (1K-100K)

Ford Motor Co. v. Catalanotte

• What if the registration occurred before the ACPA?
  – “The ACPA applies to ‘all domain names registered before, on, or after the date of the enactment’ of the ACPA, but actual and statutory damages are not ‘available with respect to the registration, trafficking, or use of a domain name that [occurred] before the date of the enactment.’”
Ford Motor Co. v. Catalanotte

- "Registration, trafficking, and use of a domain name are separate acts upon which liability may be based. Although damages may not be awarded for pre-enactment registration, trafficking, or use, the fact that a domain name was registered before the Act's passage does not absolve the registrant from liability for post-enactment trafficking or use."

Ford Motor Co. v. Catalanotte

- "We conclude that, when Catalanotte registered the domain name FORDWORLD.COM and later offered it for sale to Ford, he trafficked in the domain name for the purposes of the ACPA. Registering a famous trademark as a domain name and then offering it for sale to the trademark owner is exactly the wrong Congress intended to remedy when it passed the ACPA."

Ford Motor Co. v. Catalanotte

- End Result
  - $5,000 in statutory damages pursuant to the Anticybersquatting Consumer Protection Act affirmed
Shields v. Zuccarini

Factual Background
• Joseph Shields (P)
  – Creator of Joe Cartoon
• John Zuccarini (D)
  – Cybersquatter
• Basis of Proceeding
  – ACPA

Shields v. Zuccarini
• What issues was the court addressing on appeal?
• What happened in the dispute prior to the lawsuit?
• What happened at district court?

Shields v. Zuccarini
• What must Shields show under the ACPA?
  – TM is a distinctive or famous mark
  – DNs are identical or confusingly similar to the TM
  – DNs registered with a bad faith intent to profit
Shields v. Zuccarini

• Why is typosquatting covered under the Act?
• D “[registered] a domain name in anticipation that consumers would make a mistake, thereby increasing the number of hits his site would receive, and, consequently, the number of advertising dollars he would gain.”

Shields v. Zuccarini

• Are the bad faith factors exclusive?
• What about the first amendment?
• Why won’t Z’s argument of fair use work?

Shields v. Zuccarini

• What was the court’s conclusion?
• Can you get statutory damages for domain names registered before the ACPA was enacted?
The Uniform Domain Name Dispute Resolution Policy

• Who is ICANN?
• How does the UDRP work?
• What is the scope of the UDRP?

• The UDRP provides a mandatory administrative proceeding against a domain name registrant where the domain name is:
  – identical or confusingly similar to a mark in which the complainant has rights;
  – domain name registrant has no rights or legitimate interests in respect of domain name; and
  – the domain name has been registered and is being used in bad faith.
• Results from Successful Action: Entities proceeding under the UDRP can only gain ownership or force deletion of the domain name.

Express Services, Inc. v. RealTime Internet

• Complainant Express Services – provider of employment and personnel services
• Respondent RealTime Internet – a person that registers domain names based on web traffic
Express Services, Inc. v. RealTime Internet

• Procedural History
  – Complaint
  – Response (untimely)
  – Additional Submissions

• “While [Complainant’s registered mark] has design elements, when the mark is translated into typescript for use in a domain name, the identity or similarity cannot be disputed. Complainant contends that the <expresspersonel.com> domain name is confusingly similar to its federally registered EXPRESS PERSONNEL marks. The deletion of a letter and the misspelling of a mark still makes the disputed domain name confusingly similar to Complainant’s registered mark.”

• Typosquatting = Bad Faith
  “Complainant further contends that Respondent registered and used the disputed domain names pursuant to Policy ¶ 4(b)(iv), where Respondent intentionally attempted to attract, for commercial gain, Internet users to Respondent’s websites by creating a likelihood of confusion with Complainant’s mark. This practice of “typosquatting” has been recognized as … Given the number of registrations by the Respondent, as set out on the thirty-six (36!) pages of Complainant’s Exhibit AA, a list which includes the names of colleges and universities, states, towns, athletic teams, businesses, airlines, misspellings of the same, and common words or names, the evidence of ‘bad faith’ is sufficient.”
Domain Name Tasting

• What is domain name tasting?
• What policy has ICANN added to combat domain name tasting?

New Extensions

• New Extensions are coming
• Must meet certain requirements
• Companies paid 185K to evaluate per extension
• List of applied for domain names to date is available online

Trademark Clearinghouse

• Register trademarks with clearing house
• Allow for sunrise registration into new extensions
• Warnings about nearly exact domain name registrations in all of new extensions for limited period
Donuts Blocking

- Availability for extensions associated with Donuts
- Must have a registered trademark
- Blocks exact domain name registrations
- Allows company to later register associated domain names as desired

New Extension Strategy?

- In-class discussion

Program Completed

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