

## Protection Criteria for Domain Names: A Comparative Analysis TRIPS Agreement and Supreme Court Decision

**Dr. Mohammad A. Alfaouri**

Lecturer of Commercial law, The World Islamic Sciences & Education University, Amman, Jordan  
[alfaouri7000@yahoo.com](mailto:alfaouri7000@yahoo.com)

**Dr. Fahed Wahdani**

Ministry of Interior, Amman, Jordan

**Abeer H. Al-Rawahna**

Lecturer of Civil Law, The World Islamic Science & Education University, Amman, Jordan

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**ABSTRACT:** *The TRIPS agreement has been created as the main tool to protect trademarks as part of intellectual property, while the domain names phenomenon appeared for the first time, and its character was not crystal-clear in four decades, and as a fact the TRIPS agreement has nothing to do with domain names protection. This article tries to prove that domain names can enjoy the TRIPS agreement by fitting the trip agreement criteria given to protect the trademark if the domain names fit the same criteria. Furthermore, if domain names could be characterized as a kind of trademark, then we can approve that TRIPS agreements correlate with this new phenomenon. On top of that, the authors depend on the latest court decision that supports the hypothesis of this article that domain names can be adopted as trademarks and can serve as digital trademarks in cyberspace. The TRIPS agreement was established many years ago before the domain names phenomenon invaded the cyberspace community; then, domain names were expected to have nothing to do with the TRIPS agreement's protection. The domain names can be protected under the "TRIPS agreement" criteria, and thus, assume that domain names can be a kind of trademark. And because domain names work only in cyberspace, the authors suggest that domain names can be adopted as digital trademarks and can enjoy more protection under TRIPS agreements and traditional trademark law. The authors use an analytical approach to examine the TRIPS agreement criteria and find a correlation to domain name protection under the "TRIPS agreement". Furthermore, the comparison approach will take place to see whether the domain names can meet the TRIPS agreement criteria to fit this protection.*

**KEYWORDS:** TRIPS agreement, domain names, trademark, booking.com, American supreme court, digital trademark.

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## INTRODUCTION

The primary objective of the “TRIPS agreement “ was to establish a framework for regulating IPR related to trade. The author will analyze the agreement's assumption and assess its effectiveness in providing sufficient trademark protection. The range of protection underneath the “TRIPS agreement “extends to trademarks. The “TRIPS agreement “, including paragraphs 15-21, establishes the minimum standards for trademarks, including the necessary protection, approved legal rights, and length of the shield<sup>1</sup>. Conversely, the “TRIPS agreement “has facilitated the worldwide implementation of responsibilities for protecting intellectual property<sup>2</sup>.

### **The TRIPS Agreement and its provisions for safeguarding trademarks**

The” TRIPS agreement “sets forth minimal standards for the accessibility, scope, and utilization of seven categories of intellectual property: industrial designs, copyrights, geographical indications trademarks, layout designs of integrated circuits and patents, and hidden information (trade secrets)<sup>3</sup>, Annette Kur Mercurio holds contrasting perspectives on the extent of safeguarding provided to intellectual property. The “TRIPS agreement “can offer optimal safeguarding for IPR. <sup>4</sup> Then again, some argue that the “TRIPS agreement “offers only limited protection for IPR and has faced criticism for being biased towards specific infrastructural interests.<sup>5</sup>

### **The association between the TRIPS agreement and domain names**

The “TRIPS agreement “was a successful step towards achieving global harmonization of IPR protection<sup>6</sup>. The “TRIPS agreement “stands out from other intellectual property arrangements due to its robust enforcement system, which allows for effective disciplining of governments through the WTO's dispute settlement mechanism<sup>7</sup>. Some claim the “TRIPS agreement “does not

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1 “Calboli, I., & Farley, C. H. (2016). *The Trademark Provisions in the TRIPS Agreement* Irene Calboli & Christine Haight Farley. In C. M. Correa & A. A. Yusuf (Eds.), *Intellectual Property and International Trade: The TRIPS Agreement* (3rd ed., p. 160). The Netherlands: Kluwer Law International B.V.”

2 *ibid*

3 *Ibid* p395.

4 “Kur, A. (2011). *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of Trips* (p. 401). UK, USA: Edward Elgar Publishing”.

-Mercurio, BryanC. (2017). *The Regulation of Services and Intellectual Property* (p. 477; BryanC Mercurio & M. Krajewski, Eds.). London & New York: Routledge.

5 “Jude, Elizabeth F., & AL- sharieh, Saleh. (2011). *join the club: the implication of the anti-counterfeiting trade agreement's enforcement measures for Canadian copy right law*. *Alberta Law Review*, 49(3–4), 695. Retrieved from <https://web.archive.org>

6 Scandizzo, S. (2001). *Intellectual Property Rights and International R&D Competition* (p. P 3). International Monetary Fund.

7 Wikipedians, B. (n.d.). *WTO and the Doha Round*. Retrieved from <https://books.google.jo/books?id=pSFKA6lfNnQC>.

- Stamatoudi, I. (2010). *Copyright Enforcement and The Internet* (p. 74). Netherlands: Kluwer Law International B.V.

- Srivastava, S. K. (2016). *Commercial Use of Biodiversity: Resolving the Access and Benefit Sharing Issues* (p. 82). India: SAGE Publications.

explicitly—assume that the “TRIPS agreement “does not expressly address domain names in its provisions.”<sup>8</sup> The primary inquiry is whether there is a correlation between domain names and the “TRIPS agreement”<sup>9</sup>. To address this subject, we must first establish a clear definition of intellectual property and establish its criteria. The authors may then analyze the characteristics of domain names to determine if they meet the requirements for trademark status. The final stage will involve identifying the correlation through trademark infringement. Assuming that the individual or entity with legal rights to the trademark is officially registered. In this scenario, the domain name can be deemed as an act of infringement upon the trademark, which is afforded complete protection under the “TRIPS agreement “, as outlined below:

### Intellectual Property Criteria

The “TRIPS agreement “is specifically designed to safeguard IPR on a global scale. Additionally, it is formulated to address the requirements of the (WTO) and the various players within the intellectual property community.<sup>10</sup>—In order to determine whether the protection offered by the “TRIPS agreement “can be effectively implemented, domain names need to be assessed based on the criteria of intangible property and originality, as outlined below:

### Intangible property

Assets lacking a physical form are known as intangible property or substance, such as intellectual property, patents, trademarks, and copyrights.<sup>11</sup> Some legal experts and academics hold a minority stance regarding whether a domain can be considered a property<sup>12</sup>. Some

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- Strasser, R. (2009). *Music Business: The Key Concepts* (1st ed., p. 151). USA/CANADA: Routledge.

- Sprankling, J. G. (2014). *The International Law of Property* (1st ed., p. 161). UK: OUP Oxford.

8 (Lerman, 2013)

9 Ibid.

10 Stoll, P.-T. (2008). *Wto-Trade-related Aspects of Intellectual Property Rights* (Max Planck Commentaries on World Trade Law) (Vol. 7, p. xxxi; P.-T. Stoll, J. Busche, & K. Arend, Eds.). Leiden, Boston: MARTINUS NIJHOFF PUBLISHER.

11 Hart, J. D. (2008). *Internet Law, a Field Guide* (p. 120). BNA Books.

- Anson, W., & Drews, D. C. (2007). *The Intangible Assets Handbook: Maximizing Value from Intangible Assets* (p. 47; D. C. Drews, G. Berman, & D. Martin, Eds.). USA: American Bar Association.

- Barros, D. B., Hemingway, A. P., & Cavalieri, S. (2020b). *Property Law* (2nd ed., p. 1018). New York: Wolters Kluwer Law & Business.

Barros, D. B. (2016). *Hernando de Soto and Property in a Market Economy* (2nd ed., p. 169). London & New York: Routledge.

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12 Hart, J. D. (2008). *Internet Law, a Field Guide* (p. 120). BNA Books.

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consider the Domain intangible, as the property has historically been categorized into two distinct parts: tangible and intangible<sup>13</sup>. It is essential to acknowledge the existence of an intangible asset to understand better what an intangible property is. To this point, “Reilly & Schweih’s” have abridged this concept by asserting that an intangible asset lacks tangibility<sup>14</sup>. However, distinguishing between tangible and intangible assets is crucial in determining if domain names can be classified as intellectual property. “Reilly & Schweih’s” have chosen the parameters usually applied to distinguish between tangible and immaterial items. In this framework, proponents assert that tangible property must be perceptible to the senses, specifically sight and touch, and demonstrate a concrete and material presence<sup>15</sup>. Considering the requirements above, the primary inquiry concerns whether trademark scans are classified as intangible assets. Can domain names possess tangible or physical being? There was a solid recommendation regarding domain names as intangible assets. Domain names are seen as an instance of intangible assets in this particular scenario. Conversely, a minority of legal experts and professionals have differing opinions on whether domain names should be classified as property. According to this perspective, it is argued that a domain name does not qualify as property<sup>16</sup>. This perspective is bolstered by the notion that the domain's registrant does not acquire any legal entitlements vis-à-vis other parties involved in their agreements, except for the subsequent exclusivity arising from a similar domain that cannot be utilized during the registration process.<sup>17</sup>

## Creativity

Creativity is a crucial aspect of intellectual property, encompassing individual innovation and providing overall safeguarding for inventive results to clarify Intellectual Property<sup>18</sup>. Encompasses both invention and protection. Regarding intellectual property, domain names must be captivating, easily remembered, and sufficiently unique to qualify for the safeguard provided by law granted to IPR<sup>19</sup>. The main recommendation is to exercise creativity when selecting and officially registering a trademark<sup>20</sup>. A threshold is determined by the level of innovation

- Barros, D. B., Hemingway, A. P., & Cavalieri, S. (200b). *Property Law (2nd ed., p. 1018)*. New York: Wolters Kluwer Law & Business

- Barros, D. B. (2016). *Hernando de Soto and Property in a Market Economy (2nd ed., p. 169)*. London & New York: Routledge

- Bryer, L. G., Lebson, S. J., & Asbell, M. D. (2011). *Intellectual Property Operations and Implementation in the 21st Century Corporation (p.*

13 Reilly, R. F., & Schweih, R. P. (2016). *Guide to Intangible Asset Valuation (2nd ed., p. 9)*. New York: John Wiley & Sons.

14 *ibid.*

15 *ibid.*

16 *ibid*

-, R. S. (2016). *cyberspace Law (4th ed., p. 228)*. New York: Wolters Kluwer Law & Business

17 Bryer, L. G., Lebson, S. J., & Asbell, M. D. (2011). *Intellectual Property Operations and Implementation in the 21st Century Corporation (p. 119)*. John Wiley & Sons.

18 Sherwood, R. M. (2019). *Intellectual Property and Economic Development (1st ed., p. 17)*. New York: Routledge.

19 Levinson, J., & Levinson, J. (2013). *Guerrilla Marketing Field Guide: 30 Powerful Battle Maneuvers for Non-Stop Momentum and Results (p. 81)*. USA: Entrepreneur Press.

20 Rich, J. R. (2008). *Design and Launch an E-Commerce Business in a Week (p. 44)*. Canada: Entrepreneur Press.

exhibited in domain names, which determines whether they are eligible for intellectual property protection. Several factors provide evidence that domain names possess the capacity to safeguard IPR effectively. Evidence of uniqueness and rivalry is the fact that domain names are distinct. However, domain names aim to attract audiences<sup>21</sup> Interested in using the internet through their wording<sup>22</sup>. This draw was seen to possess a particular level of inventiveness and ingenuity. Froemel and Thaler have regarded domain names as a novel means of linguistic ingenuity.<sup>23</sup> According to Elias and Gima, the level of legal defense for a distinctive trademark is higher compared to that for a non-distinctive one since the number of inventions is directly proportional to the range of protection. However, it is advantageous to introduce goods or services to the market when the trademark is appealing, one-of-a-kind, and easily recognizable.<sup>24</sup> Nevertheless, incorporating further innovation would enhance the distinctiveness of domain names.<sup>25</sup> Consequently, the trademark might get more protection if the brand name is highly distinctive or well-known<sup>26</sup>. Another indication of the innovativeness of domain names is their financial value derived from website traffic, the selling of goods, the provision of services marketing, or internet advertising.<sup>27</sup> Undoubtedly, the commercial worth of something reflects both its level of inventiveness and the amount of protection it merits. The trademark creativity is derived from the diverse beliefs associated with utilizing advancements<sup>28</sup>. Domain names have a vital role in fostering innovation in the economics of creativity. Some contend that using basic terms and phrases without new ideas might be considered inventive when reloading with a trademark<sup>29</sup>. After careful examination, it was determined that meeting all the criteria outlined in the “TRIPS agreement “for intellectual property supports, including domain names, in the safeguarding afforded to IPR. It would be advantageous to authorize domain names as functional to enhance the effectiveness of protection, given that the trademark has been explicitly referenced in the “TRIPS agreement “.

21 Baumgardt, M. (1998). *Creative Web Design: Tips and Tricks Step by Step* (p. 14). Berlin: Springer-Verlag New York Incorporated.

22 Moro Visconti, R. (2017). *domain Name Valuation: Internet Traffic Monetization and IT Portfolio Bundling*. SSRN Journal, 4–7. <https://doi.org/10.2139/ssrn.3028534>

23 Winter-Froemel, E., & Thaler, V. (2018). *Cultures and Traditions of Wordplay and Wordplay Research* (p. 242; V. Thaler, Ed.). Berlin/ Boston: Walter de Gruyter GmbH & Co KG.

24 Elias, S., & Gima, P. (2000). *domain Names: How to Choose and Protect a Great Name for Your Website* (pp. 4–10). Berkeley, CA: NOLO.

- Charmasson, H. J. A., & Buchaca, J. (2009). *Patents, Copyrights & Trademarks For Dummies®* (2nd ed., p. 224). New York: John Wiley & Sons.

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26 Peermohamed, S. (2012). *Protecting Brands Online: Jurisdictional Comparisons* (1st ed., p. 65). London: Sweet & Maxwell.

27 Moro Visconti, R. (2017). *domain Name Valuation: Internet Traffic Monetization and IT Portfolio Bundling*. SSRN Journal, 4–7. <https://doi.org/10.2139/ssrn.3028534>

28 Moro Visconti, R. (2017). *domain Name Valuation: Internet Traffic Monetization and IT Portfolio Bundling*. SSRN Journal, 4–7. <https://doi.org/10.2139/ssrn.3028534>

29 Henri J. A. Charmasson, John Buchaca - *Patents, Copyrights, and Trademarks For Dummies*, 2009, P 224.



**Trademark protection provided by Article 41 of the TRIPS Agreement**

Upon examination of the TRIPS Agreement (article 41.), it is determined that member states are obligated to ensure that their regulations provide accessible enforcement procedures for effective action toward any instances of trademark infringement. This includes swift measures to halt infractions and remedies that serve as a deterrent against future infringements on these rights<sup>30</sup>. Member states are not obligated to establish a separate court system for enforcing IPR, apart from their regular law enforcement responsibilities. Furthermore, they need more dedication to allocating resources between the implementation of intellectual property legal rights and the primary enforcement of legislation.<sup>31</sup> First, implementing ADR rule systems is relatively inexpensive for any nation. If a state chooses not to establish an alternative mechanism, it may revert to WIPO's extended system. While not ideal, including a desired mechanism from established countries inside the TRIPS Agreement framework could be intriguing in the neighboring domain system. Implementing Alternative Dispute Resolution (ADR) regulations could enable a nation to make concessions on domain matters and obtain advantageous compromises on other intellectual property (IP) concerns. China's incorporation of ADR rule devices for the '.cn' domain clearly indicated its commitment to opening up its economy and implementing accompanying policies when it joined the WTO. It is essential to consider that Article 41 of the "TRIPS agreement "can be examined concerning the global practice of resolving domain name disputes after the "TRIPS agreement ". This analysis is guided by Article 31. of the Vienna Convention on the Law of Treaties, which states that treaties should be determined in light of any subsequent agreements or practices between the parties involved.<sup>32</sup> A link between the "TRIPS agreement "and domain names is possible through reciprocal treaties like FTAs and a country's approach to resolving domain conflicts. These factors could be considered while designing a structure for a WTO-" TRIPS agreement ". It can be concluded that a new standard for Alternative Dispute Resolution in resolving disputes has established a global practice. Under such circumstances, it is possible for WTO members to adopt alternative dispute resolution methods following Article 41 of the "TRIPS agreement "in order to provide adequate protection. The potential influence of the worldwide regulations has been acknowledged in other areas of intellectual property covered by the TRIPS Agreement, such as domain names.<sup>33</sup>.. Among the key contributors to increased revenues is the domain names marketplace, which has thrived due to the widespread recognition of trademarks as intangible assets.<sup>34</sup>.. Domain names are not explicitly encompassed under the exclusive privileges of the trademark owner as stipulated in Article 16. of the Agreement on TRIPS. Their research corroborated the findings of

<sup>30</sup> (1995, January 1). *The Agreement on Trade-Related Aspects of Intellectual Property Rights, WTO.*

- Das, J. K. (2015). *Law of Copyright* (p. 426). Delhi, India: PHI Learning Pvt. Ltd.

31 Lerman, 2013) p8

32 Lerman, 2013) p9

33 Lerman, 2013) p10

- R., R. S. (2016). *cyberspace Law* (4th ed., p. 228). New York: Wolters Kluwer Law & Business.

34 R., R. S. (2016). *cyberspace Law* (4th ed., p. 228). New York: Wolters Kluwer Law & Business.

*Carlos M. Correa and Abdulqawi A. Yusuf*, who concluded that there were no instances of domain name conflicts.<sup>35</sup>

## Case study

### **Patent and Trademark Office v. Booking.com. B.V. (2020)**

#### **A generic term**

*A generic term for a category of items or services cannot be registered as a federal trademark.* Booking.com, a website allowing users to make travel reservations, applied for federal registration of trademarks incorporating the phrase "Booking.com". The U.S. Patent and Trademark Office ("PTO") denied enrollment, stating that "Booking.com" was a generic term for online hotel reservation services. The Fourth Circuit upheld the District Court's ruling that "Booking.com" is not generic, in contrast to the term "booking" itself.

#### **The Supreme Court decision.**

The Supreme Court upheld the decision. The term "generic.com" is considered a generic name for a specific category of products or services only if customers perceive it as such. Determining Whether a phrase in compounded is general hinges on the term indicating to consumers a category of products or services when considered. Consumers do not view the name "Booking.com" in that manner. Each Internet domain name can only be held by a single company at any moment. Therefore, a word like "generic.com" can indicate a direct connection with consumers to a particular website. A rigid legal theory that ignores consumer perception would not align with a fundamental tenet of the Lanham Act. The worries of the "PTO"'s policy do not endorse a universal prohibition on registering "generic.com" keywords. Multiple principles guarantee that registering a domain of "Booking.com" would not grant its owner exclusive rights over the term "booking."

#### **Explanation**

The primary holding of the phrase "Booking.com," when combined with ".com," is not disqualified from being registered as a trademark because consumers do not consider it a generic name for a category of products or services.

The generic term that refers to a category of items or services cannot be registered as a federal trademark. The respondent, Booking.com, a company that operates a travel-reservation service under the same name, applied for federal registration of trademarks that use the word "Booking.com." The "PTO"<sup>36</sup> rejected the registration of "Booking.com" as a trademark, stating that it is a common term for online hotel reservation services. "Booking.com" requested a legal

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<sup>35</sup> *Correa, C. M., & Yusuf, Abdulqawi A. (2016). Intellectual Property and International Trade: The TRIPS Agreement (3rd ed., p. 175). Kluwer Law International B.V.*

<sup>36</sup> The U.S. Patent and Trademark Office

review, and the District Court concluded that the phrase "Booking.com" is not generic, unlike the standalone term "booking." The Court of Appeals upheld the District Court's decision, concluding that there was no mistake in the District Court's evaluation of how consumers interpret the term "Booking.com." The appellate court also dismissed the "PTO"'s argument that, as a general rule, combining a generic term such as "booking" with ".com" results in a generic combination.–Ruling: The term "generic.com" is considered a generic name for a specific category of products or services only if consumers perceive it as such<sup>37</sup>.

Determining whether a compound phrase is generic depends on whether that term indicates to consumers a category of products or services when considered as a whole. The lower courts have concluded, and the "PTO" no longer disagrees, that customers misinterpret a phrase "Booking.com" in that manner since customers do not perceive "Booking.com" as a generic name. <sup>38</sup>In contrast to that determination, the "PTO" advocates for a nearly absolute rule: Combining a generic phrase with a generic Internet domain name suffix such as ".com" results in a generic combination. The "PTO"'s previous actions do not support the rule proposed by the "PTO" and are not backed by trademark law. <sup>39</sup>

The proposed ruling by the "PTO" is not a logical consequence of Goodyear's India Rubber Glove Mfg Co. v. Goodyear Rubber Co. The "PTO" argues that Goodyear demonstrated that adding a generic business identification such as "Company" to a generic phrase does not grant trademark eligibility. As per the "PTO", appending ".com" to a generic phrase, similar to appending "Company," does not convey any meaning that identifies the source. The concept needs to be revised since an Internet address can only belong to one person at any moment. Therefore, a phrase like "generic.com" could suggest a connection with a specific website to customers. Furthermore, a rigid legal theory that completely ignores consumer impressions is inconsistent with a fundamental principle of the Lanham Act: Categorizing a specific phrase as generic or nongeneric is determined by how consumers interpret its meaning. Specifically, it depends on whether consumers see the term as a general name for a group or as a term that can differentiate between different members within the group.<sup>40</sup>

The considerations of the "PTO" policy do not justify a blanket prohibition on registering words that are "generic.com." The "PTO" argues that granting trademark protection to "Booking.com" would grant the owner excessive authority over identical wording that should be available for unrestricted use by others. That issue applies to any descriptive trademark. To prevent the anti-competitive consequences identified by the "PTO", certain legal principles are in place to ensure

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<sup>37</sup> pages 6 to 14

<sup>38</sup> pages 6 to 7.

<sup>39</sup> pages 7 to 14.

<sup>40</sup> pages 8 to 11.



that the registration of "Booking.com" does not grant its owner exclusive rights to the term "booking." The "PTO" also questions the necessity of trademark protection for owners of "generic.com" brands, given their already established competitive advantages. Nevertheless, these benefits do not automatically prohibit a trademark from being eligible for federal registration. Ultimately, the "PTO" recommends that "Booking.com" "could explore alternative solutions within trademark law. However, there is no justification to withhold from "Booking.com" the same advantages that Congress has granted to other trademarks that meet the criteria of being non-generic.<sup>41</sup>

## CONCLUSION

During their examination of the TRIPS agreement, the authors could find a logical reason that domain names can enjoy protection under the TRIPS agreement, even though the agreement existed many years ago before the first domain name merged. Furthermore, the authors could find a correlation between "TRIPS agreement" "criteria and domain names. To this point, the authors believe that domain names can be adopted as a kind of trademark, accurately digital trademark, and based on the supreme court decision mentioned above, there is no more doubt that the real character of domain names was clearly revealed, and the authors suggest that trademark law can be updated to contain domain names to enjoy the protection given to trademarks its self over the past decades.

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