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Keyword Regulation and Domain Name Exceptionalism

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Overview

Domain names are heavily regulated and search keywords aren't. Why?

Domain Name-Specific Regulation

- **Federal Laws**

- Anti-Cybersquatting Consumer Protection Act
 - Trademark protection (15 USC § 1125(d)(1))
 - In rem jurisdiction (15 USC § 1125(d)(2))
 - Personal name protection (15 USC § 1129)
 - Domain name registrar/registry immunization (15 USC § 1114(2)(D))
- Fraudulent Online Identity Sanctions Act
 - Increasing IP remedies (15 USC § 1117(e); 17 USC § 504(c)(3); 18 USC § 3559)
- Truth in Domain Names Act (18 USC § 2252B)
 - Misleading domain names leading to obscenity/porn
- Dot Kids Implementation and Efficiency Act of 2002

- **State Laws**

- State anti-cybersquatting laws (CA B&P Code §17525-28; Hawaii 481B-21 to 25; Louisiana LSA-R.S. 51:300.11-22)
- State anti-political cyberfraud laws (CA Elec. Code §18320-23)
- [Also, anti-spam/anti-phishing laws]

- **Administrative regulations**

- Ex ante: allocation controlled by centralized bodies with complex governance structures
- Ex post: UDRP

Keyword-Specific Regulation

- **State laws**
 - Utah 13-40-102 to 302
 - Alaska 45.45.792 to 798
- **Search engine trademark policies**
 - Yahoo and MSN allow TM owners to block competitive keyword buys
 - Google (US) allows TM owners to block TM references in ad copy

Domain Name Exceptionalism

- **Domain name exceptionalism isn't supportable**
 - Domain names enable SMTP traffic
 - But most regulations target domain names as navigation tools
 - Email concerns can be handled through anti-phishing and regular TM law
- **Possible regulatory options**
 - #1: Regulate search keywords like domain names
 - Regulating search keywords affects search engine algorithms
 - But search engines would love immunization!
 - But micro-regulation of domain names just leads to irresolute arms race
 - Domain name tasting
 - Domainers
 - #2: Deregulate domain names
 - Changing consumer expectations/practices
 - Doesn't make sense to prop up domain names as authoritative
 - Market would have corrected excesses