

## Cybersquatting

# A New Form Of Intellectual Property Theft

Global protection of your firm's domain name can be a challenge. A domain name is an address on the internet that points to one unique place on the World Wide Web, unlike a trademark that serves to identify a source of goods or services. A trademark owner's rights can confer to a domain name, but a domain name does not have trademark rights. It is commercially prudent to acquire a domain name identical to or similar to your company's name or trademark.

A problem for trademark owners who do not own the domain name is "cybersquatting." Cybersquatting is the intentional practice of registering a domain name in bad faith and the largest problem with protecting domain names. Cybersquatters' goals include: (i) sale of the domain name for value; (ii) precluding competitors from getting it; and (iii) click-through revenues.

The Anticybersquatting Consumer Protection Act ("ACPA") is a federal law that provides trademark owners legal remedies against cybersquatters and requires proof of three elements: (1) the domain name is identical to or confusing similar to a third party's mark; (2) the domain name registrant has no rights to the mark; and (3) the registrant has a bad faith intent to

profit from the mark. Remedies granted in an ACPA lawsuit include an order of forfeiture, cancellation or transfer of the domain name and actual damages. In lieu of actual damages, plaintiffs may elect statutory damages of up to \$100,000 per domain name, at the court's discretion.

A quicker and less costly alternative to a lawsuit is to file a complaint with the Internet Corporation for Assigned Names and Numbers ("ICANN") under its Uniform Dispute Resolution Policy ("UDRP"). ICANN is a not-for-profit global partnership committed to maintaining Internet security, stability and interoperability. ICANN's UDRP is a fast-track administrative procedure brought before an arbitration panel. However, remedies granted in a UDRP hearing are limited to an order of cancellation or transfer of the domain name.

Monitoring registrations of similar domain names and ensuring that your domain name registration contact information is accurate are key in promptly locating cybersquatters. Domain name availability should be considered when deciding on a company name or trademark.

*by Colleen M. Healy & Jean Erhardt*



## Clingen Callow & McLean, LLC

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## FIRM HIGHLIGHTS

**Steven A. Marderosian's** wins continue unabated.

- **Steve** recently forced an adversary's expert witness to give up favorable documents to a CC&M client and Steve elicited very favorable testimony from this expert witness despite the fact that the witness was paid by the opposing party.
- **Steve** successfully obtained a dismissal with prejudice of a case pending in Cook County Circuit Court on grounds of personal jurisdiction. This victory came as a result of a Motion for Reconsideration filed by Steve which convinced the trial judge that his initial ruling on the issue was wrong.
- **Steve** recently had a trial victory from Cook County Circuit Court affirmed by the First District Court of Appeals. On two unrelated matters, both **Steve** and **Ross I. Molho** defeated separate Motions for Summary Judgment allowing their clients' claims to go to trial.

# The Duty to Disclose in a Residential Real Estate Transaction: How Critical Is It?

In a case of first impression, the Illinois Appellate Court ruled that a home buyer may terminate a signed contract and receive a refund of 100% of their down payment at any time prior to closing if the seller fails to deliver the disclosure document ("Disclosure") required and defined by the Residential Real Property Disclosure Act (the "Act"). *Muir v. Merano*, 378 Ill. App. 3d 1103 (5th Dist. 2008).

The Act requires a home seller to complete the Disclosure and deliver it to the buyer before signing the contract. The Act states that if the seller never delivers the Disclosure prior to conveyance of the deed, the buyer has the right to terminate the contract and receive a full refund.

The signed contract in *Muir* stated that if the plaintiff-buyer failed to close, the defendant-seller would refund only one-half of the earnest money. The court rejected the seller's argument that the buyer's right to terminate under the Act had not ripened at the time the buyer terminated. The court found no support for the seller's position, noting that the provisions of the Act are mandatory and do not merely constitute a scheme of escalating remedies that build on one another.

The Act requires a seller to deliver the Disclosure prior to signing the contract so that the buyer has actual knowledge of any material defects. If the buyer signs the contract before receiving the Disclosure, the seller is in jeopardy of the buyer's termination of the contract and seeking a full refund up to the time of closing. This is true even if the parties' contract specifies that the buyer's failure to close will allow recovery of less than all the earnest money or down payment.

The immediate lesson from *Muir* is simple. Strict compliance with the disclosure requirements of the Act is essential. The broader lesson of *Muir* is one that CC&M discusses with its clients every day. Courts will and do enforce statutes as they are written even if the results appear harsh. Further, the freedom to contract, although broad, is not unlimited.

**The Act requires a seller to deliver the Disclosure prior to signing the contract so that the buyer has actual knowledge of any material defects.**

*by Steven A. Marderosian*

## Perfecting a Mechanic's Lien

# Complicated but Worth the Trouble

News reports abound with stories of leveraged borrowers walking away from homes unable to pay their mortgage with an ensuing foreclosure. America's court systems have seen a rise in another type of foreclosure action, however, called the mechanic's lien foreclosure.

The Illinois Mechanic's Lien Act is a powerful tool. Virtually any work a contractor undertakes to improve real estate is covered under the Act. If a mechanic's lien is perfected properly, the contractor can sue to foreclose the property and jump ahead of a secured mortgage lender. Taking priority over a mortgage is a crucial strategic advantage for mechanic's lien holders.

Perfecting a mechanic's lien is crucial to enforcing a claim under the Act. Illinois courts will only enforce a mechanic's lien if the statutory requirements are "scrupulously observed." Innocent mistakes made in drafting, serving, and recording a lien can render a claim unenforceable.

To perfect a mechanic's lien claim with priority over secured creditors, a general contractor must

1. have a valid contract (oral or written) with the property owner
2. record a properly prepared "claim for lien" against the property within four months of the last day work was "substantially completed" on the project.

In addition to the steps required of a general contractor, a subcontractor must send a 90-day notice to the owners, the general contractor, and any lender or claimant to the property. Further, a subcontractor must notify the occupant, either personally or by certified mail, that it is supplying materials or labor.

Both general and subcontractors must record a "claim for lien" within four months of substantially completing their work at a project. A proper "claim for lien" must:

1. describe the work completed
2. state the balance due on the contract
3. sufficiently describe the property and tracts subject to the lien
4. be supported by an affidavit of the contractor.

CC&M has a growing mechanic's lien practice that is efficient and cost effective. Let us help you perfect your lien and recover the amounts owed to your firm.

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by Gregory P. Adamo

## MORE FIRM HIGHLIGHTS

**Delrose A. Koch** presented on the topic of Charitable Planning for the prestigious National Business Institute's "Estate Planning Basics" seminar in Schaumburg, IL on June 23, 2008. Lawyers from all over Illinois attended this seminar.

CC&M assisted a client with the refinancing of its existing debt and in borrowing funds from the issuance of Industrial Revenue Bonds by the Illinois Finance Authority. This multi-million dollar transaction was coordinated by attorney **Deven S. Kane** with assistance from **Kenneth W. Clingen** and corporate paralegal **Jean Erhardt**.

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**Clingen Callow & McLean, LLC**

## The Duty to Disclose in a Residential Real Estate Transaction: How Critical Is It?



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## WHAT'S INSIDE? *Articles & Contributors*

### Cybersquatting: A New Form Of Intellectual Property Theft



**Colleen M. Healy,** *a partner at CC&M, concentrates her practice in corporate, real estate, estate and succession planning, and banking law.*

### **Jean Erhardt,** *a paralegal at CC&M,*

*assists CC&M attorneys with her expertise in corporate law and intellectual property issues.*



### Perfecting a Mechanic's Lien: Complicated but Worth the Trouble

**Gregory P. Adamo,** *an associate at CC&M, concentrates his practice in complex commercial litigation, corporate law and real estate law.*