CURRENT, ALBEIT ARBITRARY, rules exist governing the tax treatment of traditional forms of intellectual property, such as patents, trade secrets, copyrights, trademarks, and trade names. Current rules also exist governing the tax treatment of other intangible rights, such as government licenses and service contracts. Although specific tax principles exist for these traditional intellectual property and intangible rights, specific tax rules do not exist for new intangible rights, such as domain names, that have emerged with the arrival of global, electronic commerce transactions on the Internet. As a result, the legal nature of domain names

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should be examined to determine whether they are variations of existing intellectual property or intangible rights to which existing tax law can be applied.

**Domain Names Not Government Licenses**

Any “license, permit, or other right granted by a governmental unit or an agency or instrumentality thereof” is a “section 197 intangible” amortizable ratably over 15 years under section 197 of the Internal Revenue Code (“Code”). §197(d)(1)(D); Treas. Reg. §1.197-2(b)(8). (All section references are to the Code or regulations, unless otherwise indicated.) If the current domain name system were viewed as a form of government licensing, then domain names would seemingly fall within the scope of section 197 and capitalized domain name purchase costs would be amortizable over 15 years. Domain names should not, however, be considered government licenses for tax purposes.

**The Domain Name Registration System**

In 1993, the government relinquished direct control over development of the Internet by permitting Network Solutions, Inc. (“NSI”), a private corporation, to commence the task of assigning domain names in the “.com,” “.org,” “.net,” and “.edu” TLDs. In 1998, the government, though the Department of Commerce, ended NSI’s exclusive status and opened the domain name registration system to other registrars, allowing more international involvement in the management of the domain name system. The policy facilitated the creation of ICANN, a private, nonprofit corporation, to assume the responsibility for managing the allocation of Internet Protocol numbers and the domain name system. NSI is no longer the exclusive registrar of domain names; currently, there are hundreds of registrars of domain names worldwide. Numerous courts have uniformly held that a registrar is not a government agency, or a state or federal actor, and an agreement to perform registration services is not a “quintessential” government service agreement. See, e.g., National A-1 Advertising, Inc. v. Network Solutions, Inc., 121 F. Supp. 2d 156, 168 (D.N.H. 2000); Island Online, Inc. v. Network Solutions, Inc., 119 F. Supp. 2d 289, 307 (E.D.N.Y. 2000); Thomas v. Network Solutions, Inc., 176 F.3d 500, 511 (D.C. Cir. 1999).

**The Role Of Registrars**

Under ICANN policy, a registrar only provides services “in connection with a TLD when it has an agreement with the TLD’s Registry Operator,” and the services include “contracting with Registered Name Holders, collecting registration data about the Registered Name Holders, and submitting registration information for entry in the Registry Database.” ICANN Registrar Accreditation Agreement, www.icann.org/registrars/ra-agreement-17may01.htm, at 1.11. These services cease if a domain name registrant fails to renew its registration. By simply providing services, not domain name rights, registrars do not function as licensors. Registrars neither own nor have rights in domain names before attempts by registrants to create such names. Without first having ownership or other rights themselves, registrars cannot license domain names. Registrars have nothing to provide except registration services per an agreement with ICANN.

**Domain Names Not Contracts For Services**

It might be suggested that, for tax purposes, a domain name represents a contract for services, rather than property, because the rights in a domain name are closely intertwined with the services performed by the domain name registrar. Section 197 contains specific tax rules for contracts for services; that is, any value resulting from the future acquisition of services pursuant to contractual relationships with suppli-
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Character Of Domain Names And The Registration Agreement

There are hundreds of registrars and registrar-intermediaries providing domain name registration services. The role of the registrar in the domain name registration process is to provide services to the registrant. These services include contracting with the registrant, collecting registration data about the registrant, and submitting that information for entry in the domain name registry database. Under a contract with the registrar, the registrant enjoys a presence on the Internet for the duration of the registration. Thus, a contract between registrar and registrant determines the parties’ responsibilities, not the character or classification of the domain name itself.

Domain Names As Property, Not Service Contracts

Courts have concluded that domain names are not service contracts. See Kremen v. Cohen, 99 F. Supp.2d 1168 (N.D. Cal. 2000). A contract between a registrar and a registrant does not in itself give rise to the right to use a domain name. Rather, the right to use domain names “exists separate and apart from [the registrar’s] various services that make the domain names operational Internet addresses. These services...are mere conditions subsequent.” Id. at 1173 n.2. The role of the registrar is to provide these services, but the domain name itself is not a service contract. Id. at 1171-73 (analyzing the domain name registration agreement between NSI and the registrant and the Cooperative Agreement between NSI and NSF, and holding that the domain name itself is not a service contract but a form of intangible property). Moreover, NSI, once the exclusive registrar of domain names and currently the largest, has conceded that domain names are not service contracts but intangible property. See Kremen v. Cohen, 337 F.3d 1024, 1029 (9th Cir. 2003) (stating that Network Solutions has conceded that registrants have property rights in their domain names); Network Solutions, Inc. v. Umbro Int’l, Inc., 529 S.E.2d 80, 86 (2000) (“[Network Solutions] acknowledged during oral argument before this Court that the right to use a domain name is a form of intangible personal property.”); Network Solutions, Inc. v. Clue Computing, Inc., 946 F. Supp. 858, 860 (D. Colo. 1996) (stating that Network Solutions admits that domain names are intangible personal property).

Domain Names As Property

Domain names should not be viewed for tax purposes as government licenses or contracts for services for tax purposes. Instead, domain names should be viewed as valuable intangible property for tax purposes. See Kremen v. Cohen, 337 F.3d 1024, 1029 (9th Cir. 2003). (It should be noted that in Anticybersquatting Consumer Protection Act in rem actions resolving ownership disputes over domain name registrations, courts have consistently held that domain names are property. See Caesars World, Inc. v. Caesars-Palace.com, 112 F. Supp.2d 502 (E.D. Va. 2000); Lucent Techs., Inc. v. Lucentsucks.com, 95 F. Supp.2d 528, 534 (E.D. Va. 2000).) Classifying domain names as valuable intangible “property,” however, does not ipso facto determine their federal tax treatment. Section 197, the necessary starting point for determining the tax treatment of intangible rights, does not govern all valuable rights classified as intangible property but instead governs only those intangible rights within the definition of “section 197 intangibles.” The relevant issue is whether domain names fit within two particular categories of section 197 intangibles: trademarks and goodwill.
Domain Names As Trademarks

Should domain names be subject to the same tax rules as trademarks? In general, amounts paid or incurred to acquire a trademark must be capitalized and deducted ratably over 15 years under section 197, regardless of whether the trademark is acquired separately or with a trade or business. For purposes of section 197, the term trademark “includes any word, name, symbol, or device, or any combination thereof, adopted and used to identify goods or services and distinguish them from those provided by others.” Treas. Reg. §1.197-2(b)(10). A trade name is defined as “any name used to identify or designate a particular trade or business or the name or title used by a person or organization engaged in a trade or business.” Id. Moreover, “[a] trademark or trade name includes any trademark or trade name arising under statute or applicable common law, and any similar right granted by contract.” Id. (Emphasis added.) Are these regulatory definitions broad enough to include domain names?

Registration Of Domain Names

It is well established that certain domain names may be registered as trademarks. The U.S. Patent and Trademark Office (“PTO”) has issued guidelines on the registration of domain names as trademarks. Under the PTO policy, domain names are entitled to the protection afforded trademarks if they are arbitrary, fanciful, suggestive, or descriptive, with acquired secondary meaning. PTO Examination Guide No. 2-99, available at www.uspto.gov/web/offices/tac/notices/guide299.htm. To be considered as a potential trademark for registration, a domain name must function as a source indicator. To qualify as a trademark, the registrant or owner of the domain name must use the domain name at its web site to distinguish the goods or services offered at the web site and to indicate the source of those goods or services. The web site must be an active web site with a home page and perhaps internal pages that sell products or services at the web site. The web pages’ content should use the domain name in connection with the products or services offered at the site. All of these domain name uses are intended to convey to Internet consumers the relationship between the domain name and the source of sponsorship of the goods or services offered at the web site. Courts have consistently held that domain names are not merely addresses but powerful source indicators on the Internet. See, e.g., Brookfield Communications, Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1055 (9th Cir.1999).

Domain Names That Function As Trademarks Governed By Section 197

The definition of “trademark” in section 197 is broad enough to include domain names that are protectable as valid trademarks, such as those considered arbitrary, fanciful, suggestive, or descriptive with acquired secondary meaning. Therefore, purchase costs allocable to domain names that function as trademarks should be amortized ratably over a 15-year period irrespective of the domain name’s remaining registration period and registration renewal options. §197(a); Treas. Reg. §1.197-2(a)(1).

Do Generic Domain Names Fit?

Generic domain names such as “fitness.com,” “wireless.com,” and “wine.com” are not entitled to trademark protection. The question arises whether the costs of purchasing generic domain names are amortizable under section 197, as are the costs of purchasing domain names protected under trademark law. Some commentators have suggested that generic domain names might constitute a trademark or trade name for tax purposes even if not for intellectual property law purposes. See Annette Nellen, Domain Names and Other Intangibles for