6-1-2001

Trademark Confronts Free Speech on the Information Superhighway: Cybergripers Face a Constitutional Collision

Rebecca S. Sorgen

Recommended Citation
Available at: http://digitalcommons.lmu.edu/elr/vol22/iss1/4
TRADEMARK CONFRONTS FREE SPEECH ON THE INFORMATION SUPERHIGHWAY: "CYBERGRIPERS" FACE A CONSTITUTIONAL COLLISION

I. INTRODUCTION

As the world of Internet technology evolves, new legal issues seem to increase exponentially. In one area of cyberlaw, intellectual property rights collide with freedom of speech. This protest model, also known as "cybergripping," occurs when a consumer creates a web page on the Internet to voice an opinion (usually a negative one) about a particular product, company, or service.\(^1\) The recent trend involves the targeted company retaliating against the owner of the website or domain name by asserting its trademark rights.\(^2\) However, while mark owners have the right to vigorously protect their trademarks, they may not do so at the expense of the First Amendment.\(^3\)

Many "cybersquatters"\(^4\) wrongfully assert a First Amendment defense to justify their own commercial gain in domain name disputes.\(^5\) However,

---


2. See discussion infra Part III.

3. See discussion infra Part III.D.


   Individuals who attempt to profit by reserving domain names composed of someone else's registered marks and later reselling or licensing those domain names back to the rightful owner of the mark are called "cybersquatters." Cybersquatters intentionally register domain names based on others' trademarks for the purpose of selling or canceling them in exchange for large sums of money.

   *Id.*

legitimate cybergriper typically find themselves caught in the crossfire.6

Consider the following hypothetical: Complacent Customer purchases a widget from the Corporate Giant, Widgets, Inc. Complacent Customer then takes the product home, only to find the widget defective. After numerous telephone calls and letters, Corporate Giant still does not respond. Complacent Customer then becomes Disgruntled Customer. Furious, he launches his first cybergripe in the form of the website “www.widgetsincsucks.com.” Before he knows it, his simple protest site attracts thousands of hits from others who share similar experiences with Widgets, Inc. Members of the public post complaints on the message boards. Further, disgruntled ex-employees of Corporate Giant post their individual stories. Pretty soon widgetsincsucks.com attracts the attention of Corporate Giant. It sends Disgruntled Customer a cease-and-desist letter. Disgruntled Customer, after touting his First Amendment rights, proudly posts the letter on the website, causing even more negative publicity for the Corporate Giant.7

According to the Corporate Giant’s point of view, it does not matter whether Widgets, Inc. wins its case by asserting trademark infringement under the Anticybersquatting Consumer Protection Act8 or whether Disgruntled Customer wins based on his First Amendment9 right of free speech.10 Upon learning a valuable lesson in the world of cyberspace, Widgets, Inc. must now hire a team of Internet savvy lawyers to constantly monitor the web, searching for potential infringers.11 It also acts to prevent others like Disgruntled Customer from creating their own sites.12 In a form of reverse cybersquatting, it preemptively registers domain names such as www.widgetsincsucks.net, www.widgetsincsucks.org, and www.widgetsincreallysucks.com.13 With ICANN’s14 recent talk of

6. See Bally Total Fitness Holding Corp. v. Faber, 29 F. Supp. 2d 1161, 1166 (C.D. Cal. 1998).
7. See Robert Trigaux, gripe.com, ST. PETERSBURG TIMES, Jan. 31, 1999, at 1H.
9. See U.S. CONST. amend. I.
10. See id.
11. For example, Cyveillance is a company created to monitor online trademark abuse for clients. Trigaux, supra note 7, at 1H.
13. See id. In a preemptive strike, Bell Atlantic reserved the domain name, www.bellatlanticsucks.com, to keep protesters from using the name. Id.
14. ICANN is the Internet Corporation for Assigned Names and Numbers, a non-profit, “quasi-governmental” agency that manages the domain name system on the Internet. John Hartje,
expanding the top-level domain system, the Corporate Giant has a choice: spend millions on this preemptive strike or grin and bear it.

In the evolving world of cybersquatting, scenarios like the above hypothetical appear frequently. For example, Richard L. Hatch, a toy collector from Bangor, Maine, created www.walmartsucks.com after Bangor stores banned him from buying toys in bulk. Scott Harrison launched www.chasebanksucks.com after Chase Manhattan Bank erroneously billed his credit card. Andrew Faber launched a “Bally Sucks” website after Bally’s Total Fitness reneged on a deal to give him a lower rate and more privileges in return for a year’s membership. John Osborne rented a U-Haul truck in 1997. After repeated breakdowns, and after U-Haul insisted Osborne pay for damage to the truck, Osborne launched the site, “U-Hell, Misadventures in Moving.”

However, cybergripers do not fall into the traditional definition of cybersquatters, especially where First Amendment rights are concerned. Furthermore, even though ICANN’s Uniform Domain Name Dispute Resolution Policy (“UDRP”) closely mirrors the Anticybersquatting Consumer Protection Act (“ACPA”) enacted in 1999, domain names that
use a protected trademark to protest a particular company or product are increasingly losing domain name disputes.\textsuperscript{26}

Using the "www.[protected mark]sucks.com" model, this Comment argues that neither the Anticybersquatting Consumer Protection Act nor ICANN's Uniform Domain Name Dispute Resolution Policy should prevent a legitimate cybergriper from using a trademark in a domain name to protest a particular company or product. Part II compares and contrasts the history of both the ACPA and ICANN's dispute resolution policy with special focus on the bad faith factors balanced against First Amendment rights. Part III provides a thorough analysis of both frameworks as applied to actual domain name disputes, concentrating on the fair use defense and ICANN anomalies. Part IV compares and contrasts both systems in terms of public policy and international considerations and, finally, Part V concludes with potential solutions in light of new legal developments.

II. BACKGROUND

A. The Anticybersquatting Consumer Protection Act\textsuperscript{27}

1. Evolution of the Lanham Act\textsuperscript{28}

Trademark protection generally furthers three interests: 

\begin{quote}
[P]rotecting consumers from being deceived and misled, curbing the unjust enrichment of poachers who infringe on the marks of others, and protecting the investment made by the mark owner in developing the mark and the subsequent goodwill of consumers toward it.\textsuperscript{29}
\end{quote}

The Anticybersquatting Consumer Protection Act ("ACPA")\textsuperscript{30} went into effect on November 29, 1999, amending Section 43 of the Lanham Act.\textsuperscript{31} Prior to the ACPA,
trademark owners relied heavily on Lanham Act provisions to resolve trademark disputes, specifically focusing on the Lanham Act's requirements that the mark be famous and that another party use the mark commercially. These requirements became more difficult to meet in the realm of cybersquatting, especially where the public did not know the mark well enough to consider it famous, or where the cybersquatter simply registered the name without any commercial use. Furthermore, trademark owners only succeeded under the Lanham Act at the expense of costly litigation. As the peculiarities of cybersquatting issues led to uncertain application of the Lanham Act, Congress passed the ACPA to remedy this problem.

2. The Underlying Purpose of the ACPA

U.S. District Judge Stewart Dalzell explored the purpose of the ACPA in *Shields v. Zuccarini*. He found that the ACPA's purpose was to shield the consumer and protect American business while promoting the expansion of e-commerce. Furthermore, Judge Dalzell found that the ACPA had an additional purpose of clarifying the law for trademark owners by explicitly prohibiting "the bad-faith and abusive registration [of protected marks]," commonly known as cybersquatting.

While the Senate Judiciary Committee focused on the difficulty of cybersquatter identification, the main concern of the House was potential...
damage to businesses. The cybersquatter’s registration of a particular mark as a domain name not only prevents the trademark owner from using that particular mark in its own domain name, but customers of the trademark owner are diverted to the cybersquatter’s website, causing the trademark owner to lose business. In addition, the cybersquatter may “blur the distinctive quality of the mark,” or tarnish the mark when linking to questionable websites, such as pornography. Finally, if a business does not actively police its trademark to prohibit unauthorized use, it risks losing all of its rights by letting the trademark fall into the public domain. Thus, Congress created the ACPA in a landmark attempt to “address a growing problem in an increasingly Internet-based business world.”

3. Current Applications of the ACPA

The ACPA disregards the Lanham Act’s requirements of fame and commercial use, and includes “distinctive marks” as well. Further, the ACPA replaces the commercial use requirement with the confusingly similar standard. Thus, so long as the mark and the domain name are confusingly similar, the ACPA applies regardless of the goods or services of the parties. The ACPA provides that

[A] person shall be liable in a civil action by the owner of a mark . . . if, without regard to the goods or services of the parties, that person—

(i) has a bad faith intent to profit from that mark . . .

(ii) registers, traffics in, or uses a domain name that—

many cybersquatters register domain names under aliases or otherwise provide false information in their registration applications in order to avoid identification and service of process by the mark owner.” Id.

41. Id. at 530 n.1; see also H.R. REP. No. 106-412, at 6 (1999).
42. Lucent, 95 F. Supp. 2d at 530 n.1.
43. Id.
44. Id.
46. Dartley, supra note 33, at 270.
47. Id. at 271.
48. Id.
49. Id.
(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

(III) is a trademark, word, or name protected by reason of section 706 of title 18. . . .

Therefore, in contrast to a traditional trademark infringement claim where the owner of the trademark must demonstrate consumer confusion based upon commercial goods and services, an ACPA claim only needs to demonstrate that the mark and the domain name are similar. In addition, the ACPA broadens the application of the law to cybersquatting in general. It applies not only to a person who registers or traffics in a domain name that is identical or confusingly similar to a protected mark, but also to an individual who merely uses a domain name that is identical or confusingly similar to a protected mark.

4. The ACPA's Bad Faith Requirement

Although the ACPA does not offer a definition of the term "bad faith," the Act delineates nine factors that a court may consider. These factors include: 1) the domain name's genuine noncommercial or fair use of the mark; 2) the intent of the person to divert customers from the trademark holder's site to another site for commercial gain, to tarnish the trademark, or to create a likelihood of confusion surrounding the source of the site; 3) "the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain;" and a person's continuing pattern of hoarding multiple domain names that the person knows are identical, are confusingly similar, or are "dilutive . . . marks of others that are famous at the time of registration of
such domain names, without regard to the goods or services of the parties.\textsuperscript{60} These factors are non-exclusive and courts do not have to take any of them into consideration.\textsuperscript{61} However, a person with a legitimate belief that the use of the domain name is lawful\textsuperscript{62} may have a "fair use" defense to the ACPA's bad faith requirement.\textsuperscript{63} It applies when the defendant, in good faith, uses the plaintiff's mark for descriptive purposes only, and not as a trademark.\textsuperscript{64} The defense differs from the broad fair use exception of copyright law,\textsuperscript{65} which states that uses such as criticism, comment, news reporting, teaching, scholarship, or research may be fair.\textsuperscript{66} Trademark law forbids the use of a protected mark that is "likely to cause confusion, or to cause a mistake, or to deceive."\textsuperscript{67} Therefore, courts will not hold a domain name registrant liable when the registrant reasonably believed the use of the name was proper, even if the registrant's actions otherwise constitute bad faith under the statute.\textsuperscript{68}

5. First Amendment Implications in Trademark Law

First Amendment concerns, applied within the context of "fair use" of a registered trademark, may limit trademark rights.\textsuperscript{69} In congressional hearings involving the dilution prohibition of the Lanham Act,\textsuperscript{70} Senator Orrin Hatch asserted that the statute "will not prohibit . . . parody, satire, editorial and other forms of expression that are not a part of a commercial transaction."\textsuperscript{71} The Lanham Act's fair use defense applies to individuals

\begin{itemize}
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Dartley, \textit{supra} note 33, at 271.
\item \textsuperscript{63} See Cisneros, \textit{supra} note 1, at 232.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Jon H. Oram, \textit{Will the Real Candidate Please Stand Up?: Political Parody on the Internet}, 5 J. INTELL. PROP. L. 467, 492–93 (1998).
\item \textsuperscript{66} 17 U.S.C. § 107 (1994). The fairness of the use depends on factors including: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.
\item \textsuperscript{67} Oram, \textit{supra} note 65, at 492–93.
\item \textsuperscript{68} Dartley, \textit{supra} note 33, at 271–72.
\item \textsuperscript{69} Bally Total Fitness Holding Corp. v. Faber, 29 F. Supp. 2d 1161, 1166 (C.D. Cal. 1998) (citing L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987)).
\item \textsuperscript{71} Bally, 29 F. Supp. 2d at 1167 (citing 141 CONG. REC. S19, 310 (daily ed. Dec. 29, 1995)
using a trademark in good faith and for descriptive purposes only. If the defendant uses the plaintiff’s mark as a trademark to “describe the goods or services of the defendant or their geographic origin,” then the fair use defense does not apply.

For example, the court in Bally Total Fitness Holding Corp. v. Faber held that the First Amendment protected the defendant’s speech because the defendant used the mark in the context of a consumer commentary. However, while courts recognize that the Internet warrants special protection as a place of public discourse, there is no clear legal precedent involving free speech and trademark protection. Furthermore, in an attempt to regulate improper Internet behavior, judicial fora may broadly interpret the law in a way that threatens First Amendment protection of protest and parody sites.

B. ICANN’s Uniform Domain Name Dispute Resolution Policy

1. History of ICANN’s Dispute Resolution Policy

“ICANN is envisioned as a model for the quasi-government of the Internet because it is ostensibly responsible only to ‘the Internet community.’” ICANN is a nonprofit corporation created to assume the responsibility for domain name management from Network Solutions, Inc. (“NSI”). Previously, NSI was the only entity responsible for assigning domain names in the United States. NSI only dealt with top-level...
domains ("gTLDs") such as ".com," ".net," ".org," and ".gov," similar to ICANN’s current jurisdiction.\textsuperscript{82} NSI’s dispute resolution procedure allowed a trademark owner to prevent another’s use of a domain name that was identical to the trademark owner’s registered mark.\textsuperscript{83} Neither party could use the name unless they reached an agreement.\textsuperscript{84} The registrant often forced the trademark owner to bring an infringement action by refusing to transfer the domain name.\textsuperscript{85}

The UDRP is a fast and inexpensive administrative proceeding that provides a more efficient option for obtaining a domain name from a cybersquatter than resorting to the court system.\textsuperscript{86} The administrative panel consists of one to three members who decide the dispute under the UDRP.\textsuperscript{87} ICANN utilizes four separate organizations to adjudicate domain name disputes: the World Intellectual Property Organization ("WIPO"), the National Arbitration Forum ("NAF"), Disputes.org/eResolution Consortium ("eResolution"), and the CPR Institute for Dispute Resolution ("CPR").\textsuperscript{88} Although there are some procedural differences, each organization adheres to ICANN’s rules.\textsuperscript{89} This ensures consistent results.\textsuperscript{90}

2. Current Applications of the UDRP

The mandatory administrative proceeding of the UDRP does not apply to all disputes.\textsuperscript{91} Rather, the UDRP, approved by ICANN on October 24, 1999,\textsuperscript{92} applies only when the complainant, a third party, can prove:

(i) [the registrant’s] domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and

(ii) [the registrant has] no rights or legitimate interests in respect of the domain name; and

(iii) [the registrant’s] domain name has been registered and is

\textsuperscript{82} Anderson, supra note 1, at 1261.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Hartje, supra note 14, at 38.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} UDRP, supra note 24, § 4(a).
\textsuperscript{92} UDRP, supra note 24.
being used in bad faith.\textsuperscript{93} All three of the above elements must be present to initiate an arbitration proceeding.\textsuperscript{94} Once the parties begin arbitration, ICANN refuses to participate in the process any further.\textsuperscript{95} ICANN's involvement ends once the complainant selects the "Provider" from the approved list of arbitration organizations.\textsuperscript{96}

3. The UDRP's Bad Faith Requirement

ICANN's list of bad faith factors is strikingly similar to that of the ACPA.\textsuperscript{97} Evidence of bad faith includes circumstances indicating that the registrant obtained the domain name in order to transfer it to the trademark owner or competitor of the trademark owner "for valuable consideration,"\textsuperscript{98} that the registrant registered the domain name to keep the trademark owner from using it\textsuperscript{99} (but only if the registrant engaged in "a pattern of such conduct"),\textsuperscript{100} or that the registrant "registered the domain name primarily for the purpose of disrupting the business of a competitor."\textsuperscript{101} Finally, circumstances indicating bad faith include the registrant's intentional attempt

[T]o attract, for commercial gain, Internet users to [the registrant's] web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of [the registrant's] web site or location or of a product or service on [the registrant's] web site or location.\textsuperscript{102}

Additionally, the UDRP has a "fair use" exception similar to that of the ACPA.\textsuperscript{103} This exception applies when the registrant legitimately uses the domain name "without intent for commercial gain to misleadingly

\textsuperscript{93} Id. § 4(a).

\textsuperscript{94} Jeffrey M. Gitchel, Cyberwars: Domain Name Dispute Policy Provides a New Hope to Parties Confronting Cybersquatters, INTELL. PROP. TODAY, Aug. 2000, at 34.

\textsuperscript{95} See UDRP, supra note 24, §§ 4(h), 5--6.

\textsuperscript{96} See id. § 4(d).


\textsuperscript{98} UDRP, supra note 24, § 4(b)(i).

\textsuperscript{99} Id. § 4(b)(ii).

\textsuperscript{100} Id.

\textsuperscript{101} Id. § 4(b)(iii).

\textsuperscript{102} Id. § 4(b)(iv).

\textsuperscript{103} See id. § 4(c)(iii).
divert consumers or to tarnish the trademark or service mark at issue."  

C. Comparison of the UDRP and the ACPA

The UDRP and the ACPA were not only introduced at the same time, but they are also virtually identical. However, while the UDRP deals with domain names that are “identical or confusingly similar to a trademark or service mark in which the complainant has rights,” the ACPA deals with trademarks, protected personal names, and distinctive and famous marks. Although it seems that the UDRP only applies to trade or service marks, in contrast to the ACPA’s broader applicability, the recent administrative panel decision of Winterson v. Hogarth expanded ICANN’s policy. The panel ruled that “trademark . . . includes the rights of any third party to his/her name.”

Furthermore, the bad faith requirement in the ACPA and the UDRP are very similar. Both policies contain factors that balance in favor of the respondent when the court or arbitration panel finds a bona fide noncommercial or fair use, prior use in connection with a bona fide offering of goods and services, or when the respondent uses a name under which the individual or company is commonly known (even if the individual does not possess a trademark). Both policies also contain factors that weigh in favor of the complainant when the court or arbitration panel finds that the respondent had an intent to divert customers from the

104. UDRP, supra note 24, § 4(c)(iii).
107. UDRP, supra note 24, § 4(a)(i).
109. Id. § 1125(d)(1)(A)(i).
110. Id. § 1125(d)(1)(A)(ii)(I).
111. Id. § 1125(d)(1)(A)(ii)(II).
113. See id. § 6.20.
114. Id. (emphasis in original). “The Rules do not require that the Complainant’s trademark be registered by a government authority or agency for such a right to exist.” Id. § 6.3 (emphasis in original).
complainant’s site (either for financial gain, to disrupt a competitor’s business, or to tarnish the mark), the respondent had an intent to profit from the complainant’s mark, or the respondent had a prior history or pattern of cybersquatting. Therefore, due to their similarities, the same analysis applies to both policies.

III. ANALYSIS

This Part will compare the use of a trademark to protest in a “brick-and-mortar” setting to the use of a trademark to protest with an Internet domain name. The cases of Porsche Cars North America, Inc. v. Spencer and Porsche Cars North America, Inc. v. Manny’s Porshop illustrate that a fine line exists between traditional cybersquatting and protesting by using a protected mark in a domain name. However, these cybersquatting issues do not apply to protest and parody websites.

Next, after dispensing with the bad faith factors that do not apply to the “[protected mark]sucks.com” model, the analysis will explore the applicable factors. This Part will begin with the pre-ACPA landmark case of Bally Total Fitness Holding Corp. v. Faber, and will analyze the evolution of the confusingly similar standard as it first appeared in Lucent Technologies, Inc. v. LucentSucks.com. The “intent to divert consumers” factor is traced from Bally to the Panavision Int’l v. Toeppen and Intermatic, Inc. v. Toeppen cases, where it is distinguished. In addition, this Part will demonstrate that initial interest confusion is inapplicable to the protest website model by distinguishing “www.[protected mark]sucks.com” from the websites in Planned
Parenthood Federation of America v. Bucci and Panavision.

Finally, the analysis explores the issues of bona fide noncommercial use and the First Amendment, distinguishing between the external fair use defense of the First Amendment and the internal fair use defense built into the ACPA and discoverable through statutory construction. Applying Planned Parenthood, Morrison & Foerster, LLP v. Wick, and Shields v. Zuccarini, as distinguished from the protest website model, the analysis concludes that the "www.[protected mark]sucks.com" model constitutes speech protected by the First Amendment.

A. Traditional Cybersquatting Issues Do Not Apply to Protest and Parody Sites

The first step in the analysis determines where the "www.[protected mark]sucks.com" model fits into the existing legal framework. Generally, there are three types of Internet domain name registration: cybersquatting, good faith registration, and "cyberwarehousing." Cybersquatting is "the registration in bad faith of an Internet domain name that is identical or confusingly similar to another's trademark or famous name." Cybersquatters register domain names based on the trademarks of others with the intent of holding them for ransom by either "selling or canceling them in exchange for large sums of money." The "good-faith registrant," on the other hand, while lacking the intent to sell the domain name, reserves it to actually conduct business under it, only to discover later that the trademark belongs to someone else. The "warehousing..."
cybersquatter"¹⁴⁸ does not deliberately target trademark owners.¹⁴⁹ Seeing domain names as a "real estate" opportunity, this person registers domain names that have the potential for future consumer use.¹⁵⁰ Warehousing cybersquatters do not violate the law.¹⁵¹ A fine line exists between the traditional cybersquatter and the "warehousing cybersquatter."¹⁵² In Spencer,¹⁵³ for example, the defendant registered the domain name "www.porchesource.com"¹⁵⁴ with the intent to sell the domain name to a local Porsche dealership.¹⁵⁵ Under the ACPA's nine bad faith factors,¹⁵⁶ the court ultimately found bad faith in the defendant's "intent to profit from Porsche's mark."¹⁵⁷ Furthermore, the court based its analysis on the case of Manny's Porshop.¹⁵⁸ In that case, the court found that a Porsche repair shop called "Manny's Porshop" diluted Porsche's trademark by establishing a "likelihood of confusion."¹⁵⁹ Thus, on both the Internet and in traditional "brick-and-mortar"¹⁶⁰ stores, the trademark actions hinge on the protected mark's appearance in the challenged domain name or store name.¹⁶¹ This fine line between cyberwarehousing and cybersquatting presents a special problem when applied to protest sites that use the format "www.[protected mark]sucks.com."¹⁶² The "cybergriper,"¹⁶³ while arguably not a "good-faith registrant"¹⁶⁴ in the traditional meaning of the term, does not fit cleanly into either the bad-faith cybersquatter¹⁶⁵ or the "cyberwarehousing" category.¹⁶⁶ Like the bad-faith cybersquatter, this

¹⁴⁸. Id.
¹⁴⁹. Id.
¹⁵⁰. See id. For example, "www.hotcars.com" used for a potential car sales company or "www.greatskinnow.com" used for a skin care company. See id.
¹⁵¹. See Brown, supra note 142, at 37.
¹⁵². See id.
¹⁵⁴. Id. at *3.
¹⁵⁵. Id. at *16--*17.
¹⁵⁶. Id. at *14--*21.
¹⁵⁷. Id. at *21.
¹⁶⁰. Brookfield Communications, Inc. v. West Coast Entm't Corp., 174 F.3d 1036, 1057 (9th Cir. 1999).
¹⁶². See Parody Sites, supra note 1.
¹⁶³. See generally Trigaux, supra note 7.
¹⁶⁴. Brown, supra note 142, at 37.
¹⁶⁵. Id.
¹⁶⁶. Id.
registrant realizes that another person owns the trademark connected to the registered domain name.\textsuperscript{167} However, like the "good-faith registrant," the cybergriper intends to use the domain name for a bona fide noncommercial purpose – namely to exercise a First Amendment right to either protest or parody the trademark holder, or to provide a forum for consumer criticism.\textsuperscript{168}

With the "www.[protected mark]sucks.com" domain names, the fine lines drawn in the \textit{Porsche} cyber-warehousing cases become even fuzzier.\textsuperscript{169} The court in \textit{Manny's Porshop} found that mere inclusion of a word similar to Porsche's trademark in the store's name was sufficient to cause consumer confusion.\textsuperscript{170} Using the ACPA, the court in \textit{Spencer} reached the same conclusion.\textsuperscript{171} Under this logic, it would seem that a registrant who registers a domain name consisting of a protected mark with the word "sucks" tacked on to the end would be liable for trademark dilution on the theories of consumer confusion and bad faith.\textsuperscript{172} However, in comparing \textit{Manny's Porshop} to a scenario where a protester may paint a brick-and-mortar storefront sign stating "[Protected Mark] Sucks," the First Amendment would potentially offer protection for this type of protest speech.\textsuperscript{173} Thus, the remaining questions ask whether: 1) the likelihood of confusion test applies to this type of registrant, and 2) which bad faith requirements of both the ACPA and the UDRP apply to cybergripers. In addition, it is necessary to determine whether the First Amendment offers a complete defense to trademark dilution and, if not, to what extent the First Amendment factors into the bad faith test as compared to trademark law in general.

\textbf{B. Non-Applicable Factors}

At first glance, many of the bad faith factors in both the ACPA and the UDRP do not apply to the protest/parody sites involving "www.[protected mark]sucks.com."\textsuperscript{174} For example, a legitimate

\begin{itemize}
\item \textsuperscript{167} See Trigaux, \textit{supra} note 7.
\item \textsuperscript{168} Id.
\item \textsuperscript{170} \textit{Manny's Porshop}, 972 F. Supp. at 1131–32.
\item \textsuperscript{171} \textit{Spencer}, 2000 U.S. Dist. LEXIS 7060, at *12–*13.
\item \textsuperscript{172} See generally Lucent Techs., Inc. v. Lucent sucks.com, 95 F. Supp. 2d 528 (E.D. Va. 2000).
\item \textsuperscript{173} See generally Brookfield, 174 F.3d 1036.
\end{itemize}
cybergriper registers a domain name to protest, not to obtain a profit.\textsuperscript{175} Further, the registrant is not offering bona fide goods or services.\textsuperscript{176} Additionally, the registrant in this model does not have trademark or intellectual property rights to the mark, nor does the cybergriper have a prior pattern of cybersquatting conduct.\textsuperscript{177} Therefore, the analysis turns on three remaining factors: the confusingly similar standard, the respondent's intent to divert consumers, and the bona fide non-commercial or fair use of the mark.\textsuperscript{178}

\textit{C. Applicable Factors}

1. The Confusingly Similar/Likelihood of Confusion Standard

Prior to the ACPA, trademark owners had to bring actions under theories of either trademark infringement\textsuperscript{179} or trademark dilution.\textsuperscript{180} The difficulty the courts had in molding the Trademark Act into cyberpiracy cases led to the evolution of the ACPA.\textsuperscript{181} For example, in \textit{Bally}, the court applied the factors identified in \textit{AMF Inc. v. Sleekcraft Boats}\textsuperscript{182} (the "\textit{Sleekcraft factors}") to determine a likelihood of confusion.\textsuperscript{183}

These factors include a balance of the "strength of the mark;"\textsuperscript{184} "proximity of the goods;"\textsuperscript{185} "similarity of the marks;"\textsuperscript{186} "evidence of actual confusion;"\textsuperscript{187} "marketing channels used;"\textsuperscript{188} "type of goods and the degree of care likely to be exercised by the purchaser;"\textsuperscript{189} "defendant's

\begin{itemize}
  \item \textsuperscript{175} See Trigaux, supra note 7.
  \item \textsuperscript{176} See 15 U.S.C. § 1125(d)(1)(B)(i)(III); see also UDRP, supra note 24.
  \item \textsuperscript{177} See 15 U.S.C. § 1125(d)(1)(B)(i)(VI), (VIII); see also UDRP, supra note 24. It is also worthy of note that the threshold requirement of the mark being distinctive, famous, or a registered trademark is automatically met here in favor of the complainant. See \textit{id}. If the mark were not well known, chances are the registrant would not have a reason to protest. \textit{Id}.
  \item \textsuperscript{178} See 15 U.S.C. § 1125(d)(1)(B)(i); see also UDRP, supra note 24.
  \item \textsuperscript{180} See 15 U.S.C. § 1125(c).
  \item \textsuperscript{181} See generally \textit{Bally}, 29 F. Supp. 2d 1161; \textit{Panavision}, 141 F.3d 1316.
  \item \textsuperscript{182} 599 F.2d 341, 348-49 (9th Cir. 1979).
  \item \textsuperscript{183} "In determining whether a defendant's use of a plaintiff's trademarks creates a likelihood of confusion, the courts apply an eight factor test, . . ." \textit{Bally}, 29 F. Supp. 2d at 1163.
  \item \textsuperscript{184} \textit{Id}.
  \item \textsuperscript{185} \textit{Id}.
  \item \textsuperscript{186} \textit{Id}.
  \item \textsuperscript{187} \textit{Id}.
  \item \textsuperscript{188} \textit{Id}.
  \item \textsuperscript{189} \textit{Bally}, 29 F. Supp. 2d at 1163.
\end{itemize}
intent in selecting the mark;"\textsuperscript{190} and "likelihood of expansion of the product lines."\textsuperscript{191} While the court in \textit{Bally} was forced to stretch its reasoning to fit the facts of the case into these factors,\textsuperscript{192} it ultimately found that "[n]o reasonable consumer comparing Bally's official web site with Faber's site would assume Faber's site 'to come from the same source, or thought to be affiliated with, connected with, or sponsored by, the trademark owner.'\textsuperscript{193}

Furthermore, even though the official domain name in \textit{Bally} did not contain the protected mark, the court ruled that even if the domain name contained the mark, "‘sucks’ has entered the vernacular as a word loaded with criticism,"\textsuperscript{194} therefore, "no reasonably prudent Internet user would believe that ‘Ballysucks.com’ is the official Bally site or is sponsored by Bally."\textsuperscript{195} The \textit{Bally} court's analysis directly mirrors the identical or confusingly similar standard set forth in the ACPA.\textsuperscript{196}

The ACPA's confusingly similar standard does not require any sort of factor-balancing test.\textsuperscript{197} Rather, it is simply a threshold requirement.\textsuperscript{198} Accordingly, if the domain name is not confusingly similar to the protected mark, then the "claim . . . fails as a matter of law."\textsuperscript{199}

On May 3, 2000, the court decided \textit{Lucent} by applying the ACPA to a protest website.\textsuperscript{200} Even though the court did not rule on the defendant's argument that the plaintiff's rights were not violated as a matter of law,\textsuperscript{201} the court noted that the defendant's argument did have merit.\textsuperscript{202} The court found that parody, by its nature, makes confusion unlikely and suggests lack of bad faith intent.\textsuperscript{203} This test is the key in determining whether the defendant has infringed or diluted the trademark of the trademark holder.\textsuperscript{204}

\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} See id. at 1164--66.
\textsuperscript{193} Id. at 1163--64.
\textsuperscript{194} Id. at 1164.
\textsuperscript{195} Bally, 29 F. Supp. 2d at 1165 n.2.
\textsuperscript{197} See id.
\textsuperscript{198} See Bally, 29 F. Supp. 2d at 1164.
\textsuperscript{199} Id.
\textsuperscript{200} Lucent, 95 F. Supp. 2d at 528--30.
\textsuperscript{201} Id. at 535.
\textsuperscript{202} Id. In dismissing the case on other grounds, the court stated that the “plaintiff instituted this \textit{in rem} action too hastily after mailing and e-mailing the notice of a proposed \textit{in rem} action to the registrant of lucentsucks.com.” Id. at 536.
\textsuperscript{203} Lucent, 95 F. Supp. 2d at 535.
\textsuperscript{204} Id. (citing Petro Shopping Ctrs., L.P. v. James River Petroleum, Inc., 130 F.3d 88, 91 (4th Cir. 1997)). “The Fourth Circuit has acknowledged that effective parody ‘diminishes any risk of consumer confusion,’ and can therefore not give rise to a cause of action under the
The court found "that the average consumer would not confuse lucent<sucks>.com with a website sponsored by plaintiff." Furthermore, the court did not find evidence of bad faith. Citing the reasoning in *Bally*, the court found that as long as the defendant could successfully show that the website effectively parodied or criticized the plaintiff’s trademark, it would be near impossible for the plaintiff to succeed.

2. Intent to Divert Consumers

In both the ACPA and the UDRP, an intent to divert customers from the mark owner’s site to the site under the registrant’s domain name indicates bad faith. Success under the ACPA requires the intent of the registrant to result in potential damages, including harm to the mark’s goodwill as a result of “creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site.” It does not matter whether the registrant intends to gain commercially or if the registrant intends to “tarnish or disparage the mark.” Similarly, success under the UDRP requires the registrant to have “registered the domain name primarily for the purpose of disrupting the business of a competitor,” or 

[I]ntentionally attempted to attract, for commercial gain, Internet users to [the registrant’s] web site or other on-line location, by creating a likelihood of confusion with the complainant’s mark as to the source, sponsorship, affiliation, or endorsement of [the registrant’s] web site or location or of a product or service on [the registrant’s] web site or location.

The UDRP and the ACPA use nearly identical language in describing this factor. Both require the registrant to attempt to divert consumers for commercial gain and, in the case of the ACPA, “with the intent to tarnish

---

Trademark Act.” *Id.* at 535 (quoting Anheuser-Busch, Inc. v. L & L Wings, Inc., 962 F.2d 316, 321 (4th Cir. 1992)).

205. *Id.* at 535.

206. *Id.*


210. *Id.*

211. *Id.*


or disparage the mark.”216 Additionally, both consider a “likelihood of confusion”217 as to the “source, sponsorship, affiliation, or endorsement”218 of the website as a factor indicating bad faith.219 Finally, the UDRP contains one provision the ACPA does not.220 This provision provides that registering a domain name “primarily for the purpose of disrupting the business of a competitor”221 constitutes evidence of bad faith.222

Dispensing first with ICANN’s dissimilar provision, an indicator of a bad faith attempt to divert customers is a registrant’s primary purpose to disrupt the business of a competitor.223 A true cybergriper’s primary purpose in registering the domain name is arguably not to disrupt business, but to voice “consumer commentary.”224 Disruption of business, if any, would be purely incidental and not the cybergriper’s primary purpose.225 Furthermore, the cybergriper and the mark owner are hardly competitors in the true sense of the term.226 For example, in Bally, the plaintiff argued that the defendant’s website competed with the plaintiff’s website because both sites provided information about Bally’s services and products.227 In response to the plaintiff’s argument, the Bally court found that the defendant’s site did not compete with Bally’s site:228 “It is true that both sites provide Internet users with the same service—information about Bally. These sites, however, have fundamentally different purposes. Bally’s site is a commercial advertisement. Faber’s site is a consumer commentary. Having such different purposes demonstrates that these sites are not proximately competitive.”229 Therefore, ICANN’s bad faith factor of registering the domain name primarily for the purpose of disrupting a competitor’s business does not apply to protest websites.230

217. Id. § 1125(d)(1)(B)(i)(V); UDRP, supra note 24, § 4(b)(iv).
218. UDRP, supra note 24, § 4(b)(iv).
219. Id.
220. See id. § 4(b)(iii).
221. Id.
222. Id.
223. See id.
224. See Bally, 29 F. Supp. 2d at 1164.
225. See id. (emphasis added).
226. See id.
227. Id.
228. Id.
229. Id.
In addition, neither the commercial gain requirement nor the likelihood of confusion requirement applies to the protest website model.\textsuperscript{231} The courts in \textit{Panavision} and \textit{Intermatic} both implied that mere registration of the domain names constituted commercial use because the nature of the Internet itself satisfied the "'in commerce' requirement."\textsuperscript{232} However, those cases predated the ACPA and thus do not apply to the current analysis.\textsuperscript{233} The ACPA and the UDRP both remedy this anomaly by changing the commercial use requirement of the anti-dilution statute to "commercial gain."\textsuperscript{234} Since the true cybergriper does not commercially gain anything but a forum in which to voice opinions, this language does not apply.\textsuperscript{235}

The likelihood of confusion requirement as to the "source, sponsorship, affiliation, or endorsement"\textsuperscript{236} of the website is reminiscent of the pre-ACPA, likelihood of confusion requirement to establish trademark infringement or dilution.\textsuperscript{237} Compared to traditional cybersquatting cases like \textit{Panavision}, where "an individual appropriates another's registered trademark as its domain name,"\textsuperscript{238} a reasonable consumer is not likely to be confused as to whether the mark owner sponsors a "www.\[protected mark\]sucks.com" website.\textsuperscript{239} Accordingly, even "initial interest confusion"\textsuperscript{240} does not apply to the "www.\[protected mark\]sucks.com" model.\textsuperscript{241} Initial interest confusion occurs when a consumer, using a search engine to locate a particular company or product, retrieves a list of links to
various websites containing keywords in the "machine readable code" \(^{242}\) of the websites matching the keywords entered in the search engine. \(^{243}\) For example, a customer searching for Widgets, Inc. would enter the word "widgets" in a search engine. Not only would the official Widgets, Inc. website, "www.widgetsinc.com," appear on the list of "hits," but the customer would also retrieve the "www.widgetsincsucks.com" website because it contains the word "widgets" in the domain name and in numerous places on the page. \(^{244}\) The argument that follows is that prospective Widgets, Inc. consumers who access the protest site, www.widgetsincsucks.com, by mistake will stop searching for Widgets, Inc.'s home page "due to anger, frustration or the belief that [the Widgets, Inc.] home page does not exist." \(^{245}\)

This argument fails for several reasons. First, the theory of initial interest confusion does not change the fact that the cybergriper lacks the requisite intent to divert customers. \(^{246}\) However, assuming arguendo that the cybergriper possesses the intent, the use of the mark in the domain name does not significantly add to the large list resulting from the average Internet search, which can consist of approximately 800 to 1,000 hits. \(^{247}\)

Second, unlike the cases of Planned Parenthood and Panavision, the "www.[protected mark]sucks.com" model does not consist of just the protected mark. \(^{248}\) Since the search engines commonly display the full domain name of the selected sites, the word "sucks" in the domain name communicates to web users that the site is not an authorized site for the company. \(^{249}\) For example, in rejecting the defendant's assertion that the domain name was a mere address, \(^{250}\) the Panavision court found that a customer who is unsure of a company's domain name will most likely

---

242. Bally, 29 F. Supp. 2d at 1165 n.3.
   The machine readable code is the hidden part of the Internet upon which search engines rely to find sites that contain content which the individual user wishes to locate. The basic mechanics is that the web page designer places certain keywords in an unreadable portion of the web page that tells the search engines what is on a particular page.

Id.

243. See id.
244. See id.
245. Bally, 29 F. Supp. 2d at 1165 (quoting Panavision Int'l v. Toeppen, 141 F.3d 1316, 1327 (9th Cir. 1998)).
246. See Lucent, 95 F. Supp. 2d at 535 (emphasis added).
249. See Bally, 29 F. Supp. 2d at 1165.
250. Panavision, 141 F.3d at 1327.
assume that the company name and domain name are one and the same.\(^{251}\)

Furthermore, domain names that mirror company names are valuable because they give consumers an easy way to communicate with the company, and vice versa.\(^{252}\)

However, the protest website model does not mirror the company name to the extent where a customer would be confused.\(^{253}\) Instead, the model conforms to the rationale of Panavision because

The domain name serves a dual purpose. It marks the location of the site within cyberspace, much like a postal address in the real world, but it may also indicate to users some information as to the content of the site, and, in instances of well-known trade names or trademarks, may provide information as to the origin of the contents of the site.\(^{254}\)

Here, the domain name, consisting of the company name with the word “sucks” appended to it, indicates to users that the site is protesting the protected mark and that the mark owner did not create the site.\(^{255}\)

Finally, public policy dictates that a consumer may be entitled to receive all the information available on a particular company.\(^{256}\) While the user may choose to access the “official” company website, the search engine results allow the customer to view uncensored consumer commentary on the cybergriper’s page.\(^{257}\) Thus, potential diversion exists, but only at the consumer’s election.\(^{258}\)

\[\text{D. Bona Fide Noncommercial Use and the First Amendment}\]

1. Domain Names Constitute Speech

In both the ACPA and the UDRP, a valid fair use defense automatically satisfies the bona fide noncommercial use factor of the bad

\(^{251}\) Id. (quoting Cardservice Int’l v. McGee, 950 F. Supp. 737, 741 (E.D. Va. 1997)).

\(^{252}\) Id. (quoting MTV Networks, Inc. v. Curry, 867 F. Supp. 202, 203–04 n.2 (S.D.N.Y. 1994)).

\(^{253}\) See id.

\(^{254}\) Id. at 1327 n.8.

\(^{255}\) See Lucent, 95 F. Supp. 2d at 535 n.9.

\(^{256}\) See Bally, 29 F. Supp. 2d at 1165.

\(^{257}\) See id.

\(^{258}\) This is in contrast to a case such as Reg Vardy where, even though the site protested the owner of the protected mark, consumers would likely be diverted due to the similarity of the domain name to that protected mark. See Reg Vardy, supra note 230, § 5(i) (“[T]he use of the hyphen is insufficient to distinguish the complainant's trademark; thus] almost inevitably members of the public are going to find the domain names confusingly similar.”).
faith test in favor of the cybergriper. Additionally, it provides a First Amendment fair use defense to the ACPA and the UDRP as a whole.\textsuperscript{259} In other words, a distinction must be made between the internal fair use defense where, by its nature, \textit{bona fide} noncommercial use signifies a lack of bad faith (and thus, "fair" use); and an external fair use defense, where use of a trademark to exercise First Amendment speech rights will provide a defense to an ACPA claim in general.\textsuperscript{260} While trademark law does not trump the First Amendment right to free speech,\textsuperscript{261} it must be determined whether domain names even constitute speech protected by the First Amendment, and then what limitations apply, if any.

Domain names can constitute speech protected by the First Amendment.\textsuperscript{262} The issue only becomes difficult when, as in this model, the domain name contains both expression and functionality.\textsuperscript{263} However, a medium can have functionality and warrant constitutional protection.\textsuperscript{264} For example, every website has an Internet protocol ("IP") number (e.g. "156.121.20.201").\textsuperscript{265} Because this number is difficult to remember, websites have a domain name to correspond to the particular IP address.\textsuperscript{266} In addition, "no two websites should share the same internet protocol or the same domain name."\textsuperscript{267} The distinction between an IP address and a domain name resembles the difference between the traditional numeric telephone number and a mnemonic telephone number, such as "1-800-LAW-BOOK,"\textsuperscript{268} which a business might use to make its phone number more memorable to customers.\textsuperscript{269} Similarly, vanity license plates, although they may contain a small element of expression, serve the same function as standard automobile license plates.\textsuperscript{270} In domain name cases, "whether the mix of functionality and expression is 'sufficiently imbued with the elements of communication' depends on the domain name in question, the intentions of the registrant, the contents of the website, and the technical protocols that govern the DNS."\textsuperscript{271}

\textsuperscript{260} See Lucent, 95 F. Supp. 2d at 535.
\textsuperscript{261} Planned Parenthood, 1997 U.S. Dist. LEXIS 3338, at *35.
\textsuperscript{262} See Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 584–85 (2d Cir. 2000).
\textsuperscript{263} Junger v. Daley, 209 F.3d 481, 484 (6th Cir. 2000).
\textsuperscript{264} Id.
\textsuperscript{266} Id. at 708–09.
\textsuperscript{267} Id. at 709.
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} Name.Space, 202 F.3d at 586.
\textsuperscript{271} Id. at 585.
2. In the Legitimate Protest Model, Domain Names Constitute Protected Speech

In the "[protected mark]sucks.com" model, the good-faith registrant's intent is to protest, and the website's content will reinforce that intention. This intent is distinguishable from other cases where, in violation of both the confusingly similar standard and the *bona fide* noncommercial use factor of the bad faith analysis, the registrant's intent is to falsely identify the source of a product, rather than to relay a communicative message.272 This type of case does not warrant First Amendment protection because the First Amendment does not apply to clearly deceptive or misleading speech.273

For example, in *Planned Parenthood*, Bucci, a Catholic radio show host, established the domain name "www.plannedparenthood.com."274 As an active participant in the anti-abortion movement, Bucci set up his web page to publicize the "cost" of abortion and to make anti-abortion propaganda available to the public.275 The court in *Planned Parenthood* found that Bucci used the domain name to mislead consumers as to the source of the web address, rather than to relay a communicative message.276 By portraying the web page as the official Planned Parenthood home page, he relayed his anti-abortion message to potential Planned Parenthood clients.277 The First Amendment did not protect this use.278 Quoting *Yankee Publishing, Inc. v. News America Publishing, Inc.*,279 the court found that "[w]hen another's trademark...is used without permission for the purpose of source identification, the trademark law generally prevails over the First Amendment. Free speech rights do not extend to labelling [sic] or advertising products in a manner that conflicts with the trademark rights of others."280

273. See id. at *35-*39.
274. See id. at *3.
275. Id. at *4-*7.
276. Id. at *35-*39.
277. Id. at *38-*39.
278. *Planned Parenthood*, 1997 U.S. Dist. LEXIS 3338, at *35. "Defendant's use of another entity's mark is entitled to First Amendment protection when his use of that mark is part of a communicative message, not when it is used to identify the source of a product." Id. (citing *Yankee Publ'g, Inc. v. News Am. Publ'g, Inc.*, 809 F. Supp. 267, 275 (S.D.N.Y. 1992)).
Similarly, although the court in *Name.Space, Inc. v. Network Solutions, Inc.*\(^{281}\) did not actually rule on the issue, in dicta it explicitly found that domain names are not necessarily just source identifiers.\(^{282}\) The court, reluctant to hold that free speech did not protect domain names,\(^{283}\) stated that domain names “may be sufficiently expressive” to warrant First Amendment protection.\(^{284}\)

Other cases distinguish between domain names used as source identifiers and domain names used as expression, finding that the First Amendment does not protect misleading source identification.\(^{285}\) For example, in *Morrison & Foerster LLP*, the defendant registered several variations of the plaintiff’s protected mark, including “www.morrisonfoerster.com” and “www.morrisonandfoerster.com,”\(^{286}\) alleging that they were parodies of the famous law firm, Morrison & Foerster.\(^{287}\) The court found that, while the content of the sites constituted parody protected by the First Amendment, the domain names produced confusion.\(^{288}\) Since the domain names consisted of the protected mark and nothing more, a user could only discover the defendant’s attempt at parody by reading through the content of the sites.\(^{289}\) Because the defendant deceived Internet users into thinking they were accessing Morrison & Foerster’s official website,\(^{290}\) the First Amendment did not protect his use of the mark.\(^{291}\)

Finally, in *Shields*, the defendant registered common misspellings of the plaintiff’s domain name, “www.joecartoon.com.”\(^{292}\) These included “www.joescartoon.com,” “www.joecarton.com,” and

\(^{281}\) 202 F.3d 573, 585–86 (2d Cir. 2000).

\(^{282}\) *Id.* at 584–86 (disagreeing with PGMedia, Inc. v. Network Solutions, Inc., 51 F. Supp. 2d 389, 407–08 (S.D.N.Y. 1999)).

\(^{283}\) *Id.* at 585.

\(^{284}\) *Id.* at 588.


\(^{286}\) *Morrison & Foerster LLP*, 94 F. Supp. 2d at 1127.

\(^{287}\) *Id.* at 1131. Different versions of the defendant’s web pages contained such statements as, “We’re your paid friends!” and “Parasites No Soul [sic]... No Conscience... No Spine... NO PROBLEM!” *Id.* at 1128. The site also contained a letter from Morrison & Foerster regarding trademark infringement, and several links to various other offensive sites registered and created by the defendant. *Id.*

\(^{288}\) *Id.* at 1134.

\(^{289}\) *Morrison & Foerster LLP*, 94 F. Supp. 2d at 1134–35.

\(^{290}\) *Id.* at 1135.

\(^{291}\) *Id.*

\(^{292}\) *Shields*, 89 F. Supp. 2d at 635.
"www.joescartons.com." The defendant attempted to assert a First Amendment defense because he posted a disclaimer on his website that consisted of a political objection to the "graphic and gruesome depiction of brutality to animals in Shields's [sic] cartoons." However, the defendant only placed the political message on his page hours after being served with Shields' complaint. Moreover, like the defendants in Morrison & Foerster LLP and Planned Parenthood, the defendant tried to mislead Internet users into thinking his web page was the official Joe Cartoon website. The court, rejecting the defendant's claim of good faith and fair use as a "spurious explanation cooked up purely for [the lawsuit]," found it "incredible" that the defendant had the requisite intent for lawful political speech from the start. The court thus enjoined this "flagrant violation" of Shields' rights.

These cases illustrate that the First Amendment does not protect speech when the domain name is used as a source identifier. All of these domain names misled the Internet user into thinking that the site accessed belonged to the trademark holder. Since the First Amendment does not protect deceptive or misleading speech, the fair use defense did not apply in these cases. Furthermore, these domain names are confusingly similar to protected marks. The fact that these registrants relied on consumer

293. Id.
294. See id. at 640.
295. See id. at 635. The text of the political protest message read, in part:
This is a page of POLITICAL PROTEST... [a]gainst the web site joecartoon.com ... joecartoon.com is a web site that depicts the mutilation and killing of animals in a shockwave based cartoon format—many children are inticed [sic] to the web site, not knowing what is really there and then encouraged to join in the mutilation and killing through use of the shockwave cartoon presented to them.

Id.
296. Id. at 640.
297. Id. at 648.
298. See Morrison & Foerster LLP, 94 F. Supp. 2d at 1131–32.
301. Id. at 641.
302. Id. at 640.
303. Id.
304. Id. at 642.
305. Id.
307. See id.
308. See id.
confusion, regardless of whether the content of their pages constituted protected political speech, was enough to discredit any assertion of good faith.\textsuperscript{310}

The "www.[protected mark]sucks.com" model is a clear contrast to these cases. The key is in the expressive content of the domain name itself.\textsuperscript{311} Where, for example, an Internet user will likely confuse a domain name such as "www.plannedparenthood.com" as a source identifier, the same hardly holds true for a domain name such as "www.lucent sucks.com."\textsuperscript{312} The mere use of the word "sucks" within the domain name expresses the registrant's view of the protected mark or the mark holder.\textsuperscript{313} By its nature, because the website expresses this particular view, it cannot be held to be confusingly similar to the protected mark.\textsuperscript{314}

For example, in \textit{Bally}, because the use of Bally's mark was neither confusing nor commercial, the court found that it deserved "the full breadth of First Amendment Protection."\textsuperscript{315} This external First Amendment fair use defense thus applies to the entire ACPA and UDRP.\textsuperscript{316} In addition, the use of the domain name as legitimate expression satisfies the bad faith test because it is a \textit{bona fide}, noncommercial use, and thus fulfills the internal fair use defense built into the statute.\textsuperscript{317} For example, the House Judiciary Committee, quoted in \textit{Lucent}, stated that § 1125(d)(1)(B)(i)(IV) was intended to create a balance between the interests of trademark owners and the interests of those making lawful and noncommercial fair use of the mark.\textsuperscript{318} The mere fact that a person uses the mark lawfully indicates the absence of bad faith.\textsuperscript{319}

Finally, trademark owners may not stop unauthorized use of a protected mark by a registrant, as long as that registrant is expressing a point of view.\textsuperscript{320} Therefore, the "www.[protected mark]sucks.com" model

\textsuperscript{310} See \textit{Shields}, 89 F. Supp. 2d at 639–40.
\textsuperscript{311} See \textit{Bally}, 29 F. Supp. 2d at 1167.
\textsuperscript{312} See \textit{Lucent}, 95 F. Supp. 2d at 535.
\textsuperscript{313} See \textit{Bally}, 29 F. Supp. 2d at 1164. "‘Sucks’ has entered the vernacular as a word loaded with criticism." \textit{Id.}
\textsuperscript{315} Cisneros, \textit{supra} note 1, at 242.
\textsuperscript{316} See \textit{id.}
\textsuperscript{317} \textit{Lucent}, 95 F. Supp. 2d at 535.
\textsuperscript{318} \textit{Id.}
\textsuperscript{319} \textit{See id.}
\textsuperscript{320} \textit{Bally}, 29 F. Supp. 2d at 1167.
constitutes expression protected externally by the First Amendment as well as internally by the bad faith factors of the statute itself, and serves as a legitimate fair use defense.\textsuperscript{321}

\textbf{E. ICANN Anomalies}

While the \textit{Lucent} case is a guideline for U.S. courts in determining the ACPA’s application to the “www.[protected mark]sucks.com” model, ICANN has no such guideline for its arbitration cases falling under the UDRP.\textsuperscript{322} Generally, the arbitrations either follow the trend of \textit{Lucent} in its application of the ACPA, or they revert back to the pre-ACPA application of the \textit{Sleekcraft} factors.\textsuperscript{323} In the National Arbitration Forum case of \textit{CompUSA Management Co. v. Customized Computer Training},\textsuperscript{324} where the respondent registered the domain names “www.stopcompusa.com” and “www.bancompusa.com,” the panelist found that the respondent not only had the right to exercise his rights under the First Amendment, but the marks and domain names were neither confusingly similar nor identical.\textsuperscript{325} Furthermore, the panelist asserted that the use of the forum in this context was “inappropriate and constitute[d] ‘cyber-bullying.’”\textsuperscript{326}

While \textit{CompUSA} followed \textit{Lucent} as a guideline, other ICANN arbitration cases have not been as consistent.\textsuperscript{327} For example, in \textit{Wal-Mart Stores, Inc. v. Walsucks},\textsuperscript{328} which involved the domain names “www.walmartuksucks.com” and “www.walmartpuertoricosucks.com,” among others, the panel distinguished \textit{Bally}, explicitly rejected the \textit{Lucent} analysis as dicta, and went on to arbitrarily test for likelihood of confusion by applying the \textit{Sleekcraft} factors.\textsuperscript{329} While the complainant convincingly established a bad faith attempt to profit on the part of the respondent,\textsuperscript{330} the panel went further than necessary, holding the domain names were likely to

\begin{itemize}
  \item \textsuperscript{321} See \textit{Bally}, 29 F. Supp. 2d at 1167; \textit{Lucent}, 95 F. Supp. 2d at 535–36.
  \item \textsuperscript{323} See generally discussion supra Part III.C.1. (discussing \textit{Lucent} and \textit{Sleekcraft}).
  \item \textsuperscript{324} No. FA0006000095082 (NAF Aug. 17, 2000), \textit{at} http://www.arbforum.com/domains/decisions/95082.htm [hereinafter \textit{CompUSA}].
  \item \textsuperscript{325} Id.
  \item \textsuperscript{326} Id.
  \item \textsuperscript{328} No. D2000-0477, § 6 (WIPO July 20, 2000), \textit{at} http://arbiter.wipo.int/domains/decisions/html/d2000-0477 [hereinafter \textit{Wal-Mart 1}].
  \item \textsuperscript{329} See id.
  \item \textsuperscript{330} Id.
\end{itemize}
create confusion with the protected mark.\textsuperscript{331} This decision directly conflicts with case law involving the same issues,\textsuperscript{332} which, by definition, holds that the protest domain name model cannot be confusingly similar.\textsuperscript{333}

Other cases, notably arbitrated by the WIPO, have followed the lead of the \textit{Walsucks} dispute.\textsuperscript{334} For example, in \textit{Diageo v. Zuccarini}, the respondent registered the variations of the domain name "www.guinnessbeersucks.com," "www.guinnessbeerreallysucks.com," "www.guinnessbeerreallyreallysucks.com," and others.\textsuperscript{335} While the panel found the requisite bad faith intent,\textsuperscript{336} it further concluded that "the Respondent's domain name is confusingly similar to the Complainant's marks."\textsuperscript{337}

The panels in the various cases against Purge I.T. with respect to the domain names "www.freeservesucks.com,"\textsuperscript{338} "www.dixonsucks.com,"\textsuperscript{339} and "www.standardcharterededsucks.com,"\textsuperscript{340} also reached the same conclusion as in \textit{Diageo}.\textsuperscript{341} The panel concluded, after examination of the domain name in \textit{Freeserve}, that the adoption of the complainant's name within the domain name "is inherently likely to lead some people to believe that the Complainant is connected with it."\textsuperscript{342} It found that, while some Internet users would disassociate the additional "sucks" from the complainant's mark, "others may be unable to give it any very definite meaning and will be confused about the potential association with the Complainant."\textsuperscript{343} This reasoning completely contradicts the First

\begin{thebibliography}{99}
\bibitem{331} See id.
\bibitem{332} See Bonisteel, supra note 327.
\bibitem{333} See, e.g., Bally, 29 F. Supp. 2d at 1163–64.
\bibitem{335} \textit{Diageo}, supra note 334, § 2.
\bibitem{336} \textit{Diageo}, supra note 334, § 5. The respondent not only registered many variations of this particular domain name, but he was also the defendant in \textit{Shields}. 89 F. Supp. 2d at 635.
\bibitem{337} \textit{Diageo}, supra note 334, § 7.
\bibitem{338} \textit{Freeserve}, supra note 334, § 1.
\bibitem{339} \textit{Dixons Group}, supra note 334, § 1.
\bibitem{340} \textit{Standard Chartered}, supra note 334, § 1.
\bibitem{342} \textit{Freeserve}, supra note 334, § 5.
\bibitem{343} Id.
\end{thebibliography}
Amendment (external) fair use defense to the ACPA. While these respondents arguably register the domain names in bad faith, through the balancing of various other factors, the WIPO panel arbitrarily and incorrectly went too far in finding the domain names confusingly similar to the marks. The panel further added that, in many of these cases, its logic is not conclusive regarding other instances of "-sucks" domain names, stating:

An application of the Sleekcraft factors in another context involving Complainant's mark and the word "sucks" might produce a different result than that reached here. The Panel notes that use of a domain name confusingly similar to a mark may be justified by fair use or legitimate noncommercial use considerations, and that this may in other cases permit the use of "-sucks" formative names in free expression forums.

However, the panel's decision does not leave much room for error in cases involving the legitimate "www.[protected mark]sucks.com" model. The WIPO implies that, while the mark is confusingly similar, it may be "justified by fair use or legitimate noncommercial use considerations." It is impossible to reconcile this logic with an ACPA analysis, which provides that the registrant cannot assert a successful First Amendment defense if a domain name is confusingly similar to the protected mark because the domain name appears as a source identifier rather than a means of expression. The very nature of the "www.[protected mark]sucks.com" model keeps it from the "confusingly similar" category. Furthermore, finding a "www.[protected mark]sucks.com" website confusingly similar to a protected mark in essence satisfies the UDRP's bad faith requirement. Therefore, this implied loophole is a legal fiction — as long as the WIPO panels continue to view these domain names as confusingly similar to the protected marks, a legitimate protest

344. See Bally, 29 F. Supp. 2d at 1167.
346. See Diageo, supra note 334, § 7; Standard Chartered, supra note 334, § 6; Freeserve, supra note 334, § 6; Dixons Group, supra note 334, § 6.
348. See id.
349. Id. § 6 (emphasis added).
352. See, e.g., Bally, 29 F. Supp. 2d at 1163–64 ("No reasonable consumer comparing Bally's official web site with Faber's site would assume Faber's site 'to come from the same source, or thought to be affiliated with, connected with, or sponsored by, the trademark owner.'").
353. See UDRP, supra note 24, § 4(b).
domain name registrant will never be able to assert First Amendment rights in the “www.[protected mark]sucks.com” model.\footnote{354}

IV. AN IDEAL COMPROMISE

A. Comparison of ICANN Arbitration and the U.S. Court System

Even though ACPA litigation in traditional courts is preferable where a trademark holder needs the immediate relief of a temporary restraining order, when the trademark owner seeks damages, or when it is clear that the registrant will fight to the “bitter end,” ICANN arbitration has its advantages.\footnote{355} For example, arbitration is generally faster and less expensive than going to court.\footnote{356} ICANN’s arbitration panels usually render decisions within two months, and the costs are fixed.\footnote{357} In addition, attorneys’ fees in arbitration are reasonable because of the limited duration of the actual proceedings.\footnote{358}

However, the appeal of ICANN arbitration is outweighed by its shortcomings, especially concerning the registrant of the “www.[protected mark]sucks.com” model. An arbitration decision may have evidentiary value in a subsequent court proceeding, either where the registrant tries to prove a bad-faith use of the arbitration system by the trademark-holder or where the trademark-holder asserts damages against the domain name registrant.\footnote{359} Yet, ICANN arbitration proceedings have no legal precedential value. In a case of first impression, the court in \textit{Weber-Stephen Products Co. v. Armitage Hardware & Building Supply, Inc.}\footnote{360} held that “this Court is not bound by the outcome of the ICANN administrative proceedings.”\footnote{361} The court further declined to determine a standard of review for the panel’s decision, and what deference, if any, it would give that decision.\footnote{362}

\footnote{354. \textit{But see Wal-Mart II, supra} note 314, § 6(D) (reasoning that, “I do not see how a domain name including ‘sucks’ ever can be confusingly similar to a trademark to which ‘sucks’ is appended”).} 
\footnote{355. Railo, supra note 86, at 6.} 
\footnote{356. Null, supra note 30, at 42.} 
\footnote{357. Gitchel, supra note 94, at 34.} 
\footnote{358. \textit{Id.}} 
\footnote{359. \textit{Id.} at 34–35.} 
\footnote{361. \textit{Id.} at *7.} 
\footnote{362. \textit{Id.}}
Moreover, ICANN arbitration decisions have little precedential value within the family of ICANN's own arbitration panels.\textsuperscript{363} Although arbitrators often rely on other decisions within their own particular forum as precedent, nothing in the UDRP requires them to do so.\textsuperscript{364} This, in turn, leads to a seemingly \textit{ad hoc} decision-making process that will not stand in federal court.\textsuperscript{365}

In addition, critics of ICANN have asserted bias in the arbitration proceedings given that three out of four cases are decided in favor of corporations.\textsuperscript{366} Furthermore, while the complainant in the NAF and the WIPO wins more than eighty percent of the time, eResolutions proceedings only find for the complainant roughly fifty percent of the time.\textsuperscript{367} In a detailed study, Dr. Milton Mueller found that while price differences, decision turnaround, and country of origin played a part in forum selection, decision outcome was the strongest of the factors.\textsuperscript{368} In other words, the complainant has the choice of forum. Thus, the complainant is most likely to choose the forum that has a statistically higher number of outcomes in favor of the complainant.\textsuperscript{369} This leads to forum shopping and, arguably, an abuse of the arbitration system.

An additional impact on the fairness of ICANN's procedure is the use of the WIPO as an arbitration forum.\textsuperscript{370} The WIPO has the highest history of winning complainants.\textsuperscript{371} However, the WIPO's participation in the arbitration proceedings also constitutes a conflict of interest.\textsuperscript{372} The WIPO is a division of the United Nations, organized to "promote the protection of intellectual property."\textsuperscript{373} As part of this mandate, the WIPO, for a fee, helps companies file international patents and trademarks.\textsuperscript{374} The proceeds for its international filing assistance amounts to eighty-five percent of the WIPO budget, which equaled around two hundred million dollars for

\begin{itemize}
\item \textsuperscript{363} Hartje, \textit{supra} note 14, at 39.
\item \textsuperscript{364} \textit{Id}.
\item \textsuperscript{365} See \textit{id}.
\item \textsuperscript{366} Elizabeth Wasserman, \textit{The New Masters of Domains}, \textit{Industry Standard}, Sept. 4, 2000, LEXIS, News.
\item \textsuperscript{368} \textit{Id}.
\item \textsuperscript{369} \textit{Id}.
\item \textsuperscript{370} See \textit{id}.
\item \textsuperscript{371} \textit{Id}.
\item \textsuperscript{372} \textit{See} Wasserman, \textit{supra} note 366.
\item \textsuperscript{373} \textit{Id}.
\item \textsuperscript{374} \textit{Id}.
\end{itemize}
While the arbitrators may try to adjudicate these cases fairly, it is difficult to see how bias would not interfere in light of such a significant financial interest for the organization. Therefore, a new and fairer procedure is necessary to decide the UDRP cases.

B. International Implications of the Protest Model

The Internet is an international medium. While jurisdiction and choice of law issues are beyond the scope of this Comment, it is worth noting that many other countries do not have the equivalent of the First Amendment of the Constitution of the United States. In addition, trademark laws may differ from country to country. Therefore, it logically flows that the UDRP may either expand or restrict a particular individual’s rights, depending on the individual’s country of origin.

In addition, the issue of native language presents a sticky situation. For example, the panel in Caixa d’Estalvis y Pensions de Barcelona ("La Caixa") v. Namezero.com awarded the domain name "www.lakaixa.com" to the complainant after determining that the Respondent’s "cultural criticism" of the complainant in substituting the letter "c" with the letter "k" would not be understood “outside of certain Latin countries . . . of a specific countercultural milieu." The panel went further to differentiate La Caixa from the American "-sucks.com" cases by following the precedent set in the French case, Societe Accor v....

375. Id.
377. See, e.g., Societe Accor v. M. Philippe Hartmann, No. D2001-0007, §§ 6, 6(A) (WIPO Mar. 13, 2001), at http://arbiter.wipo.int/domains/decisions/html/d2001-0007.html [hereinafter Societe Accor]. The Commission claimed it was not competent to address freedom of expression over the Internet. Id. § 6. Moreover, it noted that under French law, parody can result in civil liability of the user. Id. § 6(A).
379. See id.
381. Id. § 6(C). "[I]n several Latin languages, it has become common to substitute the letter ‘k’ to the letter ‘c’ in order to express a left-wing or anarchist protest." Id.
The panel in *Societe Accor* noted, in awarding the domain name “accorsucks.com” to the complainant, that “it is not obvious, given the international character of the Internet, that everybody, in every country of the world, would immediately recognize what ‘sucks’ means.” Thus, in comparing the two, the *La Caixa* panel found that, while converting “c”s into “k”s as a form of expression resembles the use of the word “sucks” in English, that practice is exclusive to Latin countercultures. Most Internet users would not understand the reference. Rather, the Internet public would view “LAKAIXA” as a mark confusingly similar to Complainant’s trademark, “LA CAIXA.” “The countercultural meaning of political criticism would have been understood only by a minority.”

While this decision seems to be an anomaly, more of these types of cases will arise with increased international use of the Internet and the increasing number of domain names available with new gTLDs. It remains to be seen what impact this will have on international arbitration.

### C. Potential Solutions

Fairness and consistency are the touchstones in applying the ACPA and the UDRP to legitimate protest websites. The focus needs to shift from a contest between the domain name and trademark holders to adequate representation of the interests of both corporate and individual Internet users. While application of the ACPA in federal courts may arguably lead to “divergent judicial enforcement” because of the potential inconsistency in applying the bad faith factor balancing test, the ACPA’s application in practice has led to more congruous results than ICANN’s UDRP.

Additionally, a recent ICANN development has led to even more potential legal issues. In November 2000, ICANN selected seven new
gTLDs for further negotiation, including " .biz," " .info" and " .name." Out of fear of the potential increase of domain name/trademark disputes, ICANN’s Intellectual Property Constituency proposed a “sunrise” period that would allow trademark owners to preemptively register variations of their trademarks as domain names before ICANN allows public access. This policy would allow trademark holders, in violation of ICANN’s own bad-faith test, to engage in a form of reverse-cybersquatting by simply registering these domain names in order to prevent others from using them.

ICANN’s Non-Commercial Domain Name Holders Constituency (“NCDNHC”) takes a different position. It presented several resolutions to the ICANN Board during its quarterly international meeting, including “Resolution #5,” which strongly opposes these “sunrise” arrangements as they unfairly give trademark holders priority over others who may have a legitimate use of the name. The NCDNHC additionally passed a resolution to reopen applications for new TLDs that support free expression, noting that none of the new TLDs explicitly “support these values.” Finally, the NCDNHC recommended a task force to provide guidelines for the UDRP process, including the request that the complainant in the UDRP proceeding should not have the exclusive opportunity to choose the arbitration forum. While these resolutions have yet to be adopted by ICANN, they serve as another step towards recognizing and resolving these issues.

In addition to the First Amendment, public policy requires consumers to be allowed to express their views, even if that cannot occur without stepping on the toes of large corporations. Further, a company can even

Domains, at http://www.icann.org/announcements/icann-pr16nov00.htm (last updated Nov. 16, 2000) [hereinafter ICANN Press Release].

394. Id.


396. See Leibowitz, supra note 12.


398. Id.


401. See, e.g., Railo, supra note 86.

402. See, e.g., Bally Total Fitness Holding Corp. v. Faber, 29 F. Supp. 2d 1161 (E.D. Penn. 2000).
turn these Internet attacks to its advantage. For example, newsgroup comments attacking Timberland Co.'s racially discriminating practice of not serving minority neighborhoods promptly encouraged the shoe company to join the discussion in order to disprove allegations and rebuild its reputation. In addition, disgruntled schoolteacher David Felton created a protest site relating to Dunkin' Donuts when he could not find his favorite coffee lightener at any of his local franchises. His "cyber-bulletin board" soon became a "hotbed of doughnut discontent," and is now frequently monitored by executives at Dunkin' Donuts' headquarters. The company uses the bulletin board in a valiant customer service effort, sending free coupons to disgruntled customers, and even makes sure Felton's local franchise contains plenty of one-percent milk.

This lighthearted example barely touches on the legal and constitutional implications of not having a consistent method for resolving these disputes. As the ACPA cases usually involve a preliminary injunction with no jury present, and as the ICANN Board and arbitrators can hardly claim to be representative of the people subject to their rulings, many scholars have suggested the use of juries, particularly in ICANN proceedings, to decide the non-legal issues of reasonableness and bad faith. While this suggestion raises many other issues, such as how the UDRP juries should be chosen and how to find an appropriate pool of jurors, it is a step in the right direction.

The problem with the "www.[protected mark]sucks.com" model is the inapplicability of existing law to Internet law cases. It is a matter of trying to fit a square peg into a round hole. Lawmakers, courts, and arbitration forums alike need to invent new ways to deal with these emerging issues. An international, unbiased forum is necessary, perhaps complete with a jury, in which to try these cases. Furthermore, these decisions should have significant precedential value, as well as finality in federal courts.

---

403. Leibowitz, supra note 12.
404. Id.
405. Sites for Sore Consumers, supra note 18.
406. Id.
407. Id.
408. See id.
410. Id.
411. See Parody Sites, supra note 1.
V. CONCLUSION

Although our Disgruntled Customer has a legitimate protest site that will probably fall under First Amendment protection in court, his cybergripe against Widgets, Inc. will most likely fail if Widgets, Inc. pursues the claim through ICANN's UDRP. Since the mere registration of the domain name makes ICANN arbitration mandatory, the Corporate Giant will most likely win its case by convincing the arbitration panel that the domain name is confusingly similar to its protected mark. A fair use defense will probably fail because the finding that the domain name is confusingly similar implies bad faith in that the average Internet user would mistake the domain as the Corporate Giant's official website. Thus, this renders the domain name a source identifier rather than a means of expression, thereby diverting customers and discounting bona fide noncommercial use.

However, under the ACPA, Disgruntled Customer will be able to prove his good faith by his bona fide noncommercial use of the domain name to protest the Corporate Giant. Additionally, his First Amendment defense of fair use establishes his protest site as a means of expression, as compared to a source identifier. Thus, because the domain name is not confusingly similar, Disgruntled Customer has a fair use defense to the ACPA as a whole, which at the same time, may counterbalance any indication of bad faith.

Applying existing law to the "Information Superhighway" creates an awesome challenge. Recent decisions pave the way at breakneck speed, often leaving domain name disputes in the dust. A fair and consistent system needs to exist for the benefit of trademark owners and protesters alike—one designed to protect both trademark and First Amendment rights. All parties involved must address this issue today. Otherwise, the road to resolution will indefinitely remain under construction.

Rebecca S. Sorgen*

* I wish to extend my sincerest gratitude to the editors and staff of the Loyola of Los Angeles Entertainment Law Review, particularly Tom Werner, Brian E. Pellis, Leah Phillips Falzone, Graham B. Smith, Tabitha Rainey, Scott Sterling, Erika Brauch, Jeffrey Renzi, and Gil Dan, for all of their time and effort. I would additionally like to thank Professor Lawrence B. Solum for his inspiration, knowledge, and guidance. A special thank you to Ryan Schneider, whose patience, encouragement, and confidence never failed. Finally, I would like to dedicate this Comment to my parents, Jeff and Paula Sorgen, and the rest of my entire family (who are too many to name) for their constant love and support.