Claim Jumping on the Newest Frontier: Trademarks, Cybersquatting, and the Judicial Interpretation of Bad Faith

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I. THE PROBLEM

Imagine that you are the manager of a thriving business unit that has a solid reputation and owns the well-known registered trademark "ACME." After deciding to expand into the booming world of electronic commerce, you attempt to register a domain name that includes your business's trademark, which you believe is the way most customers would seek to find your products on the web. You soon discover that acme.com, acme.org, and other domain names including variations of your business's trademark have already been registered. In fact, the domain names including your trademark were registered either by a competitor who is using the address to direct potential customers to its own products, or more likely, by an individual who is willing to sell you the domain name, but only for an exorbitant fee,

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and who in the meantime is using the site to advertise pornographic web sites.

Similar situations became so common as the Internet grew in the 1990s that the new word "cybersquatting" was coined to describe the phenomenon.[1] Internet domain names ending in ".com" are issued by private companies on a first-come, first-served basis upon payment of a small fee.[2] There is no requirement that these private companies ensure that domain names including trademarks are purchased only by the trademark owners, so an applicant is able to register any domain name that has not already been taken.[3] This lack of regulatory control led to a thriving cybersquatting business, in which individuals would register domain names including the trademarks of well-known companies and then "ransom" the domain names back to the trademark owners.[4]

Traditional trademark and federal anti-dilution laws were insufficient to solve the problem. When considering legislation designed to curb cybersquatting, the Senate noted that the effectiveness of the Federal Trademark Dilution Act (FTDA) had been limited because cybersquatters were adapting their activities to avoid liability.[5] In addition, several courts refused to find cybersquatters liable under traditional trademark laws.[6] In short, the uncertainty about how traditional laws would apply to the new frontier of the Internet produced inconsistent judicial opinions that left both trademark owners and domain name registrants uncertain of their legal rights.

II. THE NEW LAW

In 1999, in response to a growing chorus of complaints from trademark owners, Congress passed legislation designed to curb cy-

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[1] *See* Sporty's Farm L.L.C. v. Sportsman's Mkt., Inc., 202 F.3d 489, 493 (2d Cir. 2000).

[2] *See id.*

[3] *See id.* (citing H.R. REP. NO. 106-412, at 5 (1999)).

[4] *See id.* (citing H.R. REP. NO. 106-412, at 5-7 (1999); S. REP. NO. 106-140, at 4-7 (1999)).

[5] *See id.* at 495-96 (citing S. REP. NO. 106-140, at 7 (1999)). For instance, cybersquatters had learned not to offer domain names for sale in ways that courts had held would cause liability. *See id.*

[6] *See id.*

bersquatters who warehouse and traffic in Internet domain names deliberately "to cause mischief or extract payment from the rightful owner."[7] The Anticybersquatting Consumer Protection Act ("ACPA") allows trademark owners to obtain damages and injunctive relief in federal court when a third party with a "bad faith intent to profit . . . registers, traffics in, or uses a domain name" that is identical or confusingly similar to a mark that was distinctive at the time the domain name was registered, or is identical or confusingly similar to, or dilutive of, a mark that was famous at the time the domain name was registered.[8] The ACPA provides nine non-exclusive factors for courts to consider when determining whether a person acted in bad faith.[9] The factors are:

(1) the trademark or other intellectual property rights of the person, if any, in the domain name;

(2) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;

(3) the person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;

(4) the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;

(5) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood or confusion as to the source, sponsorship, affiliation, or endorsement of the site;

(6) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior

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[7] *See Omnibus Spending Bill Clears Congress with Major Intellectual Property Reforms*, 59 PAT., TRADEMARK & COPYRIGHT J. (Bureau of Nat'l Affairs, Inc., Washington, D.C.), Nov. 25, 1999, at 146.

[8] Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), § 1125(d)(1)(A)(i)-(ii)(II) (2000).

[9] *See id.* § 1125(d)(1)(B)(i).

conduct indicating a pattern of such conduct;

(7) the person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct;

(8) the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous 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; and

(9) the extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous within the meaning of subsection (c)(1) of section 43.[10]

Although Congress clearly intended for the courts to evaluate the intentions of a domain name registrant, even a casual reading of the factors reveals that they are highly ambiguous and leave room for doubt about what exactly constitutes bad faith intent in any given situation. Since the ACPA came into effect, the courts have found themselves attempting to resolve that doubt a handful of times. Four of those cases, and the answers they provide about what constitutes bad faith intent to profit, are discussed below.

III. THE CASES

A. Sporty's Farm L.L.C. v. Sportsman's Market, Inc.

The first case to interpret and apply the provisions of the ACPA was *Sporty's Farm L.L.C. v. Sportsman's Market, Inc.*[11] Sportsman's Market, Inc., is a mail order catalog company specializing in aviation-related products and the owner of the "SPORTY'S" trademark, which it uses in connection with its catalogs. Sportsman's has a large number of catalog customers, including one of the owners of Omega Engineering, Inc., a company that sells engineering products through mail

[10] *Id.*

[11] *See* Sporty's Farm L.L.C., 202 F.3d 489 (2d Cir. 2000).

order catalogs.

Omega registered the domain name sportys.com even though it was aware of Sportsman's SPORTY'S trademark. Several months later, Omega transferred its rights in the domain name to an Omega-related company, "Sporty's Farm." Sporty's Farm used the domain name to sell home-grown Christmas trees, and Omega's CEO claimed the company name had been derived from his childhood memories of a dog named Spotty.

Two months after Sporty's Farm began selling Christmas trees, Sportsman's discovered that Omega had registered the domain name sportys.com. Omega and Sporty's Farm promptly filed a declaratory judgement action in federal district court, hoping to enforce their right to use the sportys.com domain name. Sportsman's counterclaimed, alleging ownership rights to the sportys.com domain name.

The district court found that although Omega and Sporty's Farms did not infringe Sportsman's mark, they did dilute the mark by registering the sportys.com domain name. Accordingly, the district court ordered the companies to transfer the domain name to Sportsman's. On appeal, the Second Circuit affirmed the district court's judgment transferring the domain name to Sportsman's,[12] but it did so under the new provisions of the ACPA.

Without much discussion, the Second Circuit found that Sportsman's "SPORTY'S" trademark was a distinctive mark and that the sportys.com domain name was "confusingly similar" to the mark. The Second Circuit focused instead on its determination that Omega and Sporty's Farm had acted with a bad faith intent to profit. With respect to the nine bad faith factors, the Second Circuit noted that Omega and Sporty's Farms lacked any intellectual property rights in the sportys.com domain name, that the domain name did not include the legal name of the party at the time of registration because the formation of Sporty's Farm occurred *after* the registration of the domain name, and that neither party offered any "bona fide" goods or services as they did not use the web site until *after* the filing of the lawsuit.[13]

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[12] Congress enacted the ACPA while the case was pending appeal. The Second Circuit determined that the ACPA did apply to the case, as it is customary to "apply the law that exists at the time of the appeal." *Id.* at 496.

[13] The Second Circuit also concluded that Sporty's Farms did not allege "non-

More noteworthy was the court's analysis of factors beyond the nine listed by Congress, based on a finding that the case presented "unique circumstances" that were important to the case but did not "fit neatly" into those Congress had enumerated.[14] In its analysis, the Second Circuit found that Omega was clearly aware that Sportsman's used its "SPORTY'S" trademark in connection with its mail order catalogs and that Omega's primary purpose for registering the domain name was to prevent Sportsman's from using the domain name. The evidence, according to the Second Circuit, showed that Omega had formed the Sporty's Farm company so it could use the domain name while avoiding potential trademark infringement claims by Sportsman's, and the Second Circuit found incredible the alleged "Spotty dog" history behind the selection of the Sporty's Farm name. The Second Circuit concluded that Omega and Sporty's Farm possessed the requisite "bad faith intent to profit" and were therefore in violation of the ACPA.

This case was the first appellate case interpreting the ACPA. Although important because of its precedential value, this case also illustrates the need for the ACPA. The facts show that the defendants made various attempts to circumvent the existing trademark law and to create a trail of evidence that would keep them from being sued (e.g., creating the Sporty's Farms company to use the sportys.com domain name). Of great interest was the Second Circuit's application of the non-exclusive nine factors in combination with its own reasoning to support a finding of "bad faith intent to profit." The approach shows not only the flexibility of the ACPA, but also the open ended inquiry that courts may conduct to determine what constitutes a "bad faith intent to profit."

B. Shields v. Zuccarini

The situation was quite different in *Shields v. Zuccarini*.[15] Joe

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commercial use" of the web site, that Omega's sale of the domain name to Sporty's Farm was under "suspicious circumstances," and that the SPORTY'S mark was distinctive. *Id.* at 499.

[14] *Id.*

[15] *See* Shields, 89 F. Supp.2d 634 (E.D. Pa. 2000).

Shields creates cartoons and animations under the name "JOE CARTOON" and markets his associated merchandise at joecartoon.com. His more popular cartoons include "Frog Blender," in which a frog is whirled in a blender until it meets its hapless end, and "Live and Let Dive," in which lemmings compete in an Olympic like diving competition, only to meet untimely ends at the bottom of the cliff. The JOE CARTOON mark has been used for 15 years, and the domain name for two and a half years, in connection with animations and sales of related products. The Joe Cartoon web site receives more than 700,000 visits per month and has been widely publicized and advertised.

Zuccarini is a wholesaler of Internet domain names: he acquires multiple domain names, which are generally common misspellings of popular sites, with the intent to profit from their use. Having misspelled a domain name, the unintended visitor is diverted to one of Zuccarini's sites and is not allowed to exit without viewing and clicking a succession of advertisements, from which Zuccarini derives click-based revenue. In this case, he registered five variations of Shields' domain name, including joescartoon.com, joecarton.com, joescartons.com, joescartoons.com, and cartoonjoe.com. Shields filed suit in federal district court under the ACPA and sought a preliminary injunction preventing Zuccarini from using the domain names until resolution of the lawsuit. A court cannot grant a preliminary injunction unless the party seeking it is likely to prevail at trial, so the court identified the legal inquiries necessary to decide the case on its merits. These determinations are (1) whether the mark is a distinctive or famous mark entitled to protection, (2) whether the domain names are identical or confusingly similar to the mark, and (3) whether the domain names were registered with a bad faith intent to profit.

The court easily found that the JOE CARTOON mark was both distinctive and famous[16] and that the domain names were, for all practical purposes, identical to Shields' mark, causing actual confusion. In determining whether Zuccarini had registered the domain names with a bad faith intent to profit, the court focused on the fifth and eighth

[16] The court followed the lead of *Sporty's Farm* by applying the multi-factor, famous mark test embodied in the Federal Trademark Dilution Act ("FTDA"). *See id.* at 638-39.

factors.[17]

Significantly, Zuccarini admitted that he deliberately registered multiple domain names that were likely misspellings of famous marks or personal names. In addition, his revenue from click-based advertising amounted to more than $1 million annually. The court concluded that Zuccarini registered confusingly similar names with the intent to divert customers so they would see his ads.

As for the other factors, the court determined that Joe Cartoon was not even close to Zuccarini's name, that Zuccarini had made no prior commercial use of any of the domain names, and that JOE CARTOON was a famous mark deserving of protection. The court concluded that there was overwhelming evidence of Zuccarini's bad faith intent in registering the similar domain names and granted Shields' motion for a preliminary injunction.

This was one of the first preliminary injunction motions brought under the ACPA. In view of the nefarious pattern of conduct by the registrant, the court seemed to have no difficulty deciding that Zuccarini had bad faith intent. Nor could Zuccarini find a "safe harbor" from liability based on a reasonable belief that the use of the domain names was fair and lawful.[18] After suit was filed, Zuccarini placed messages on his web sites protesting the inhumane treatment of animals depicted in animations and the U.S. and international domain name policies embodied in the ACPA and the Internet Corporation for Assigned Names and Numbers ("ICANN"). The safe harbor defense was quickly dismissed, though, in light of the timing of this content change, Zuccarini's prior conduct of commercial use, and the fact that Zuccarini had no history of protesting the mistreatment of animals.

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[17] Under paragraph (V), the court may consider whether the registrant intends to divert customers to the registrant's web site either for commercial gain or with an intent to tarnish or disparage the mark. *See* ACPA, 15 U.S.C.S. § 1125(d)(1)(B)(i)(V) (Law. Ed. 1991 & Supp. Apr. 2000). Under paragraph (VIII), the court may consider the registrant's acquisition of multiple domain names that the registrant knows to be identical, confusingly similar, or dilutive of another's mark. *See id.* § 1125(d)(1)(B)(i)(VIII).

[18] *See id.* § 1125(d)(1)(B)(ii) ("Bad faith intent described under subparagraph (A) shall not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful.").

C. *Virtual Works, Inc. v. Network Solutions, Inc.*

Another case that interpreted and applied the provisions of the ACPA was *Virtual Works, Inc. v. Network Solutions, Inc.*[19] Virtual Works, Inc., registered the domain name vw.net for use with its Internet Service Provider (ISP) and web site design business. Volkswagen of America, Inc., and its parent company challenged Virtual's rights in the domain name via the "Domain Name Dispute Policy" of Network Solutions, Inc. (NSI), the private company that until recently registered all generic top-level domain names, including those using ".com" and ".net." At that time, NSI's dispute policy provided that when a party who claimed a senior proprietary interest in a domain name registered by someone else provided sufficient evidence of its trademark rights, the domain name was put on hold, and neither party could use the domain name.[20] The hold status could be cancelled by filing a lawsuit. Virtual filed a lawsuit against Volkswagen for tortious interference, alleging that Volkswagen knew of the existence of the domain name contract between Virtual and NSI and that Volkswagen intentionally and improperly sought to induce a breach of an existing contract between Virtual and NSI. Virtual alleged that Volkswagen's actions deprived Virtual of the benefit of its bargain with NSI and had caused damages, including the loss of business. Volkswagen brought various counterclaims against Virtual, including a claim of cyberpiracy under the ACPA.[21]

On cross-motions for summary judgment, the court addressed neither the distinctiveness or fame of "VW" nor the issue of confusing similarity between the domain name and Volkswagen's trademark. The court instead turned to the nine factors for analyzing a bad faith

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[19] Virtual Works v Network Solutions, Inc., 106 F.Supp. 2d 845, 846 (E.D. Va. 2000).

[20] NSI's dispute policy was revised, effective January 1, 2000, to comply with ICANN's Uniform Domain Name Dispute Resolution Policy which created guidelines for resolving trademark-based domain name disputes.

[21] "Cyberpiracy" is frequently used to denote the same types of activities as the word "cybersquatting," and one section of the ACPA is entitled "Cyberpiracy Prevention." *See* Intellectual Property and Communications Omnibus Reform Act of 1999 § 3002, Pub. L. No. 106-113, 113 Stat. 537, 537-540 (West Supp. Apr. 2000), (codified as amended at 15 U.S.C.S. § 1125(d) (Law. Ed. 1991 & Supp. Apr. 2000)).

intent to profit. First, it found that Virtual had never registered a trademark or conducted business using the mark VW and was not using VW as a legal name to identify a person. It next found that Virtual's receipt of email messages directed to Volkswagen showed actual confusion in the marketplace, that Virtual's references on the web site to Volkswagen as "Nazi's [sic] using slave labor" showed intent to tarnish or disparage the mark,[22] and that Virtual's offer for sale of the domain name to Volkswagen was for financial gain.[23] Finally, the court found that Volkswagen's VW was a famous mark entitling Volkswagen to the relief provided by the ACPA, and it therefore entered summary judgment to Volkswagen on its claim of cyberpiracy.

This was not a case of a domain name wholesaler. Indeed, Virtual alleged in its complaint that the ".net" top-level domain was originally intended under NSI policy to be used exclusively by ISPs. (The NSI policy now allows anyone to register a ".net" domain.) Virtual would then be free to select vw.net without any interference from Volkswagen. This argument seems reasonable on its face. Moreover, although the opinion did not specify the terms on which the domain name was offered for sale, the court did not indicate that resale was the original purpose of registering the domain name. Nevertheless, Virtual appears to have shot itself in its foot with its spiteful comments about Volkswagen on the web site, and its case was weakened further because it did not use "VW" as a trademark in its business.

D. Morrison & Foerster L.L.P. v. Wick

The most recent of these cases interpreting and applying the ACPA is *Morrison & Foerster L.L.P. v. Wick*.[24] Morrison & Foerster L.L.P. is a prominent law firm with offices around the world and the

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[22] Virtual Works v. Network Solutions, Inc., 106 F. Supp. 2d 845, 846 (E.D. Va. 2000).

[23] It is interesting that the opinion provides no analysis of the remaining text of paragraph VI, which provides that "the person's offer to . . . sell . . . the domain name to the mark owner . . . for financial gain *without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services* . . .". 15 U.S.C. § 1125(d)(1)(B)(i)(VI) (2000) (emphasis added). As noted above, Virtual was using the vw.net web site in what appeared to be a bona fide offering of its services as an ISP and web site designer.

[24] Morrison & Foerster v. Wick, 94 F.Supp. 2d 1125, 1126 (D. Colo. 2000).

owner of the "MORRISON & FOERSTER" and "MOFO" trademarks. Morrison & Foerster registered the domain name mofo.com and attempted to register the domain name morrisonfoerster.com, but it found out that Brian Wick had already registered it.

Wick owned four domain name registrations of interest to Morrison & Foerster, including morrisonfoerster.com, morrisonandfoerster.com, morisonforester.com, and morrisonandforester.com. He also owned domain names for ninety other law firms, including hollandandhart.com and bakerandhostetler.com. Wick used these domain names to host several controversial web sites that included statements such as "Best friends money can buy" and "Parasites No Soul . . . No Conscience . . . No Spine . . . NO PROBLEM." In addition, the web sites included links to offensive web sites including GestapoTactics.com and NoIrishNeedApply.com.

Wick operated another web site at the domain name namesforsale.com. The site advertised his services and stated, "Name the property, product or service you want to donate, sell, buy, or rent. Free matching service for donators, sellers, buyers and renters."

Morrison & Foerster filed suit against Wick alleging violation of the ACPA and requested a preliminary injunction requiring that Wick forfeit or transfer to them the four Morrison & Foerster-related domain names. The district court found that Wick had violated the ACPA, ordered him to relinquish his interest in the domain names, and permanently enjoined him from interfering with Morrison & Foerster's right to the domain names.

In applying the ACPA, the district court found that Morrison & Foerster was the true owner of the MORRISON & FOERSTER trademark, that the trademark was distinctive and famous, and that the domain names were identical or confusingly similar to the mark.[25] The district court then decided that Wick's claim that the web pages were a "parody" was invalid because his use was actually meant to "confuse the public and disparage the firm." Moreover, linking the sites to offensive domain names and derogatory remarks against the legal profession illustrated an intent to divert consumers from the

[25] The district court quickly concluded that Wick did not have any intellectual property rights in the domain names, the domain names did not include Wick's legal name, and there was no prior use of any of the marks by Wick. *See id.* at 17.

trademark owner's own web site, and the controversial information on the web sites may have caused visitors to question Morrison & Foerster's endorsement of such viewpoints. In addition, the nameisforsale.com web site showed intent to sell domain names for a profit, and Wick's use of false information in registering the domain names supported a finding of bad faith. The district court noted that Wick's knowledge of the various law firm marks when he registered the law firm domain names provided further evidence of his bad faith.

Perhaps more important to the district court, however, was Wick's own testimony that he had previously caused outrage in the business community by registering the domain names of several large companies and that he intended to enrage the law firm community in a similar fashion. The district court ultimately concluded that Wick had acted in bad faith and ordered him to relinquish or transfer his interests in all four domain names.

This case represents the specific type of defendant Congress intended to target with the ACPA. The defendant's registration of multiple domain names, his posting of controversial statements on the web pages, and the defendant's own testimony that he was out to get the law firms provided ample evidence for the district court to find "bad faith intent to profit." Although this case provides a clear illustration of the activities Congress wished to prevent, it begs the question of how much, or how little, evidence is necessary to show bad faith intent to profit.

IV. HYPOTHETICALS: WHAT IS BAD FAITH INTENT TO PROFIT?

The above discussed cases provide insight as to how some courts are applying the ACPA, but the existing case law leaves many issues open. More specifically, the case law leaves open the question of "what is bad faith intent to profit?" as illustrated by the following hypotheticals.

A. Is Ignorance Bliss?

Tracy is a computer nerd who designs web pages (when she's not playing computer games). One day she decides she can make a few

bucks by reselling domain names. She registers the domain names of the planets and their moons, such as mars.com, thinking that someone may become interested enough to buy the names but not knowing that a certain car company may want saturn.com and a candy company may want mars.com. Her web sites list facts about the planets and moons and provide colorful NASA photographs. After seeing the astronomical number of hits at her site, Tracy sets up banner ads and waits for the checks to arrive.

Pluto is a musical instrument company known for its custom xylophones. When Pluto tries to set up a web site, it finds that Tracy had already registered pluto.com. Immediately, Pluto has its attorney send a letter demanding that Tracy transfer the domain name to Pluto.

Should Tracy be liable under the ACPA? This is a case of a weak mark and an ignorant registrant who happens to have found a name that produces some profit. The ACPA includes a "safe harbor" provision that states that there is no bad faith intent if the person reasonably believed that the use of the domain name was lawful. Does the evidence show that Tracy has a "bad faith intent to profit," or did she reasonably believe she was acting lawfully? Should Tracy have known that saturn.com would be of concern to a car manufacturer or that mars.com would be interesting to a candy manufacturer? Should the strength of Pluto's mark matter?[26]

B. Is Financial Gain Evidence of Bad Faith?

Tyke's Clothing owns the famous "LITTLE WEEDS" trademark and uses it to sell children's clothing. Meanwhile, Garden Growers registers the domain name LittleWeeds.com and displays a web site that states: "Web Site Under Construction: Little Weeds Grand Opening Scheduled for Fall 2000 – Top Line Gardening Products."

Should Garden Growers be liable under the ACPA? What happens if Garden Growers learns about Tyke Clothing's trademark and offers to sell the domain name for one million dollars? Is such a financial gain evidence of bad faith? Garden Growers may argue that

[26] Although the facts of this hypothetical are fictional, Cello Holdings, L.L.C. v. Lawrence-Dahl Co., 89 F. Supp. 2d 464, 466 (S.D.N.Y. 2000), involves a similar set of circumstances where the defendant registered the domain names of several musical instruments. At this time, the case has not been decided on its merits.

the price is merely a reflection of the high demand for a unique name. Would the outcome change if the amount were $25,000 or $25,000,000?

C. *Is Parody or Fair Use a Defense to Bad Faith Intent to Profit?*

Smartdudes makes its money by collecting advertising revenue from pornographic web sites. Recently, it became aware of a report indicating that five people had gotten sick drinking bottled water in a foreign country. Knowing that people were dying for news about the implicated company, Sidsy, which is also the largest seller of bottled water in the world, Smartdudes creates a parody at sudsywater.com. The web site advertises T-shirts featuring a face with spirals for eyes and a tongue hanging out and the words "I drink Sudsy, so should you."

Should Sidsy prevail under the ACPA? The ACPA includes a "safe harbor" provision that states that there is no bad faith intent if the person reasonably believed that the use of the domain name was a fair use. Is this a bona fide fair use as contemplated by the ACPA? Is it trademark infringement? Would a parody or fair use almost always have a problem if there was associated commercialism, such as the T-shirts advertised for sale here?

D. *What about the Cybergriper?*[27]

Tight Jeans Co. owns the famous "SKIN JEANS" trademark and the domain name skinjeans.com, where it has a web site to sell its skin tight blue jeans. Joe Cool buys a pair of Skin Jeans, and the first time he wears them they fall apart, causing him an uncool amount of embarrassment. Joe Cool talks with several of his friends and finds out that they have been having the same problem. Joe Cool decides to register the domain name ihateskinjeans.com and displays a web page making disparaging comments about Skin Jeans and Tight Jeans Co.

Does Tight Jeans Co. have a case under the ACPA? Although these issues are similar to those raised in the previous hypothetical,

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[27] "Cybergriping" is a new Internet trend wherein a party registers a domain name in the form of "<companyname>sucks.com." *See* Lucent Technologies, Inc. v. Lucentsucks.com, 95 F.Supp. 2d 528, 529 (E.D. Va. 2000).

they are not the same, as the courts tend to treat parodies and disparaging comments differently. Does Joe Cool have a "bad faith intent to profit," or does he just have plain "bad faith intent," which is not covered by the ACPA? Is Joe Cool intending to divert customers or just to educate them? What First Amendment rights does Joe Cool have to the domain name? Would those First Amendment rights provide a defense against "bad faith intent to profit?"

VI. CONCLUSION

This article examined the current state of the law concerning the registration of Internet domain names containing trademarks and attempted to highlight questions that remain unanswered by the courts. The courts have begun to define what type of conduct constitutes bad faith intent to profit, but most of the cases to date have involved fairly egregious examples of the deliberate registration of domain names to cause trouble or extract ransom from the trademark owner. Still unresolved are questions about exactly where the line will be drawn concerning the types or amount of evidence necessary to show bad faith intent to profit and the extent to which the First Amendment may protect registrants. The answers to these and other questions are not yet clear. What is obvious to all, however, is that just as the Western land rush of the late 1800s spawned decades of debate and litigation over boundaries and water rights, the new rush to enforce and define trademark rights on the Internet will be litigated and debated, both in and out of the courts, for years to come.