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Note

No Free Parking: Obtaining Relief from Trademark-Infringing Domain Name Parking

*Elizabeth M. Flanagan**

Over 128 million domain names—the worldwide web addresses most familiar to Internet users—are currently registered across the globe.¹ Instead of adding value and diversity to the Internet, however, many of these registered domain names amount to nothing more than nuisance sites that annoy and discourage Internet users and frustrate trademark owners. A significant number of registered domain names link to websites brimming with advertisements or pay-per-click links.² It should be no surprise that money fuels the domain name registration movement.³

Recently, commercial domain name parking, a means for Internet advertising that exploits trademarks without the mark owner's consent,⁴ has emerged as a relatively easy way to

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1. *The VeriSign Domain Report*, DOMAIN NAME BRIEF (VeriSign, Inc., Mountainview, Cal.), at 2, <http://www.verisign.com/static/042161.pdf>.

2. See Brian Quinton, *Google's Parking Problem*, DIRECT, Mar. 1, 2007, at 50, available at http://www.directmag.com/opinions-columnists/websight/marketing_googles_parking_problems (“[Domain name speculators] buy a domain name—some popular word or phrase ending in ‘.com’ that some portion of the public may type into a browser navigation bar thinking they’ll find an authoritative site . . . [but w]hat they get is a site full of pay-per-click ads, sometimes with a little content but often not.”).

3. See Patrick Thobideau, *Cybersquatting Can Yield Pay-Per-Click Bounties*, COMPUTER WORLD, Apr. 16, 2007, at 1, available at <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=289576>.

4. Leslie Walker & Brian Krebs, *The Web's Million-Dollar Typos*, WASH. POST, Apr. 30, 2006, at F01 (relaying a law professor's assertion that “the

generate income.⁵ Domain name parking occurs when a domain name registrant deposits its domain names with a registrar or parking service provider who “creates placeholder pages and then invites . . . Internet ad networks to fill them with ads” as opposed to constructing a functional website.⁶ This scheme generates money when Internet surfers click on links to other websites advertised on the parked page.⁷ For every user’s click, the advertiser indirectly pays the domain name registrant, an activity referred to as pay-per-click advertising.⁸

Imagine a consumer considering the purchase of a Cannondale® bicycle who may wish to research various Cannondale bicycle models. The consumer may directly visit www.cannondalebikes.com,⁹ believing it to be a legitimate site operated by Cannondale, the bicycle manufacturer. When the web page loads, however, the consumer does not see the substantive website of the company that makes Cannondale bikes. Instead, the consumer is confronted with a list of hyperlinks to other websites unaffiliated with Cannondale, including links to competitors’ websites, websites selling competitors’ products, or shopping websites like ebay.com and shopzilla.com.¹⁰ The

practice amounts to someone making money off someone else’s trademark without permission”).

5. *Id.* (revealing that Wall Street analysts estimate that close to half of Google’s \$6 billion 2005 revenue originated from ads on partner sites).

6. *Id.* Additionally, when Internet users arrive at the parked sites and click on the advertisements, the Internet ad networks receive payment from the advertisers and pass on a portion of the revenue to the domain name registrant. *Id.*

7. See, e.g., Bruce A. McDonald, *Sites in Shadow: Typosquatters on the Web Don’t Deserve the Mask of Anonymity*, LEGAL TIMES, June 26, 2006, at 66–67, available at http://www.schnader.com/Newest_4_02/site%20Files/nletters/pdf/McDonaldSitesShadow6-06.pdf (noting that third-party Website owners pay online search engines like Google and Yahoo! to direct traffic to their sites, and in turn pay the registrants of the parked pages); Go Daddy Inc., Cashparking Service Agreement, https://www.godaddy.com/gdshop/legal_agreements/show_doc.asp?se=%2B&pageid=Cash%5FPark%5FSA (last visited Nov. 4, 2007) (establishing GoDaddy’s parking payment policy).

8. Press Release, Microsoft, Microsoft Launches Enforcement Campaign Targeting Web Site “Cybersquatters” Who Use Online Ads (Aug. 22, 2006), <http://www.microsoft.com/presspass/features/2006/aug06/08-22domaindefense.msp>.

9. See *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 952 (C.D. Cal. 1997), *aff’d*, 194 F.3d 980 (9th Cir. 1999) (“If a user knows or can deduce the domain name associated with a Web Site, the user can directly access the Web Site by typing the domain name into a Web browser, without having to conduct a time consuming search.”).

10. For another example of a domain name parking scheme, this time involving 1800Contacts.com, see *Contracting the Internet: Does ICANN Create a*

parked domain, cannondalebikes.com, presents the consumer with navigation options but fails to identify the intended target of the consumer's direct navigation attempt—Cannondale's bike-specific webpage: cannondale.com/bikes. This scenario is just an example of the millions of parked domain names that frustrate trademark owners and are encountered by consumers on a daily basis.¹¹

Domain name parking harms and annoys trademark owners and consumers. Mark owners are injured because unaffiliated domain name registrants can incorporate the owners' marks into parked domain names, reducing the trademark owner's ability to control the use of their mark in cyberspace and diverting consumers to competitors' websites.¹² Some trademark owners have taken legal action to resolve these problems and enforce their trademark rights. For example, Microsoft has filed suit against registrants of domain names it claims are confusingly similar to Microsoft's trademark.¹³ Moreover, advertisers who pay domain name parking service providers to place their advertisements on websites do not like being connected to potentially infringing parked domain

Barrier to Small Businesses: Hearing Before the H. Comm. on Small Business, 109th Cong. 63–76 (2006) (statement of Steven Delbianco, Exec. Director, NetChoice) [hereinafter Delbianco Testimony].

11. See Frances Williams, *Cybersquat Threat to Trademarks*, FIN. TIMES, Mar. 13, 2007, at 11 (“According to [the World Intellectual Property Organization], companies that make a business of buying, selling and parking domain names account for a significant share of the 120 [million] website addresses registered worldwide. In addition, tens of millions of domain names are temporarily registered every month for ‘tasting,’ with only those names that generate significant traffic retained.”).

12. See Walker & Krebs, *supra* note 4 (quoting Verizon Wireless's spokesman as condemning parking because those “sites are siphoning off traffic by tricking people who have tried to obtain information about Verizon Wireless”); see also McDonald, *supra* note 7, at 67 (“Trademark counterfeiters often set up ‘parked’ Web Sites, which exist for no purpose other than to attract and redirect Internet traffic to other sites.”).

13. Complaint at 28, *Microsoft Corp. v. Brown*, No. CV06-5247 (C.D. Cal. Aug. 21, 2006) (“When a person looking for a Microsoft website lands on one of Defendant's Websites, that person may click on one of the advertisements or hyperlinks on the site either because the person finds it easier to click on the advertisement or hyperlink than to continue searching for the Microsoft site, or because the person mistakenly believes Microsoft has authorized or endorsed the advertisements or hyperlinks. In either case, the person has been diverted from the Microsoft website he or she was seeking to visit, and Microsoft has lost that opportunity to interact with that person.”); see also Gregg Keizer, *YOURKOMPANYNAME.COM—Typo-Squatter Landgrab*, INFO. WEEK, Aug. 28, 2006, at 15 (noting that Microsoft has filed two federal lawsuits regarding typosquatting).

names.¹⁴ Internet consumers may also be misled or frustrated by domain name parking activities when they seek out a brand's website but instead encounter a detour. Although an infringing parked domain name may not appear individually problematic, a broader view of the implications of domain name parking reveals that trademark owners can neither single-handedly stop this activity nor protect consumers from being misled.

This Note discusses how commercial domain name parking affects both trademark owners and consumers and suggests potential solutions regarding how those two groups may obtain relief from this abusive practice. Part I explains the concept of domain name parking and discusses the function of trademarks in cyberspace. Part II discusses the tools trademark owners can use to take legal action against domain name parking, including the Lanham Act, the Anticybersquatting Consumer Protection Act (ACPA), and indirect trademark infringement liability. Part III suggests that the ACPA and the Lanham Act may provide an avenue of redress for trademark owners against domain name registrants and parking service providers who, without consent, profit from their mark. In practice, however, these statutes cannot rectify the effects of domain name parking on a large scale because each trademark owner must individually pursue the perpetrators of this infringing activity, and there are significant practical obstacles and expenses in doing so. Part III concludes by urging that, outside the general statutory framework, the Federal Trade Commission should initiate lawsuits against registrants of parked domain names and domain name parking service providers. Together, current trademark law and FTC enforcement would allow trademarks to function properly in cyberspace by permitting trademark owners to regain control over their marks and by protecting consumers from unexpected and confusing detours.

14. Such advertisers are likely to contest concepts of unjust enrichment in relation to commercial domain name parking. See Complaint at 34, *Crafts by Veronica v. Yahoo!, Inc.*, No. 2:06-cv-01985-JCL-MF (D.N.J. May 1, 2006), available at http://www.washingtonpost.com/wp-srv/technology/documents/yahoo_may2006.pdf (alleging harm because defendants placed ads "within 'parking' and other bulk registration sites" even though "Defendants represented that Class Members' ads would be shown in 'popular, high-quality sites' . . . not second-rate content-less sites users only reach because they guessed or misspelled a domain name"); see also McDonald, *supra* note 7, at 2 (describing litigation initiated by advertisers claiming that Google and Yahoo! "collude with typosquatters to use infringing parked Web Sites as a means of illicitly redirecting Internet traffic to the advertisers' Web Sites").

I. AN OVERVIEW OF TRADEMARK FUNCTION IN CYBERSPACE

Trademarks have been a hot commodity on the Internet since its inception. Businesses and forward-looking individuals sought to stake a claim on the web by registering valuable trademarks as domain names.¹⁵ Part I first introduces the purposes underlying trademark law and sets forth the basic concept of commercial domain name parking. Part I then describes the problems domain name parking presents for trademark owners and Internet consumers.

A. PURPOSES UNDERLYING TRADEMARKS AND TRADEMARK LAW

In their most basic form, trademarks are valuable source identifiers that help consumers quickly identify products and differentiate between competing goods and services.¹⁶ Trademark law serves to maintain the function of trademarks in two ways. Since “trademarks create an incentive to keep up a good reputation for a predictable quality of goods,”¹⁷ trademark law correspondingly protects a mark owner’s investment in the quality of its mark and the corresponding goods and services.¹⁸ Second, trademark law aids consumers by ensuring the quality of the brand information they receive and by preventing them from being confused.¹⁹ When trademark owners bring suit against alleged infringers, seeking the protections of trademark law, trademark owners act not only in their own interest, but also in the interest of consumers.²⁰ The policies of protecting the goodwill that trademark owners have developed through the investment of time, effort, and money, and of preventing

15. H. Brian Holland, *Tempest in a Teapot or Tidal Wave? Cybersquatting Rights and Remedies Run Amok*, 10 J. TECH. L. & POL’Y 301, 302–03 (2005) (portraying the registration of domain names corresponding to valuable trademarks as a “land rush”).

16. John Dwight Ingram, *The Genericide of Trademarks*, 2 BUFF. INTELL. PROP. L.J. 154, 154 (2004) (listing the functions of trademarks).

17. 1 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 2:4 (4th ed. 2007); *see also* ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 20 (4th ed. 2006).

18. 1 MCCARTHY, *supra* note 17, § 2:4; *see also* Park ’N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 213 (1984) (Stevens, J., dissenting) (“Congress enacted the Lanham Act ‘to secure trade-mark owners in the goodwill which they have built up.’”).

19. *See* MERGES ET AL., *supra* note 17, at 20–21.

20. *See* 1 MCCARTHY, *supra* note 17, § 2:33; MERGES ET AL., *supra* note 17, at 29–30.

consumers from being confused, underscore the main premises of trademark law.²¹

B. THE ESCALATING PRACTICE OF COMMERCIAL DOMAIN NAME PARKING

A domain name consists of a top-level extension like .com, .org, and .net, preceded by a second-level extension, often a trademark or a company name, which distinguishes one website from another.²² The benefit of the domain name system is that each domain name is unique; the problem with the system is that each domain name is registered on a first-come, first-served basis.²³ This arrangement may be a recipe for success for some, but it can be disastrous for trademark owners.²⁴

For trademark owners, the Internet provides a profitable, but problematic, platform for business growth.²⁵ Mark owners often deal with numerous headaches inflicted by third parties, often referred to as cybersquatters.²⁶ Cybersquatting initially embodied the practice of registering domain names consisting of valuable trademarks and subsequently approaching the trademark owners with demands for large payments to transfer control of the domain name to the mark's owner.²⁷ For example, notorious cybersquatter Dennis Toepfen made a business of registering "well known marks" and demanding payment from the owners of the marks.²⁸ Routine cybersquatting practices quickly expanded to typosquatting, where a third party registers domain names similar to valuable trademarks but differ by

21. See, e.g., Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1844–46 & n.13 (2007).

22. *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 783 (8th Cir. 2004).

23. *Sporty's Farm L.L.C. v. Sportsman's Market, Inc.*, 202 F.3d 489, 493 (2d Cir. 2000).

24. See Jonathan H. Gatsik, Note, *Cybersquatting: Identity Theft in Disguise*, 35 SUFFOLK U. L. REV. 277, 278 (2001) ("Cybersquatters typically victimize business entities . . . because the domain name has monetary value, regardless of whether the cybersquatter attempts to sell the domain name to the business or entity or traffics in consumers on the Internet.").

25. See Holland, *supra* note 15, at 308–09 (showing the exponential growth rate of e-commerce transactions from 1999 to 2003).

26. See, e.g., *Panavision Int'l, L.P. v. Toepfen*, 945 F. Supp. 1296, 1300 (C.D. Cal. 1996) (outlining defendant's registration of panavision.com and demands for money to "discontinue his 'use' of the domain name"), *aff'd*, 141 F.3d 1316 (9th Cir. 1998).

27. See MICHAEL J. REMINGTON ET AL., *CYBERSQUATTERS BEWARE: TRADEMARK OWNERS ARE FIGHTING BACK 2* (2004).

28. *Panavision Int'l*, 945 F. Supp. at 1300.

reflecting common typographic errors Internet users make when attempting to reach a website via direct navigation.²⁹ Typosquatting exemplifies a misuse of trademarks in cyberspace that injures trademark owners with similar underlying profit motives as traditional cybersquatting.³⁰

Domain name parking incorporates the basic concepts of cybersquatting and typosquatting: it exploits another's trademark for commercial gain.³¹ Domain name parking can occur when domain names are registered, but before a corresponding website is constructed or operable.³² Rather than allowing the domain name to lay idle, registrants may park domain names pending site development in the short term. Alternatively, domain name parking can occur when domain names are registered for the express purpose of parking it to generate profits in the long run.³³ Internet users often reach parked web pages when their direct navigation attempts fail due to an incorrect guess at a domain name or because they commit typographical errors. In those cases, domain name speculators position the domain name at webpages filled with advertisements that distract Internet users from the websites they originally intended to visit.³⁴ In effect, "[s]urfing to these Web pages leads site visitors to a screen chock full of pay-per-click advertisements and

29. See Christopher G. Clark, *The Truth in Domain Names Act of 2003 and a Preventative Measure to Combat Typosquatting*, 89 CORNELL L. REV. 1476, 1480 (2004) (describing typosquatting as the practice of "identifying legitimate popular web sites and purposefully registering deceptively similar or deliberately misspelled domain names").

30. See *id.* at 1481 ("[T]yposquatters also profit if owners of the legitimate domain name are willing to purchase the deceptive domain name to prevent further confusion.").

31. See Delbianco Testimony, *supra* note 10, at 72 ("A 'parked' website is one that closely resembles a popular domain name Based solely on traffic generated by user errors, parking sites earn easy money when users click on ads displayed on the page.").

32. AllBusiness.com, Inc., *Domain Name Parking Primer*, <http://www.allbusiness.com/technology/internet-domain-names/3922-1.html> (last visited Nov. 20, 2007) ("Parking' means your registrar puts up a placeholder page at your new Web address until you are ready to launch your new site.").

33. See, e.g., Jon Swartz, *Domain Names Become Premium Web Real Estate*, USA TODAY, May 10, 2006, at 3B (explaining the long-term investment aspects of domain name parking).

34. Walker & Krebs, *supra* note 4 (quoting an intellectual property attorney and professor who stated that "[i]f everyone has to spend a whole bunch of time wading through all this look-alike crap online, then the value [of trademarks serving as source identifiers] for Internet consumers is going to be seriously reduced").

little meaningful content.”³⁵ Thus, domain name parking obstructs key trademark law objectives by hindering a mark owner’s ability to indicate the single source of the goods or services of the mark and impedes customers’ attempts to locate a desired website.

C. THE HARMS OF DOMAIN NAME PARKING

Trademark law protects mark owners’ intellectual property rights and aids consumers in the marketplace.³⁶ This Section discusses mark owners’ motivations to contest domain name parking that amounts to trademark infringement and explains why consumers benefit from such enforcement activities.

1. Domain Name Parking Hinders the Ability of Trademark Owners to Control Their Marks

Domain name parking creates both business and legal problems for trademark owners.³⁷ Because trademarks function as source identifiers,³⁸ often becoming part of consumers’ vernacular, domain names that include famous or well-known trademarks are highly valued.³⁹ Many Internet users who directly navigate the Internet reach websites by enclosing a well-known trademark between “www.” and “.com.”⁴⁰ Prudent businesses obtain domain names that conform to this formula in

35. Press Release, Microsoft, *supra* note 8.

36. See 1 MCCARTHY, *supra* note 17, § 3:1(B).

37. Ryan Kaatz & Julie Erin Land, *Microsoft Files Federal Complaints to Combat Extensive Trademark Infringement and Cybersquatting*, MONDAQ (Oct. 3, 2006), http://www.mondaq.com/article.asp?article_id=42844 (noting that domain name parkers “allegedly profit from these domain names by diverting Internet traffic to websites containing advertisements and hyperlinks, from which [they] receive advertising revenue and click-through payments each time a misdirected Internet user clicks on one of the links”).

38. See, e.g., *Wells Fargo & Co. v. WhenU.Com, Inc.*, 293 F. Supp. 2d 734, 761 (E.D. Mich. 2003).

39. *Panavision Int’l, L.P. v. Toeppen*, 945 F. Supp. 1296, 1299 (C.D. Cal. 1996) (“[H]aving a known or deducible domain name is important to companies seeking to do business on the Internet, as well as important to consumers who want to locate those business’ web sites.”), *aff’d*, 141 F.3d 1416 (9th Cir. 1998).

40. See *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 952 (C.D. Cal. 1997) (“Because most businesses with a presence on the Internet use the ‘.com’ top-level domain, Internet users intuitively try to find businesses by typing in the corporate or trade name as the second-level domain”), *aff’d*, 194 F.3d 980 (9th Cir. 1999).

order to protect their trademark and its goodwill and to assist their customers in finding their website quickly and easily.⁴¹

Domain name registrants target and incorporate trademarks into their parked domain names because the earning potential of parked domains increases when the domains exploit a brand's value.⁴² Contrary to and perhaps more troubling than traditional cybersquatting, a registrant who parks a domain name has little incentive to approach the trademark owner to demand money in exchange for the transfer of the domain name.⁴³ When the registered domain name experiences a high volume of traffic, the benefits of retaining the domain name grow as the profits from the advertising revenue increase.⁴⁴ The result is an enormous stockpile of parked domain names, more detours on the information superhighway for Internet users and an illegitimate means of generating revenue from the unauthorized use of another's trademark.⁴⁵

Trademark owners have strong incentives to protect their marks and to stop infringing activities. If a trademark owner does not vigorously monitor and take action against the unauthorized use of its mark, the mark may become legally weak and even generic, the ultimate consequence of lax trademark

41. *See id.* at 953 ("In short, the exclusive quality of second-level domain names has set trademark owners against each other in the struggle to establish a commercial presence on the Internet, and has set businesses against domain name holders who seek to continue the traditional use of the Internet as a non-commercial medium of communication."); S. REP. NO. 106-140, at 5 (1999) ("The practice of cybersquatting harms consumers, electronic commerce, and the goodwill equity of valuable United States brand names, upon which consumers increasingly rely to locate the true source of genuine goods and services on the Internet.").

42. *Cf. Kaatz & Land, supra* note 37 (comparing the monthly deletion rates of registered domain names in April 2005 and April 2006 and concluding that a higher deletion rate corresponds to increased profitability and creates incentives to acquire and hold on to high-traffic domain names and to discard low-traffic domain names).

43. *Cf. id.* ("The trend of collecting and exploiting high-traffic domain names is reflected in a dramatic increase in registrants or registrars tating . . . domain names for web traffic volume rather than registering them for long-term web development.").

44. *See Clark, supra* note 29, at 1489-90.

45. *See Delbianco Testimony, supra* note 10 ("[W]hen typos happen, legitimate businesses shouldn't lose customers who fall into traps designed to generate ad revenue. What's more, the ad revenue generated by parking drives up the price if the intended business tries to acquire the domain name from the parking operator.").

enforcement.⁴⁶ When a trademark becomes the common descriptive name of a type of product, rather than the original trademark owner's product, the trademark owner no longer has exclusive rights to its use.⁴⁷ As a result, the mark becomes "generic" since it no longer serves as a source-identifier.⁴⁸ Therefore, many trademark owners find it prudent to police against infringing domain name registrations by using third parties to monitor and identify potential cybersquatters.⁴⁹ Additionally, because registrars do not scrutinize the domain name for potential trademark infringement before registering them, there is a growing need for others to police newly registered domain names.⁵⁰ Aside from presenting concerns of weakening the mark or genericide, infringing acts threaten a mark owner's ability to retain its customer base, potentially resulting in lost customers and sales. As with all other forms of infringement, trademark owners have an incentive to thwart domain name parking activities that violate their intellectual property rights and threaten their businesses.

2. Domain Name Parking Impermissibly Compounds Consumer Confusion on the Internet

Domain name parking also presents concerns for Internet users. Domain name parking can distract, confuse, and mislead Internet users.⁵¹ While parked domains may benefit consumers by providing options in the form of links to competitive or similar websites, the negative characteristics of parked domains dominate. Just as the tangible effects of too-similar brand names confuse consumers, a parked domain name misleads

46. When a trademark becomes generic, the trademark owner loses both the exclusive right to its use and its investment in developing the mark's goodwill. *See* Ingram, *supra* note 16, at 154.

47. *Id.*

48. *Id.* Consider the former registered trademarks cellophane, aspirin, and trampoline. Those trademarks once enjoyed legal protection, but after rampant misuse by others—such as calling any dose of acetyl salicylic acid by the tradename "aspirin"—and failure by the trademark owner to take appropriate enforcement measures, the trademark owner lost the federal registration for the mark, which could then be used industry-wide. *See id.* at 154–57.

49. *See* REMINGTON ET AL., *supra* note 27, at 31 (advocating third-party monitoring to combat cybersquatting).

50. *See* Holland, *supra* note 15, at 307 ("[R]egistrars do not consider the trademark significance of (or possible infringement resulting from) a particular registration.").

51. Delbianco Testimony, *supra* note 10 ("Parking sites confuse and divert potential customers.").

consumers into pursuing an undesired end. This is especially true when the links offered on the parked page are described by the trademark, but the official website of the trademark owner does not appear.⁵² Consumers might follow any link whose description bears the same trademark they attempted to reach by direct navigation.⁵³ Thus, domain name parking can catch Internet consumers in a complex maze rather than aiding consumers, and it disrupts the underlying principles of trademarks.

II. PROTECTING TRADEMARKS IN CYBERSPACE

Part I discussed the concept of domain name parking within the context of trademark infringement and explained the activity's harms. Part II describes the enforcement mechanisms available for trademark owners to challenge trademark misuse in cyberspace. Those mechanisms include section 43(a) of the Lanham Act, the traditional statute used to combat trademark infringement;⁵⁴ the Anticybersquatting Consumer Protection Act, a discrete section of the Lanham Act directed towards preventing cybersquatting, a particular type of trademark infringement,⁵⁵ and theories of contributory trademark infringement.

A. SETTING THE STAGE FOR TRADEMARK PROTECTION: THE LANHAM ACT

The Lanham Act⁵⁶ provides federal protection for trademarks.⁵⁷ The Act seeks "to ensure that 'where the holder of a trademark has spent energy, time, and money in presenting to the public [his] product, he is protected in his investment from its misappropriation by pirates and cheats.'"⁵⁸ The law prohibits others "from appropriating or copying them and taking ad-

52. See Walker & Krebs, *supra* note 4, at F01.

53. See Quinton, *supra* note 2, at 50.

54. Lanham Act § 43(a), 15 U.S.C.A. § 1125 (West Supp. 2007).

55. *Id.* § 1125(d).

56. *Id.* §§ 1051–1072, 1091–1096, 1111–1127, 1141.

57. See Margreth Barrett, *Internet Trademark Suits and the Demise of "Trademark Use,"* 39 U.C. DAVIS L. REV. 371, 376–77 (2006) (explaining that the "purpose of trademark protection is to foster competition" and that "trademark law . . . does not convey monopoly rights . . . [r]ather, businesses have 'property' rights in their trademarks only to the extent necessary to prevent unauthorized uses that cause a likelihood of consumer confusion").

58. *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 777–78 (8th Cir. 2004) (quoting S. REP. NO. 1333, at 3 (1946)).

vantage of the holder's good will for their own benefit."⁵⁹ The overall goal of the Lanham Act is to encourage competition, allocate resources, and create an incentive for mark owners to improve and maintain product quality.⁶⁰

To prevail on an infringement claim under the Lanham Act,⁶¹ the plaintiff must prove that he has a valid mark,⁶² that the defendant used the mark in commerce "in connection with the sale . . . or advertising of goods or services,"⁶³ and that the mark was used in a manner that is likely to cause consumer confusion.⁶⁴ Section 1127 defines use in commerce as "the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark," and provides examples of such use.⁶⁵ A plaintiff that establishes these core elements may be entitled to an injunction, as well as damages.⁶⁶

1. It Is Critical to Establish a Likelihood of Consumer Confusion in an Infringement Claim

In order to prevail on a trademark infringement claim, the plaintiff must prove that the defendant's use of the mark is likely to confuse an ordinary consumer as to the source or sponsorship of the goods.⁶⁷ Courts generally consider several factors in assessing whether the defendant's use creates confusion, including, but not limited to, the strength or distinctiveness of the plaintiff's mark, the similarity between the plaintiff's and defendant's marks, the proximity of the products, the existence of actual confusion, the level of sophistication of the consuming public, and the defendant's intent in adopting the same or similar mark.⁶⁸ The outcome of the confusion analysis generally turns on the specific facts of the case.⁶⁹

59. *Id.* at 777.

60. *See* 1 MCCARTHY, *supra* note 17, §§ 2:1–2:5 (explaining various policy rationales underlying trademark law).

61. *See, e.g.*, 1-800 Contacts, Inc. v. WhenU.Com, Inc., 414 F.3d 400, 406–07 (2d Cir. 2005) (listing the elements of a trademark infringement claim under various sections of the Lanham Act).

62. *See* 15 U.S.C. § 1114(1) (2000) (establishing liability for the infringement of registered trademarks); 15 U.S.C.A. § 1125(a) (establishing liability for the infringement of unregistered trademarks).

63. 15 U.S.C. § 1114(1)(a).

64. *Id.*

65. 15 U.S.C.A. § 1127 (West Supp. 2007).

66. *Id.* § 1125(c).

67. *See, e.g.*, Gov't Employees Ins. Co. v. Google, Inc., No. 1:04CV507, 2005 WL 1903128, at *4 (E.D. Va. Aug. 8, 2005).

68. *See id.*; REMINGTON ET AL., *supra* note 27, at 6–7; John Handy, *Why*

The “initial interest confusion” doctrine allows a mark owner to satisfy the likelihood of confusion requirement by demonstrating that a certain kind of confusion results from the trademark’s use.⁷⁰ Actionable initial interest confusion has been defined as “customer confusion that creates initial interest in a competitor’s product” that, “[a]lthough dispelled before an actual sale occurs[,] . . . impermissibly capitalizes on the goodwill associated with a mark.”⁷¹ While the initial interest confusion doctrine may be characterized as being “particularly applicable to the Internet,”⁷² not all federal courts of appeals have adopted this stance.⁷³

Even where evidence of confusion exists, courts may absolve a defendant from liability for trademark infringement if the defendant shows that its use of the mark does not misappropriate the mark’s goodwill.⁷⁴ A defendant may raise the classic fair use defense when using the plaintiff’s mark in conjunction with describing the defendant’s own product⁷⁵ or when the defendant uses the mark in its dictionary sense.⁷⁶ The defendant may raise a nominative fair-use defense if the use of the mark describes the plaintiff’s product but does not attempt to exploit consumer confusion or transfer the goodwill associated with the mark to the defendant.⁷⁷ Although fair use may

the Initially Confused Should Get a Clue: The Battle Between Trademark Infringement and Consumer Choice Online, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567, 576 (2006).

69. *Gov’t Employees Ins. Co.*, 2005 WL 1903128, at * 3.

70. *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d 1020, 1024–25 (9th Cir. 2004).

71. *Id.* at 1025.

72. *Wells Fargo & Co. v. WhenU.Com, Inc.*, 293 F. Supp. 2d 734, 764 (E.D. Mich. 2003) (quoting *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 55 F. Supp. 2d 1070, 1074 (C.D. Cal. 1999), *aff’d*, 202 F.3d 278 (9th Cir. 1999) (unpublished table decision)).

73. *See, e.g., id.* at 764 (discussing the failure of the Court of Appeals for the Sixth Circuit to acknowledge the initial interest confusion doctrine).

74. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 120 (2004) (noting that the defendant need only raise this affirmative defense when the plaintiff has established a likelihood of confusion by a preponderance of the evidence); Handy, *supra* note 68, at 578.

75. *See, e.g., Volkswagenwerk Aktiengesellschaft v. Church*, 411 F.2d 350, 352 (9th Cir. 1969) (holding that a mechanic’s use of Volkswagen’s trademark to describe his line of work does not constitute trademark infringement).

76. Handy, *supra* note 68, at 579 (“[A] farmer using the term ‘Apple’ to describe his orchard cannot be held to infringe Apple Computer, Inc.’s trademark.”).

77. *See, e.g., Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 802 (9th Cir. 2002) (finding the defendant’s use of the Playmate trademark a permissible

negate a claim of trademark infringement, establishing a likelihood of consumer confusion is necessary to prevail on a trademark infringement claim.

2. The Lanham Act's Early Utility in Cyberspace

In early cybersquatting cases, trademark owners sought relief from infringing domain name registrants under the Lanham Act.⁷⁸ For example, the Federal Trademark Dilution Act of 1995 (FTDA), an amendment to the Lanham Act,⁷⁹ was used to hold cybersquatter Dennis Toeppen liable for trademark infringement.⁸⁰ Cybersquatters, however, soon circumvented the FTDA by not offering the domain name for sale in connection with the sale of goods or services, which is required to implicate liability.⁸¹ As a result, courts did not thwart the practice of cybersquatting because trademark law did not explicitly provide relief from such activity for mark owners in cyberspace.⁸² As the prevalence of cybersquatting increased, Congress further amended the law to clarify trademark owners' rights, to provide for adequate remedies, and to deter cyberpiracy and cybersquatting.⁸³

nominative fair use because "[t]here is no other way that [defendant] can identify or describe herself and her services without venturing into absurd descriptive phrases"); Handy, *supra* note 68, at 579.

78. See, e.g., *Panavision Int'l, L.P. v. Toeppen*, 945 F. Supp. 1296, 1306 (C.D. Cal. 1996) (concluding that the defendant violated federal and state trademark dilution statutes by "intentionally registering plaintiff's trademarks as his Internet domain names"), *aff'd*, 141 F.3d 1316 (9th Cir. 1998).

79. Federal Trademark Dilution Act of 1995 (FTDA), Pub. L. No. 104-98, 109 Stat. 985 (1995) (codified as amended at 15 U.S.C.A. § 1125(c) (West Supp. 2007)).

80. *Panavision Int'l*, 945 F. Supp. at 1304 ("The Court finds that Toeppen's conduct, which prevented Panavision from using its marks in a new and important business medium, has diluted Panavision's marks within the meaning of the statute."). The FTDA provides remedies when plaintiffs prove their mark is famous, the defendant uses the mark commercially, the mark was famous before the defendant began using the mark, and the defendant's use of the mark dilutes the mark's distinctive qualities. 15 U.S.C.A. § 1125(c)(1).

81. See 15 U.S.C.A. § 1125(a); S. REP. NO. 106-140, at 7 (1999).

82. S. REP. NO. 106-140, at 7 ("Instances of cybersquatting continue to grow each year because there is no clear deterrent and little incentive for cybersquatters to discontinue their abusive practices. While the Federal Trademark Dilution Act has been useful in pursuing cybersquatters, cybersquatters have become increasingly sophisticated as the case law has developed and now take the necessary precautions to insulate themselves from liability.")

83. *Id.* at 7-8 (listing the findings of Congress in enacting the Anticybersquatting Consumer Protection Act (ACPA), (codified as amended at 15 U.S.C.A. § 1125(d)), including the need for legislation banning cybersquatting).

B. A RESPONSE TO CYBERSQUATTING: THE ACPA

The Anticybersquatting Consumer Protection Act (ACPA)⁸⁴ was Congress's response to the inadequacies of conventional trademark law in addressing cybersquatting. The ACPA provides a trademark owner with a cause of action against anyone who, with a "bad faith intent to profit" from another's mark, "registers, traffics in, or uses a domain name" that is "identical or confusingly similar to that mark."⁸⁵ The ACPA effectively waives the commercial use requirement of a trademark infringement claim, forcing courts to focus on the registrant's intent.⁸⁶ The ACPA, however, fails to make mere registration actionable.⁸⁷ Therefore, the possible defendants under an ACPA claim are limited to the domain name registrant or its authorized licensee.⁸⁸ Further, the remedies available under the ACPA are restricted to the forfeiture or cancellation of the domain name or the transfer of the domain name to the mark's owner.⁸⁹

The ACPA lists nine factors that courts may use to evaluate the bad faith intent of the domain name registrant.⁹⁰ Four factors support the defendant's good faith registration: the registrant's rights in any marks incorporated into the domain name, the extent to which the registrant is known by or associated with the marks, any prior bona fide use of the domain name in connection with the registrant's bona fide offering of any goods or services, and whether there are any legitimate noncommercial or fair uses of the mark on the site accessible via the domain name.⁹¹ The remaining five enumerated factors

84. 15 U.S.C.A. § 1125(d).

85. *Id.* § 1125(d)(1)(A).

86. Adam Silberlight, *Domain Name Disputes Under the ACPA in the New Millennium: When Is Bad Faith Intent to Profit Really Bad Faith and Has Anything Changed with the ACPA's Inception?*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 269, 277 (2002) ("One major difference between traditional trademark law and the ACPA . . . is that the ACPA does not require that the domain name at issue be used in commerce.").

87. See *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 957, 959 (C.D. Cal. 1997) (holding that under pre-ACPA law a registrar's "acceptance of domain name registrations is not a 'commercial use'"); see also *Panavision Int'l, L.P. v. Toeppen*, 945 F. Supp. 1296, 1303 (C.D. Cal. 1996).

88. 15 U.S.C.A. § 1125(d)(1)(D). Even before the enactment of the ACPA, courts absolved registrars from liability. See *Lockheed Martin Corp.*, 985 F. Supp. at 959 (explaining that the registrar's "acceptance of domain name registrations is not a 'commercial use' within the meaning of the Federal Trademark Dilution Act").

89. 15 U.S.C.A. § 1125(d)(1)(C).

90. *Id.* § 1125(d)(1)(B)(i)(I)-(IX).

91. See *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 785 (8th Cir. 2004).

weigh against the defendant's good faith intentions: the registrant's intent to divert consumers from the true mark owner's online location, the registrant's willingness to profit from the sale, transfer, or assignment of the domain name, whether the registrant provided false contact information during the registration process, the bulk registration of domain names incorporating others' marks, and the similarity between the domain name and a distinctive or famous mark.⁹² These bad faith factors are not exhaustive and allow courts to exercise discretion on a case-by-case basis to determine the registrant's intent.⁹³

The ACPA proved a successful tool in combating one instance of domain parking in *Mattel, Inc. v. Adventure Apparel*.⁹⁴ In *Mattel*, the defendant operated a commercial website, *adventureapparel.com*, at which he parked two domain names that incorporated Mattel's BARBIE® trademark, *barbiesbeachwear.com* and *barbiesclothing.com*.⁹⁵ The court found that Mattel was entitled to summary judgment on an ACPA claim because the BARBIE mark in the defendant's domain names diluted the famous mark and was confusingly similar to the distinctive Mattel mark.⁹⁶ The court also found that the defendant demonstrated a bad faith intent to profit from the use of the BARBIE mark.⁹⁷ The court analyzed the nine ACPA bad faith factors, and found that, on balance, the defendant exhibited the requisite bad faith.⁹⁸ The court further held that parking the domain names at the defendant's commercial site did not constitute fair use under the ACPA because the defendant did not show a protected, noncommercial use of the domain name.⁹⁹

Although the district court quickly disposed of the domain name parking at issue in *Mattel* by applying the ACPA, the defendant's parking activities there are distinguishable from domain names parked solely to generate advertising revenue, the

92. *See id.* at 785–86.

93. *See Clark, supra* note 29, at 1498–99.

94. *Mattel, Inc. v. Adventure Apparel*, No. 00 Civ. 4085, 2001 WL 1035140 (S.D.N.Y. Sept. 7, 2001).

95. *Id.* at *1.

96. *See id.* at *2–3.

97. *Id.* at *5.

98. *Id.* at *3–5 (finding that the defendant did not attempt to transfer, sell, or assign the domain name to Mattel or a third party, did not withhold false contact information when registering the domain, and did register a large portfolio of such domain names).

99. *Id.* at *5.

focus of this Note. Rather than redirecting traffic to the registrant's legitimate commercial website, commercially parked domains present the Internet user with an abundance of advertisements and hyperlinks.¹⁰⁰ Part III discusses whether the ACPA would apply to a claim against a domain name registrant who parks his domain name for commercial profit.¹⁰¹

C. THIRD PARTY LIABILITY FOR TRADEMARK INFRINGEMENT IN CYBERSPACE

Trademark owners may also initiate suit against parties that indirectly infringe their trademark rights. In the absence of explicit statutory language, courts have developed theories of contributory and vicarious trademark infringement, which originally applied to manufacturers and distributors of trademarked products.¹⁰² For contributory liability to attach, the defendant must either "intentionally induce[] another to infringe a trademark" or "continue[] to supply its product to one whom it knows or has reason to know is engaging in trademark infringement."¹⁰³ Although the mere registration of domain names including another's mark does not amount to contributory infringement by the registrar,¹⁰⁴ third parties other than registrars may be held accountable under theories of contributory

100. *See id.* at *1.

101. The Internet Corporation for Assigned Names and Numbers (ICANN), in partnership with the United States Department of Commerce, is the body charged with managing the domain name system. *See* ICANN, Fact Sheet, <http://www.icann.org/general/fact-sheet.html> (last visited Nov. 4, 2007). ICANN has a dispute resolution policy separate from the United States' federal statutes, the Uniform Domain Name Dispute Resolution Policy (UDRP), pursuant to which trademark owners may file complaints against cybersquatters outside the United States federal court system. *See* ICANN, Uniform Domain Name Dispute Resolution Policy, <http://www.icann.org/dndr/udrp/policy.htm> (last visited Nov. 4, 2007). UDRP proceedings have determined that domain name parking constitutes bad faith use. *See, e.g.*, *Beverages & More, Inc. v. Glenn Soble*, Case No. AF-0092 (eResolution, Mar. 9, 2000), <http://www.disputes.org/decisions/0092.htm> (finding the defendant's parking of a confusingly similar domain name a bad faith use).

102. *See* Alicia Gámez, *WhenU.com, Inc. & Google, Inc.: Parsing Trademark's Use Requirement*, 21 BERKELEY TECH. L.J. 403, 409-12 (2006) (tracing the development of the indirect and contributory trademark infringement doctrines in case law).

103. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982).

104. *See Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 967 (C.D. Cal. 1997) (holding that the defendant domain name registrar would only be liable for contributory trademark infringement if it had an "affirmative duty to police the Internet for infringing uses" of the plaintiff's trademark), *aff'd*, 194 F.3d 980 (9th Cir. 1999).

infringement. In those situations, the defendant “must supply a product to a third party with which the third party infringes [a trademark].”¹⁰⁵ When the defendant provides a service rather than a product, the court will “consider the extent of control exercised by the defendant over the third party’s means of infringement.”¹⁰⁶ Pursuing a theory of contributory infringement against providers of domain name parking services remains a possibility for trademark owners, but proving such a claim is difficult.¹⁰⁷

III. THE CURRENT TOOLS OF TRADEMARK PROTECTION MUST BE SUPPLEMENTED TO PROVIDE RELIEF FROM DOMAIN NAME PARKING

Against the backdrop of trademark law outlined in Part II, Part III discusses the potential applicability of the ACPA and Lanham Act to commercial domain name parking. By drawing on the current state of trademark law in cyberspace, Part III argues that trademark owners will likely find relief in the courtroom against domain name parking, but only on a piecemeal basis. As such, present trademark law cannot efficiently address the domain name parking nuisance. Part III concludes by considering an administrative mechanism to deter domain name parking and provide consumers with relief.

A. THE ACPA IS MERELY THE FIRST STEP IN COMBATING COMMERCIAL DOMAIN NAME PARKING

The ACPA provides a starting point for trademark owners to combat the commercial domain name parking phenomenon because the owner can initiate a suit directly against the domain name registrant.¹⁰⁸ The ACPA is effective at stopping traditional typosquatting because the ACPA protects marks incorporated into a domain name in a “confusingly similar” manner.¹⁰⁹ It follows that, in cases of parked typo-domain-names and domains utilizing a trademark along with other words, the ACPA should provide relief.

105. See *Lockheed Martin Corp.*, 194 F.3d at 984.

106. *Id.*

107. See *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 806–07 (9th Cir. 2007) (commenting on the difficulty of satisfying the test for secondary trademark infringement and explaining the plaintiff’s deficiency in pleading a viable claim for contributory infringement).

108. 15 U.S.C.A. § 1125(d)(1)(A)(ii) (West Supp. 2007).

109. Clark, *supra* note 29, at 1499–1500.

As discussed in Part II.B, a trademark owner must prove the defendant's "bad faith intent to profit" from the trademark to prevail under the ACPA.¹¹⁰ In cases where the registrant clearly participates in and receives payments from a commercial domain name parking program, the registrant's intent to profit is obvious.¹¹¹ In determining whether the requisite bad faith accompanies intent, one ACPA bad faith factor applies directly to commercial domain name parking activities: factor five analyzes "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 . . . for commercial gain."¹¹² Because Internet users often incorrectly guess domain names, setting up a parked page that anticipates an incorrect guess may demonstrate an intent to divert consumers away from the mark owner's site. Courts should consider how long the registrant utilized the domain name as a commercial parking device in the bad faith calculus. The longer the parked domain name idles and generates revenues from click-through advertising, the less likely the registrant may credibly assert the fair use defense. To ascertain whether the pay-per-click advertisements actually divert consumers and damage the trademark's goodwill, courts may need to look at the actual content of the page at which the domain name is parked. If the links on the parked page advertise goods related to those of the trademark owner, the court may find that the registrant acted in bad faith based on his attempt to free-ride off of the goodwill associated with the mark.¹¹³

On the other hand, the successful outcome of an ACPA claim for domain name parking remains questionable. First, if the advertised links lead to goods or services unrelated to the trademark, it is less likely the court will consider the registrant a free rider hoping to profit from the use of the trademark and its goodwill. Second, domain name registrants generally do not determine the contents of the parked page. Rather, the parking service provider selects the page's contents.¹¹⁴ Since the ACPA

110. 15 U.S.C.A. § 1125(d)(1)(A)(i).

111. For example, when a registrant has no plans to construct an operable website, and instead receives advertising revenue from click-through traffic, the registration of a trademark-infringing domain name appears illegitimate.

112. 15 U.S.C.A. § 1125(d)(1)(B)(i)(V).

113. *See id.*

114. *See, e.g.,* Google, Inc., Google AdSense for Content, https://www.google.com/adsense/static/en_US/AfcOverview.html (last visited Nov. 4, 2007) (describing how the Google AdSense™ program "automatically deliver[s] text and

does not explicitly provide comprehensive relief from entities other than the domain name registrant,¹¹⁵ the trademark owner may be without recourse if it cannot demonstrate the registrant's bad faith intent. Third, the ACPA's safe harbor provision, which provides a safe harbor for registrants who "believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful,"¹¹⁶ may also leave trademark owners without relief. For example, if *cannondalebikes.com* functioned as a forum for Cannondale fanatics to share their thoughts on Cannondale bikes or if its content amounted to a parody, the likelihood of a court imposing liability becomes unlikely.¹¹⁷ Likewise, when popular names or trademarks are included within the domain name of a website that advertises related products, a court may not provide relief if it draws on comparative advertising principles.¹¹⁸

Regardless of whether the ACPA may provide relief to trademark owners, the ACPA fails to efficiently remedy trademark owners' concerns. It is expensive and time consuming for

image ads that are precisely targeted to your site and your site content—ads so well-matched, in fact, that your readers will actually find them useful").

115. Recall that the ACPA provides a cause of action against a person who, with a bad faith intent to profit from the mark, registers, traffics in or uses a domain name that is identical or confusingly similar to a trademark. 15 U.S.C.A. § 1125(d)(1)(A). In theory, the ACPA may be used directly against a domain parking service provider since they are "using" a domain name for profit. Yet this interpretation does not comport with congressional intent, which was primarily directed towards prohibiting bad faith domain name registrations. *See* S. REP. NO. 106-140, at 7–8 (1999).

116. 15 U.S.C.A. § 1125(d)(1)(B)(ii).

117. *Cf.* *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 366–67 (4th Cir. 2001) (considering, but denying, the defendant's parody defense to allegations of trademark infringement). *But see* *Planned Parenthood Fed'n of Am., Inc. v. Bucci*, No. 97 Civ. 0629 (KMW), 1997 WL 133313, at *10–11 (S.D.N.Y. Mar. 24, 1997) (holding that the First Amendment does not prevent injunctive relief against trademark misuse when the use of that trademark is not part of a communicative message).

118. *Clark*, *supra* note 29, at 1500. Some courts are unwilling to automatically grant relief to a mark owner where the trademarked term is a "basic element of the product." *Ty, Inc. v. Perryman*, 306 F.3d 509, 513–14 (7th Cir. 2002). One court reasoned, "[w]e do not think that by virtue of trademark law producers own their aftermarkets and can impede sellers in the aftermarket from marketing the trademarked product." *Id.* at 513. Note, however, that when a domain name incorporating another's mark is merely parked for the purpose of generating revenue, the mark is not likely being used in a manner consistent with a fair-use defense. *Cf.* *Mattel Inc. v. Adventure Apparel*, No. 00 Civ. 4085, 2001 WL 1035140, at *5 (S.D.N.Y. Sept. 7, 2001) ("Though the [parking of infringing domain names at the defendant's website] was not egregious, it is clearly not the kind of fair use intended by the ACPA.").

trademark owners to tackle infringing, parked domain names on a case-by-case basis.¹¹⁹ Moreover, the piecemeal, individualized approach of the ACPA does not permit a court to determine whether the broader act of commercial domain name parking constitutes trademark infringement.

B. FILLING GAPS WITH THE LANHAM ACT: TARGETING DIRECT INFRINGEMENT

Because the Lanham Act provides a cause of action against anyone who misuses a trademark in commerce,¹²⁰ its scope extends further than that of the ACPA. Accordingly, trademark owners could seek broader relief against commercial domain name parking service providers under the Lanham Act.

1. Pay-Per-Click Advertisements on Parked Domain Pages Fulfill the Use Requirement

Under the Lanham Act, the trademark owner must prove that the defendant uses its trademark in commerce.¹²¹ In the Internet context, courts broadly interpret the use in commerce requirement, lessening the plaintiff's burden to explain why the use is actionable.¹²² Under a liberal interpretation of "use,"

119. The ACPA may be more effective when the defendant is both the registrant and registrar. *See* McDonald, *supra* note 7, at 67 (explaining that domain name registrars register domain names "en masse" and own large portfolios of offensive domain names because their deep pockets enable them to pay for the consequences of infringement, if found). However, the limited remedies under the ACPA— forfeiture and cancellation of the domain name—do not constitute effective deterrents because registrants can turn around and continue to register problematic domains. *See* 15 U.S.C.A. § 1125(d)(1)(C).

120. *See* 15 U.S.C.A. § 1125(a)(1).

121. *Id.*

122. *See, e.g.,* Brookfield Commc'ns., Inc. v. West Coast Entm't Corp. 174 F.3d 1036, 1066 (9th Cir. 1999) (considering the defendant's use of the plaintiff's trademark as a metatag actionable "use"); 800-JR Cigar, Inc. v. Go-To.com, Inc., 437 F. Supp. 2d 273, 282–83 (D.N.J. 2006) (concluding that the defendant's acceptance of bids of others' trademarks as keywords constituted "use" under the Lanham Act); Edina Realty, Inc. v. TheMLSOnline.com, No. Civ. 04-4371JRTFLN, 2006 WL 737064, at *3 (D. Minn. Mar. 20, 2006) ("Based on the plain meaning of the Lanham Act, the purchase of search terms is a use in commerce."); Gov't Employees Ins. Co. v. Google, Inc., 330 F. Supp. 2d 700, 704 (E.D. Va. 2004) (permitting the plaintiffs to pursue a cause of action against search engine operators who allegedly "unlawfully used [plaintiff's] trademarks by allowing advertisers to bid on the trademarks and pay defendants to be linked to the trademarks"). *But see* Rescuecom Corp. v. Google, Inc., 456 F. Supp. 2d 393, 400–01 (N.D.N.Y. 2006) (concluding that defendant's sale of plaintiff's mark as a keyword does not constitute "use" under the Lanham Act); Merck & Co. Inc. v. Mediplan Health Consulting, 425 F.

domain name parking activities appear actionable against the registrant and against providers of domain name parking services.¹²³ Domain parking service providers offer to fill a web page with targeted advertisements that relate to the trademark-incorporating domain name.¹²⁴ As with the *cannondale-bikes.com* example, parking service providers often allow domain names incorporating another's trademark to serve as parked pages. Thus, both parking service providers and domain name registrants likely use a trademark in connection with a commercial service as required to state a cause of action under the Lanham Act.¹²⁵

2. Satisfying the Confusion Requirement

Employing the initial interest confusion doctrine, the Lanham Act protects against the diversion of consumers' initial interest.¹²⁶ Just as courts applied the initial interest confusion doctrine in cases involving the exploitation of trademarks as metatags¹²⁷ and search engines,¹²⁸ the doctrine can apply to trademark infringement that occurs with commercial domain name parking.¹²⁹ Initial interest confusion may occur because

Supp. 2d 402, 415 (S.D.N.Y. 2006) (concluding that defendant's purchase of plaintiff's mark as a keyword for sponsored links is not "use" under the Lanham Act).

123. Cf. *Edina Realty*, 2006 WL 737064, at *3.

124. See, e.g., Google Inc., What Is AdSense for Domains?, <http://www.google.com/domainpark> (last visited Nov. 4, 2007) ("AdSense for domains delivers targeted, conceptually related advertisements to parked domain pages by using Google's semantic technology to analyze and understand the meaning of the domain names."). But see Sedo LLC, How Do I Choose Keywords and Personalize My Parking Page?, <http://www.sedo.com/faq/index.php?action=artikel&cat=26&id=319> (last visited Nov. 4, 2007) (giving domain name owners the ability to select advertising keywords to use in generating the links on their parked pages).

125. 15 U.S.C.A. § 1125(a)(1) (2000).

126. *Brookfield Commc'ns*, 174 F.3d at 1063.

127. See *id.* at 1065 (concluding that the Lanham Act precludes the use of terms identical or confusingly similar to trademarks as metatags).

128. *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1022–25 (9th Cir. 2004) (stating that the defendant's practice of keying, which "allows advertisers to target individuals with certain interests by linking advertisements to pre-identified terms," presents a good argument for applying the initial interest confusion doctrine). But see *id.* at 1034–35 (Berzon, J., concurring) ("I do not think it is reasonable to find initial interest confusion when a consumer is never confused as to source or affiliation, but instead knows, or should know . . . that a . . . web link is not related to that of the trademark holder because the list produced by the search engine so informs him.").

129. But see Zachary J. Zweihorn, *Searching for Confusion: The Initial Interest Confusion Doctrine and its Misapplication to Search Engine Sponsored*

parking service providers fill parked pages with contextually relevant advertisements, causing consumers to come across opportunities for redirection to unexpected websites. When presented with these options, consumers may try typing in another domain name, or they may click-through to another website, abandoning their initial destination.¹³⁰ When the consumer decides to visit the competitor's site rather than to continue to seek the site originally intended, the mark owner is harmed.¹³¹

Assuming that the contents of the parked page relate to the trademark incorporated in the parked domain name, it is plausible that courts will find a high likelihood that initial interest confusion exists. It is unclear, however, whether consumers actually experience confusion when they arrive at a parked page.¹³² Consumers may be unable to determine the relationship between the trademark used in the domain name and the hyperlinks listed on the parked page.¹³³ Parked pages do not resemble the fully operative websites of most trademark owners. Instead, they typically resemble search engine results pages—a list of links with descriptions.¹³⁴ Although savvy Internet users might recognize a parked page immediately, some “[o]nline consumers have a difficult time distinguishing a ge-

Links, 91 CORNELL L. REV. 1343 *passim* (2006) (arguing that the initial interest confusion doctrine no longer need be invoked in cyberspace).

130. *But cf.* *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 746 (E.D. Mich. 2003) (explaining that Internet users can find relief from undesired webpages by returning to the previous webpage by clicking on a browser's "Back" button).

131. *See id.* at 764 (“[E]ven though the user knows she is not in the site initially sought, she may stay. In that way, the competitor has captured the trademark holder’s potential visitors or customers.” (citing *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 55 F. Supp. 2d 1070, 1074 (C.D. Cal. 1999), *aff’d*, 202 F.3d 278 (9th Cir. 1999) (unpublished table decision))).

132. Barrett, *supra* note 57, at 413 (“Internet users are accustomed to encountering multiple links on the websites they visit. There is no general expectation that linked and linking sites are part of a single or affiliated entity. Permitting trademark owners to regulate use of their marks in connection with links may disrupt the effectiveness of the Internet to provide a wide range of information efficiently to users.”). *But see Brookfield Commc’ns*, 174 F.3d at 1057 (explaining how consumers who happen upon a competitor’s website in attempt to access the trademark owner’s website may realize they are at a different site but may be content to remain there).

133. *Cf. Playboy Enters.*, 354 F.3d at 1022–27 (allowing the plaintiff’s theory of initial interest confusion based on the defendant’s use of the plaintiff’s trademark in “keying” practices to go forward); *Brookfield Commc’ns*, 174 F.3d at 1056–58 (discussing forms of confusion the Lanham Act protects).

134. For a representative sample of parked pages under Sedo’s domain name parking program, visit http://www.sedo.com/services/tour_parking.php (last visited Nov. 4, 2007).

nuine site from a pirate site, given that often the only indications of source and authenticity of the site . . . are the graphical interface on the site itself and the Internet address at which it resides.”¹³⁵ Assuming, *arguendo*, that the use in commerce and confusion elements are satisfied, trademark owners may also seek redress against third parties for their role in facilitating this infringing activity.

C. SPREADING THE BLAME: CONTRIBUTORY INFRINGEMENT BY PARKING SERVICE PROVIDERS

Pursuing claims against the providers of domain name parking services cuts to the heart of acts of trademark infringement facilitated by commercial domain name parking.¹³⁶ Although such providers argue that their behavior does not amount to trademark infringement because they refuse to extend parking services to infringing domain name registrants, in practice it remains unclear whether those policies are enforced.¹³⁷ Therefore, bringing suit against service providers may deter their participation in this activity and encourage them to enforce their policies.

A trademark owner could bring a contributory infringement claim against domain parking service providers, alleging that they induce individuals to register and park domain names that infringe well-known marks to generate profits from pay-per-click advertising. Arguably, one domain parking service provider does just that by seeking out large domain name portfolio owners to use its unique advertising program geared towards parked domains.¹³⁸ Parking service providers may use technology that deciphers domain names to deliver contextually relevant pay-per-click advertisements.¹³⁹ Such continued delivery of targeted links to infringing domain names likely falls

135. S. REP. NO. 106-140, at 4–5 (1999).

136. In some instances, the domain parking service provider and the domain name registrar are the same entity. For example, GoDaddy Software, Inc., is a licensed registrar and also offers parking services to registrants. *See* GoDaddy Software, Inc., About GoDaddy.com, <https://www.godaddy.com/gdshop/about.asp?se=%2B&ci=3802> (last visited Nov. 4, 2007).

137. Walker & Krebs, *supra* note 4 (noting that even Google’s trademark lawyer admits that the software algorithms employed to detect trademark infringements are imperfect).

138. Google Inc., Maximize Revenue on Your Parked Pages with Google AdSense for Domains, <http://www.google.com/domainpark> (last visited Nov. 4, 2007).

139. *Id.*

within the purview of contributory infringement because the parking service provider continues to supply products to those it knows or has reason to know engage in trademark infringement.¹⁴⁰

Further, some registrars permit domain name registrations to be retracted if within a certain window of time—known as the “tasting” period—the domain name fails to generate sufficient traffic to make it a worthwhile investment.¹⁴¹ This process allows final registration of “those domain names associated with well-known trademarks that receive hits during the tasting period” and termination of those domain names that do not generate sufficient volumes of traffic.¹⁴² The preregistration tasting scheme presents a more implicit basis for imposing inducement liability on the registrar, both for domain name parking and traditional cybersquatting. Thus, where domain parking service providers undertake affirmative acts to influence others to infringe a trademark, liability for contributory infringement may follow.¹⁴³

The domain parking service provider exercises control over the content of the web pages presented to consumers,¹⁴⁴ which implicates liability for contributory infringement.¹⁴⁵ The park-

140. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982); cf. Heidi S. Padawer, *Google This: Search Engine Results Weave a Web for Trademark Infringement Actions on the Internet*, 81 WASH. U. L.Q. 1099, 1118–19 (2003) (explaining that search engines that sell trademarks should be liable for contributory trademark infringement because the “search engine would ‘know or ha[ve] reason to know’ of infringing conduct by those with whom it contracts,” and acknowledging that, in this case, “the pay-for-placement model is the direct instrument that might facilitate a cunning website operator’s deviant attempt to lure consumers away from trademarked sites by enabling him to buy those trademarked terms from the search engine”).

141. This practice, known as tasting, allows the preregistration of a large number of domain names that are either deleted or registered depending on the number of hits the domain name receives in a five-day period. McDonald, *supra* note 7, at 67; see also Williams, *supra* note 11.

142. McDonald, *supra* note 7, at 67; Kaatz & Land, *supra* note 37.

143. See *Perfect 10, Inc. v. Visa Int’l Service Ass’n*, 494 F.3d 788, 807 (9th Cir. 2007).

144. This is the basis of Google’s AdSense contextual advertising program. To participate, domain name registrants need only copy and paste a block of html text on a web page. Google Inc., *Google AdSense: Get Started in Minutes*, http://www.google.com/services/adsense_tour/page3.html (last visited Nov. 4, 2007).

145. *Perfect 10, Inc.*, 494 F.3d at 807 (“For liability to attach, there must be [d]irect control and monitoring of the instrumentality used by a third party to infringe the plaintiff’s mark.”).

ing service provider generates advertisements that are displayed on the parked site using the trademark contained within the domain name.¹⁴⁶ Although no manual involvement may be required to generate the parked page's content, the underlying algorithms used to match the advertisements to the infringing domain name nevertheless contribute to the provider's liability.¹⁴⁷ Because domain parking service providers incentivize individuals to register and park infringing domain names and control the content of the parked pages, trademark owners should target enforcement activities against domain parking service providers under theories of contributory liability.¹⁴⁸

Trademark owners have several tools at their disposal to challenge commercial domain name parking, directly and indirectly, in the courtroom. But, even though the self-help remedies trademark owners may invoke under the Lanham Act could provide some relief from trademark infringement associated with commercial domain name parking, the Lanham Act does not reach far enough. The infinite number of new domain names available for registration and the deep pockets of many infringers render the limited remedies available under the ACPA and the broader Lanham Act ineffective deterrents.¹⁴⁹

D. THE FTC SHOULD INITIATE SUITS AGAINST DOMAIN NAME PARKING ACTORS TO PROVIDE CONSUMERS WITH RELIEF

Consumers, like trademark owners, experience the adverse effects of domain name parking, including confusion, frustration, and, in extreme cases, fraud.¹⁵⁰ This Section argues that

146. GoDaddy's CashParking program uses Google's AdSense technology to generate pay-per-click parked pages. See Posting of Jennifer Slegg to JenseSense: Making Sense of Contextual Advertising, http://www.jensense.com/archives/2006/07/google_adsense_10.html (July 20, 2006, 12:21 EST).

147. Google Inc., Maximize Revenue on Your Parked Pages with Google AdSense for Domains, <http://www.google.com/domainpark> (last visited Nov. 4, 2006); Sedo LLC, What Is Domain Parking? Earn Money While You Sleep!, <http://www.sedo.com/services/parking.php3?language=us> (last visited Nov. 4, 2007) (describing how Sedo hosts websites and provides targeted ad links).

148. Cf. Padawer, *supra* note 140, at 1122 ("[P]ay-for-placement ushers in unlitigated issues in trademark infringement, including probable extension of the contributory infringement test").

149. Cf. Michael L. Rustad, *Punitive Damages in Cyberspace: Where in the World Is the Consumer?*, 7 CHAP. L. REV. 39, 41 (2004) (undertaking an empirical analysis and concluding that "punitive damages play no meaningful role in protecting consumers in cyberspace despite the epidemic of wrongdoing that goes undetected and unpunished by public authorities").

150. See, e.g., John Iwasaki, *Third Deal in Spyware Case Defendant to Pay \$2,000 But Won't Admit Guilt*, SEATTLE POST-INTELLIGENCER, June 7, 2006,

administrative intervention is necessary to ensure that the consumer protection principles underlying trademark law are properly upheld.

The Federal Trade Commission (FTC) is suited to challenge the negative consequences domain name parking inflicts on consumers.¹⁵¹ The FTC has the power under section 5 of the FTC Act to prevent “[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce.”¹⁵² For a practice to be deceptive, the practice must include a material representation or omission that is likely to mislead a reasonable consumer under the circumstances.¹⁵³ The FTC can bring suit in federal district court to enjoin the violation of any law it enforces.¹⁵⁴ More broadly, the FTC’s Bureau of Consumer Protection (BCP) protects consumers against unfair, deceptive, or fraudulent practices by conducting investigations, initiating lawsuits, and educating consumers about their rights.¹⁵⁵

In the past, the FTC has addressed concerns about practices analogous to domain name parking. The FTC brought suit against John Zuccarini, a cybersquatter, for violating section 5 of the FTC Act because he undertook a “concerted course of activity involving the redirecting of consumers from their intended destinations on the World Wide Web to his own Web pages” and trapped consumers in a series of Web pages displaying advertisements for his own financial gain.¹⁵⁶ The district

at B5 (explaining how the defendant deceived consumers by fraudulently affiliating his business with Microsoft, leading consumers to click on his hyperlinked advertising and purchase non-Microsoft products).

151. “The FTC focuses on stopping actions that threaten consumers’ opportunities to exercise informed choice.” *Hearing Before the H.R. Subcomm. on Courts, the Internet, and Intellectual Property* (2002) (statement of Howard Beales, Director, Bureau of Consumer Protection, Fed. Trade Comm’n). *But see* Rustad, *supra* note 149, at 80 (“The FTC is the most active Internet enforcer, but even this pro-active agency lacks the necessary resources to patrol cyberspace.”).

152. 15 U.S.C. § 45(a)(1) (2000). The FTC Act was amended in 1938 to declare “unfair or deceptive acts or practices in commerce” illegal. Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111.

153. *See In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174–84 (1984) (appending the FTC Policy Statement on Deception of Oct. 14, 1983 to the majority decision).

154. 15 U.S.C. § 45(m)(1)(A).

155. *See* About the Bureau of Consumer Protection, <http://www.ftc.gov/bcp/about.shtm> (last visited Nov. 4, 2007).

156. *F.T.C. v. Zuccarini*, No. CIV.A 01-CV-4854, 2002 WL 1378421, at *1 (E.D. Pa. Apr. 9, 2002); *see also F.T.C. v. Zuccarini*, No. 01CV4854, 2001 WL

court found that Zuccarini's practice of redirecting and obstructing consumers was "likely to cause substantial injury" and was "not outweighed by countervailing benefits to consumers or competition."¹⁵⁷ The district court defined "redirecting" as "the practice of diverting consumers to Web sites . . . that consumers did not intend to visit or access, using tactics including . . . operating, publishing, or disseminating Web sites or pages with domain names that are confusingly similar to famous trademarks, service marks or names."¹⁵⁸ Zuccarini was permanently restrained from redirecting consumers on the Internet and "[r]epresenting that . . . domain names . . . are endorsed by, or affiliated or associated with, any third party or any entity, including . . . any Web site . . . [or] trademark . . . when in fact they are not."¹⁵⁹

Domain name parking is highly analogous to Zuccarini's practice of "redirecting" Internet users and is the type of activity the FTC should seek to prevent. Domain name parkers, like Zuccarini, use cybersquatting and typosquatting tactics to register domain names similar to well-known trademarks. They both then prey on Internet consumers who mistakenly enter those domain names in their Internet browsers by presenting the consumers with websites that were not their intended destination. Finally, whereas Zuccarini trapped Internet consumers in a web of pop-up advertisements, commercial domain name parkers trap Internet consumers in a maze of pay-per-click advertisements. Although Zuccarini's trapping tactics may appear more egregious than listings of pay-per-click advertisements, both schemes are designed to frustrate consumers and provide the bad actor with profits. Because the effects of and methods of implementing these two schemes markedly parallel one another, the FTC should draw upon the *Zuccarini* case to proceed against infringing domain name parkers.

Analogously, the FTC has also used its enforcement powers to address spyware, which is "software that monitors computer

34131411, at *1 (E.D. Pa. Sept. 25, 2001) (granting a temporary restraining order against Zuccarini for "engag[ing] in a concerted course of unlawful activity involving the redirecting of consumers from their intended destinations on the . . . Web to his own Web pages, where he traps consumers in multiple series of Web pages").

157. *Zuccarini*, 2002 WL 1378421, at *1.

158. *Id.* at *4.

159. *Id.* at *4–5. Zuccarini was also ordered to pay \$1,897,166 in equitable relief. *Id.* at *5.

usage without a user's knowledge or consent."¹⁶⁰ Spyware is problematic, in part, because it enables third parties to capture sensitive personal information, posing risks to privacy and perpetrating fraud.¹⁶¹ The FTC has filed suit against purveyors of spyware, alleging, for example, that they deprive consumers of their right of consent and control in software installation.¹⁶² The FTC also initiated suit against "various segments of the spyware industry, including adware developers and distributors, individual advertising/distribution affiliates and intermediate advertising/distribution affiliate networks."¹⁶³ Notably, the FTC brought suit against advertising affiliates that derived revenues for disseminating pop-up advertisements.¹⁶⁴ The FTC alleged that "providing the means and instrumentalities for the commission of deceptive and unfair acts and practices" violated section 5 of the FTC Act.¹⁶⁵

Although all of the FTC's spyware suits settled,¹⁶⁶ precluding a decision on whether spyware constitutes an unfair or deceptive practice in violation of section 5 of the FTC Act, these cases shed light on how the FTC may proceed against domain name parking activities. First, the FTC's allegations against advertising affiliates largely parallel causes of action for contributory trademark infringement.¹⁶⁷ The FTC may therefore be willing to proceed against domain name parking service providers for their role in perpetuating this type of trademark infringement and misleading consumers in cyberspace. Second, settlements reached between the spyware defendants and the FTC are instructive as to the types of relief consumers and trademark owners can anticipate. For example, the FTC set

160. Liying Sun, *Who Can Fix the Spyware Problem?*, 22 BERKELEY TECH. L.J. 555, 555 (2007).

161. *Id.* at 556–57.

162. *Id.* at 570.

163. *Id.* at 572.

164. *Id.*

165. *Id.* at 572–73.

166. *Id.* at 574.

167. *Id.* at 573. "[T]he FTC alleged that [the adware vendor] had violated the FTC Act because it . . . knew or should have known that its affiliates had retained numerous third-party sub-affiliates to install its adware . . . and . . . had committed, through affiliates and sub-affiliates acting on its behalf and for its benefit, various deceptive and unfair software installations and operations." *Id.* Contributory trademark infringement requires that the defendant "continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982).

“strict guidelines” on one spyware defendant’s future practices and made clear that the defendant would be responsible for affiliates acting on its behalf in the future.”¹⁶⁸ Even if domain name parking suits result in settlements, such settlements will likely carve out relief for consumers and trademark owners, and begin to clean up cyberspace.

Additionally, suits brought by the FTC against domain name parkers offer several advantages over suits initiated by trademark owners. First, the FTC can, in one action, proceed against actors who park portfolios of domain names that infringe several different trademarks. Whereas trademark owners are limited to challenging activities that solely affect their trademark rights, the FTC can more broadly challenge infringing activities because they are not limited by intellectual property rights. Rather, the FTC can proceed against any actor that parks infringing domain names to generate pay-per-click advertising revenue. Thus, the FTC is especially positioned to proceed against en masse domain name registrants, more quickly reaching the roots of the domain name parking problem. Second, the FTC’s section 5 enforcement powers are much broader than trademark owners’ counterpart, the Lanham Act. Whereas a Lanham Act plaintiff must prove use in commerce and a likelihood of confusion, the FTC need only show that domain name parking is an unfair or deceptive practice, which covers a broad range of activity.¹⁶⁹ Third, where the FTC prevails, the monetary relief awarded by the court goes back to consumers, whereas suits initiated by trademark owners afford relief only into the plaintiff’s hands.¹⁷⁰ For these reasons, the FTC is a powerful and appropriate body to investigate the adverse affects of domain name parking on consumers in cyberspace.

CONCLUSION

Beyond serving as an additional conduit for generating advertising-related profits in cyberspace, commercial domain

168. Sun, *supra* note 160, at 574.

169. Deborah Platt Majoras, *The Federal Trade Commission: Learning from History as We Confront Today’s Consumer Challenges*, 75 U. MO. KAN. CITY L. REV. 115, 130 (2006).

170. *Id.* at 125–26 (“Almost from its inception, this [consumer protection] program has proved an effective tool not only to obtain court orders halting fraudulent schemes, but also to obtain consumer redress and other potent equitable remedies.”).

name parking creates another motivation for the registration of domain names identical to or confusingly similar to trademarks. The implications of this practice are far-reaching. So long as the domain name parking trend continues, the likelihood that consumers stumble upon parked pages and are diverted from a trademark owner's website increases. For trademark owners, commercial domain name parking misappropriates a mark's goodwill, lessens the mark's source-identifying capacity and potentially erodes a mark owner's customer base. Current trademark law may provide the flexibility to appropriately confront the trademark infringement caused by domain name parking.¹⁷¹ But trademark law cannot broadly address the harms domain name parking inflicts on consumers. Administrative involvement, through the FTC, is needed to prevent continued frustration, misunderstanding, and chaos on the information superhighway.

171. *Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.* 174 F.3d 1036, 1054 (9th Cir. 1999) ("We must be acutely aware of excessive rigidity when applying the law in the Internet context; emerging technologies require a flexible approach.").