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DRAWING A LINE IN THE CONSTITUTIONAL SAND BETWEEN CONGRESS AND THE FOREIGN CITIZEN "CYBERSQUATTER"

"Cybersquatting" on the Internet is a phenomenon that has warranted an amendment to the Trademark Dilution Act of the Lanham Act. The undisputed omnipresence of the Internet, as well as the boundless possibilities of infringement activity on the Internet, has made such an amendment inevitable, as well as necessary. Congress' power to regulate trademark infringement activity, whether traditionally or on the Internet, relies on the Commerce Clause of the United States Constitution. The author asserts that participation in the Internet domain name registration process itself does not constitute the "commercial activity in commerce" requirement of the Trademark Dilution Act; in turn, such an act does not constitute commercial activity for the purposes of the Commerce Clause. Such analysis also depends on a careful look at the Internet's uniquely amorphous and borderless structure, complicated by the fact that no one nation has clear control on the Internet. Ultimately, this Note concludes that under traditional Commerce Clause analysis, foreign citizens' registration of domain names with intent to sell those registered domain names does not substantially affect interstate commerce, and that applying the Lanham Act to this activity is an improper application of Congress' Commerce Clause power.

* * *

INTRODUCTION

On September 14, 1999, the District Court of Massachusetts enjoined the activity of a Canadian "cybersquatter;" defendant Northern Lights Club is being haled into the Massachusetts court by an American business, Northern Light Technology.¹ Northern Light alleges that the defendant's registered domain name, www.northernlights.com, infringes upon its domain name, www.northernlight.com, by causing consumer confusion.² Bernard J. Bonn, III, counsel for the plaintiff, notes that the finding of infringement marks the end of this type of activity and hails it as a big step in the preservation of trademark rights in the Internet context.³ He remarks: "They can no longer feel secure sitting up there thinking that they are not going to be sued successfully in the United States. Once they enter into American

¹ Robert L. Sharpe, Jr., *U.S. Federal Court Reaches into Canada to Enjoin Internet Cyber-Squatter*, THE LEGAL INTELLIGENCER, Sept. 14, 1999, available at LEXIS, Regional News.

² See *id.*

³ See *id.*

commerce via the Internet, they can be hauled into an American court."⁴

With increased reliance on "e-commerce," this variety of "cybersquatting" claim is being raised with epidemic frequency in American courts; however, this appears to be the first attempt to curtail the activities of a Canadian citizen.⁵ Previous attempts to regulate the activity of United States citizen "cybersquatters" have required courts to stretch the traditional application of the Lanham Act,⁶ as it was intended to protect registered trademarks. The 1995 Trademark Dilution Act⁷ provides a cause of action for those marks which lose intrinsic value based on the concurrent use by another identical or confusingly similar mark.⁸ The power of the mark to identify its owner is said to be "diluted" or decreased in the event that it is confused with one of another origin.⁹

Recent regulation of "cybersquatter" activity falls squarely under the November 1999 amendment to the Trademark Dilution Act.¹⁰ Registered trademark holder response to the amendment has been overwhelming, with several cases filed a matter of days after the amendment's passage.¹¹ At this time, however, none of these early filings have proceeded to judgment, so it is yet unclear how courts will apply this highly-specialized statutory language to "cybersquatters," both foreign and domestic.

Congress' power to regulate in the area of trademark law traditionally has been founded upon the enumerations of the Commerce Clause of the United States Constitution.¹² The application of the Trademark Dilution Act to non-United States citizen Internet users requires a sweeping interpretation of the Commerce Clause powers because it relies upon a finding that the international "cybersquatter" makes a commercial use of the trademark which he has merely registered as an Internet domain name.

The focus of this Note lies in the argument that Congress lacks such a power, under the Commerce Clause, to regulate those who squat on American trademark-domain names from beyond the nation's borders. Participation in the Internet domain name registration process by itself does not constitute "commercial activity in commerce" as required by the Trademark Dilution Act and therefore is not a commercial activity for the purposes of the Commerce Clause.

It is critical to begin any discussion of Internet regulation with a brief

⁴ *Id.*

⁵ *See id.*

⁶ 15 U.S.C. §§ 1051-1127 (West 1946).

⁷ *Id.* at § 1125.

⁸ *See id.*

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See infra* notes 140, 143, and accompanying text.

¹² *See* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 5.3, at 5-6 (4th ed. 1996).

introduction to the Internet itself—what it is, how it developed, and how its capacity as a commercial and communications medium is limited by unique physical and technical constraints. Following this is a non-technical explanation of the Internet domain name and domain name registration process, specifically highlighting the Internet's amorphous, borderless structure and the inherent difficulties which come from a lack of clear national control.

In order to discuss the application of the Commerce Clause power to the Canadian "cybersquatter" case in the District Court of Massachusetts, it is also necessary to outline briefly the development of modern trademark law, examining the ways in which prior courts have chosen to regulate domestic "cybersquatting" under the Trademark Dilution Act and anticipating courts' interpretations of the recent cyber-piracy amendment to the Act. Given this background, this Note seeks to clearly define "cybersquatting" based on corporate trademark holders' previous attempts to curtail the activities of United States citizen "cybersquatters."

In light of the conflicting views of domestic-focused precedent, this Note specifically analyzes whether "cybersquatting" constitutes "commercial use in commerce" of a registered trademark as required by the Trademark Dilution Act. This Note concludes that under traditional Commerce Clause analysis, foreign citizens' registration of domain names with intent to sell those registered names does not substantially affect interstate commerce, and that the application of the Lanham Act to this activity is an improper application of Congress' Commerce Clause power. In conclusion, it highlights the need for global participation in the structuring of Internet regulations, beginning primarily with international cooperation.

I. INTRODUCTION TO THE INTERNET

A. *Development*

In the 1960s, the Pentagon encouraged the Rand Corporation to expand its research in the area of communications.¹³ The concept of a "fish-net" communications network was conceived by Rand scientist Paul Baran; if one link in the computer-based network became disabled, information traveling along the network could simply re-route and reach its destination by means of an alternate path.¹⁴ In 1962, the Department of Defense's Advanced Research Project Association (ARPA) implemented a system based on Baran's research, which it

¹³ Berit Erickson, *History of the Internet*, PBS Online, at <http://www.pbs.org/internet/timeline> (last modified Oct. 15, 1998).

¹⁴ Bruce Sterling, *Short History of the Internet*, MAG. FANTASY & SCI. FICTION (Feb. 1993), at http://info.isoc.org/guest/zakon/Internet/History/Short_History_of_the_Internet

later called ARPANET.¹⁵ This early system paved the way for the creation of what later would be called the Internet: "not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks."¹⁶

The World Wide Web ("the web") presents information on the Internet in a graphical format.¹⁷ A "page" on the web textually and pictographically conveys information which has been stored in a computer data file.¹⁸ The web page offers multimedia access to all of the information stored in the data file, including sound, video, and pictures.¹⁹ Individual web pages are commonly accessed through a "home page," similar to a cover sheet or table of contents, the home page organizes and identifies all of the information being conveyed by the site's creator.²⁰ Once information is posted on a web page, it is accessible to all Internet users worldwide.²¹ This ability to deliver to a single user in any part of the world information from anywhere else in the world has been hailed as the Internet's most important feature.²²

Unlike all other existing forms of communication, the Internet is not constrained in any way by geographical boundaries.²³ This nearly limitless accessibility has facilitated the development of the Internet into an efficient international medium of commerce and communications, offering commercial entities the possibility of communicating with, and marketing to, a nearly infinite number of consumers from across the globe.

¹⁵ See *id.*

¹⁶ *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997). See generally Sterling, *supra* note 14 (discussing the history of the Internet).

¹⁷ See Ira S. Nathenson, Comment, *Showdown at the Domain Name Corral: Property Rights and Personal Jurisdiction Over Squatters, Poachers, and Other Parasites*, 58 U. PITT. L. REV. 911, 918 (quoting *Reno*, 929 F. Supp. at 836).

¹⁸ See *id.*

¹⁹ See, e.g., *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1318 (9th Cir. 1998) (noting that web page contains "names, words, messages, pictures, sounds, and links to other information"); see also Nathenson, *supra* note 17, at 914 n.5.

²⁰ See *Reno*, 929 F. Supp. at 836.

²¹ See *id.* at 844.

²² See *id.* at 837.

²³ See *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997) (identifying geography as "a virtually meaningless construct on the Internet"); see also Nathenson, *supra* note 17, at 985 (recognizing "one of the most important aspects of the Internet—the ability to transcend geographical boundaries") (quoting G. Peter Albert, Jr., *Right on the Mark: Defining the Nexus Between Trademarks and Internet Domain Names*, 15 J. MARSHALL J. COMPUTER & INFO. L. 277, 309 (1997)).

B. *The Internet Domain Name*

Internet domain names are commonly analogized to telephone numbers and street addresses.²⁴ The domain name's direct association with a name, word, or phrase distinguishes it, however, from randomly assigned or designated identifiers.²⁵ For example, while a telephone number is most often comprised of a group of randomly selected numerical digits, most Internet domain names are carefully chosen to most logically and creatively represent the name's owner.²⁶

The Internet domain name consists of three principal parts, each identifying a web page's specific location on the Internet network and separated by a period.²⁷ Reading from left to right, the first group of characters identifies the server, the most common example of which is the World Wide Web (represented by the letters "www").²⁸ The second group is known as the second-level domain name.²⁹ This unique combination of alphanumeric characters distinguishes the site and identifies its origin or owner.³⁰ The second-level domain name is chosen by the site's creator and may include a name, trademark, or other generic word.³¹ The third group of characters, the top-level domain (TLD) identifies the site owner's category of use, ".edu" (educational use) and ".gov" (government use) being practical examples.³²

There are currently two different TLD forms: geographic and generic.³³ Geographic TLDs are controlled by the national registration agencies of each country participating in Internet use.³⁴ For example, ".uk" is the TLD controlled by

²⁴ See, e.g., Nathenson, *supra* note 17, at 918 (explaining the analogy).

²⁵ See *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1325 (9th Cir. 1998); see also *Reservation Help: Glossary ("Domain Name")*, Network Solutions, Inc., at <http://www.networksolutions.com/cgi-bin/glossary/lookup?term=Domain%20Name> (last visited Nov. 16, 1999).

²⁶ See *Toeppen*, 141 F.3d at 1325 (noting that "a telephone number . . . is distinguishable from a domain name because a domain name is associated with a word or phrase").

²⁷ See *Reservation Help: Glossary ("." or "dot")*, Network Solutions, Inc., at <http://www.networksolutions.com/cgi-bin/glossary/lookup?term=%22,%22%20or%20dot> (last visited Nov. 16, 1999).

²⁸ See *Reservation Help: Glossary ("Top-level Domain")*, Network Solutions, Inc., at <http://www.networksolutions.com/cgi-bin/glossary/lookup?term=Top-level%20Domain> (last visited Nov. 16, 1999).

²⁹ See *Reservation Help: Glossary ("Second-level Domain")*, Network Solutions, Inc., at <http://www.networksolutions.com/cgi-bin/glossary/lookup?term=Second%20Level%20Domain> (last visited Nov. 16, 1999).

³⁰ See Network Solutions, Inc., at <http://www.networksolutions.com> (last visited Nov. 16, 1999).

³¹ See *id.*

³² See *id.*

³³ See Nathenson, *supra* note 17, at 920-21.

³⁴ See IANA Country Code Top Level Domain Database, at <http://www.iana.org/cctld/cctld-whois.htm> (last modified Oct. 31, 1999).

the United Kingdom.³⁵ The geographical TLD available in the United States is ".us."³⁶ Registration within this TLD has been administered by the United States Domain Registry.³⁷ Despite its availability, the ".us" designation is used less frequently than its generic TLD counterparts.³⁸

There are currently six types of generic TLDs available: ".edu" (educational use), ".org" (organizational use), ".net" (network use), ".gov" (government use), ".mil" (United States Armed Forces use), and ".com" (commercial use).³⁹ Although commonly mistaken as being a strictly United States designation like ".us," several of the generic TLDs are internationally available.⁴⁰ Second-level domain names within this limited number of internationally available TLDs are in increasingly short supply.⁴¹ The ".com" TLD has become, without rival, the most popular generic TLD in use worldwide.⁴²

C. *The Registration Process*

Generic TLDs are currently issued through InterNIC, a joint effort of Network Solutions, Inc. (NSI), and the United States government.⁴³ A domain name can be registered simply by accessing the NSI/InterNIC web site; registration forms may be filled out online and are submitted with a payment of seventy dollars.⁴⁴ The registrant is limited to a name consisting of twenty-six alphanumeric characters, but NSI recommends choosing a shorter designation to facilitate Internet searches.⁴⁵

In completing the registration process, the registrant affirms that the chosen domain name "does not interfere with or infringe upon the rights of any third party . . . and is not intended for any unlawful purpose."⁴⁶ Once an application is filed, NSI will not deny a request based on infringement of an otherwise registered trademark, nor will it analyze a registration for possible misrepresentation of

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See* Nathenson, *supra* note 17, at 920-21.

³⁹ *See Generic Top Level Domains*, IANA Country Code Top Level Domain Database, at <http://www.iana.org/generic.html> (last modified Oct. 31, 1999).

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *See* Nathenson, *supra* note 17, at 922.

⁴³ *See* Network Solutions, Inc., at <http://www.networksolutions.com/services> (last visited Nov. 16, 1999).

⁴⁴ *See Payment Options*, Network Solutions, Inc., at <http://www.networksolutions.com/purchase/index.html> (last visited Nov. 16, 1999).

⁴⁵ *See Reservation Help: Index*, Network Solutions, Inc., at <http://www.networksolutions.com> (last visited Nov. 16, 1999).

⁴⁶ *Id.*

information.⁴⁷ Rather, a registration is denied only if an identical domain name already exists.⁴⁸

NSI assigns domain names on a first-come, first-served basis and allows an applicant to either register a domain name for immediate use or reserve a domain name for use at some time in the future.⁴⁹ A registrant is limited to the purchase of a maximum of ten domain names at any one time.⁵⁰

The first-come, first-served system has the practical effect of limiting the use of any particular combination of alphanumeric characters to only one registrant, being quite logically the one who registers first.⁵¹ For individuals, businesses, and organizations sharing similar or identical names, this policy has become the source of many problems.⁵² In other words, "once a good name is gone, it's gone for good."⁵³

Continued reliance on the ".com" TLD without the addition of other universal commercial use top level domains, coupled with the first-come, first-served registration system, poses a real threat to the continued viability of the Internet as an effective, user-friendly tool.⁵⁴ While the combinations of alphanumeric

⁴⁷ See *id.*

⁴⁸ See *General Help: Legal Questions*, Network Solutions, Inc., at <http://www.networksolutions.com> (last visited Nov. 16, 1999).

⁴⁹ See *Reservation Help: Index*, Network Solutions, Inc., at <http://www.networksolutions.com> (last visited Nov. 16, 1999); see generally *ACLU v. Reno*, 929 F. Supp. 824, 830-48 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) (discussing the nature of cyberspace).

⁵⁰ See *Reservation Help: Index*, Network Solutions, Inc., at <http://www.networksolutions.com> (last visited Nov. 16, 1999).

⁵¹ See *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 872 (9th Cir. 1999) (noting that "once a domain-name combination is reserved, it cannot be used by anybody else, unless the first registrant voluntarily or otherwise relinquishes its registration").

⁵² Suppose, for example, there are two businesses whose names include the word "ace." One, Ace Books, wants to register the domain name "www.ace.com" but is prevented from doing so because the other, Ace Markets, has already registered this exact domain name. Although it is possible for Ace Books to register as "www.acebooks.com," the shorter designation is clearly preferable. "[S]ince the value of a domain name corresponds to the simplest, shortest way of expressing a trademark or trade name, doubtlessly most parties prefer the shorter version." Nathenson, *supra* note 17, at 954.

⁵³ *Id.* at 925; see also Danielle Weinberg Swartz, Comment, *The Limitations of Trademark Law in Addressing Domain Name Disputes*, 45 UCLA L. REV. 1487, 1493 (1998) ("A single trademark holder who succeeds in obtaining prior registration with NSI can therefore preclude all other identical trademark holders from registering the same trademark as a domain name.").

⁵⁴ See 4 MCCARTHY, *supra* note 12, § 25:72.1, at 25-146-47 (noting that one reason for the addition of top-level domains is that only one domain name can exist from a single, specific combination of characters, while under trademark law, concurrent use of a mark is possible).

characters for use in second-level domain names are potentially limitless, as previously highlighted, domain names are simply not assigned or chosen at random.⁵⁵ The Internet encourages commercial use and market expansion due to its ability to reach a worldwide consumer base and universal application. It is, therefore, an invaluable resource to commercial entities which, in the present absence of regulation, takes into consideration the multiplicity of competing interests involved and must be tapped quickly and stealthily, in a way which will reach the largest potential number of consumers.

D. Domain Names as Trademarks

The purpose of an Internet domain name as a locator, an address identifying a web site's place on the Internet network, is clear. The domain name may also serve to identify a particular company's business, products, or reputation, much in the same manner as a trade or service mark.⁵⁶

The value of the domain name is enhanced if it is clearly representative of a company's business, whether that be its trademark, products, or other creatively identifying characteristic.⁵⁷ The consumer uses whatever domain name the company chooses to locate that company on the web. Quite logically, the wealth of resources available on the Internet go untapped if the user is unable to locate the sites he wishes to visit.⁵⁸

When faced with the difficult task of selecting a domain name for a corporate home page, companies have learned that it is best to choose a name that is short and easy to remember.⁵⁹ While Internet browsers and site-search software provide a user-friendly approach to Internet searching, a browser may provide too many options and may give repetitive or irrelevant information. The most valuable domain names, therefore, are those which can be guessed or recalled without the use of a search engine.⁶⁰

⁵⁵ See *supra* note 26.

⁵⁶ See 4 MCCARTHY, *supra* note 12, at 7-24 ("In the same way that businesses sometimes desire to have a prestige business address, businesses want a prestige address in cyberspace that corresponds to the trade name of the company or to a company trademark.").

⁵⁷ See J. Theodore Smith, Note, "1-800-RIPOFFS.COM": *Internet Domain Names are the Telephone Numbers of Cyberspace*, 1997 U. ILL. L. REV. 1169, 1175 (1997) (citing Sally M. Abel, *Trademark Issues in Cyberspace: The Brave New Frontier*, in UNDERSTANDING BASIC TRADEMARK LAW 1996 at 151, 154 (PLI Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No. 451, 1996)).

⁵⁸ See Stacy B. Sterling, Comment, *New Age Bandits in Cyberspace: Domain Names Held Hostage on the Internet*, 17 LOY. L.A. ENT. L. REV. 733, 735 (1997) ("It is well recognized that a business cannot function unless its customers and potential customers know where to find it.").

⁵⁹ See *id.*

⁶⁰ "A customer who is unsure about a company's domain name will often guess that the

Registration of a trade or service mark with the Patent and Trademark Office confers significant rights upon the mark's holder.⁶¹ A trademark holder naturally expects that he or she will receive exclusive use rights in a certain mark and will receive legal protection in the event of concurrent or confusingly similar use.⁶² Registration of an Internet domain name does not currently confer trademark rights upon the registrant, however.⁶³ A domain name registrant may be able to register the chosen domain name itself as a trademark, and NSI currently recommends that the registrant initiate that process on his or her own if there is a potential concern as to infringement or dilution in that context.⁶⁴

Registration of a mark with the Patent and Trademark Office allows for multiple use of the same mark provided that this does not lead to consumer confusion.⁶⁵ In stark contrast, the physical limitations of the Internet do not allow for more than one of any specific combination of characters, regardless of differentiated use, markets, or geographic area.⁶⁶ As a locating device, the domain name can point only to one specific location on the World Wide Web. Should another registrant beat the trademark owner to the registration of a trademark as a domain name, the value of that trademark with respect to that specific TLD is essentially usurped.

The drive to acquire a user-friendly Internet domain name had started a mad dash to NSI registration, with companies seeking to register the most recognizable

domain name is also the company's name. For this reason, 'a domain name mirroring a corporate name may be a valuable corporate asset, as it facilitates communication with a customer base.'" *Cardservice Int'l v. McGee*, 950 F. Supp. 737, 741 (E.D. Va. 1997) (quoting *MTV Networks, Inc. v. Curry*, 867 F. Supp. 202, 203-04 n.2 (S.D.N.Y. 1994)). See also Daniel M. McClure, *Trademarks and Competition: The Recent History*, 59 LAW & CONTEMP. PROBS. 13, 29 (1996) ("Easily identified trademarks reduce the costs consumers incur in searching for what they desire, and the lower the costs of search the more competitive the market.") (quoting *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1429 (7th Cir. 1985)).

⁶¹ See 1 MCCARTHY, *supra* note 12, § 2:14, at 2-29 (equating a trademark to a property right).

⁶² See 1 *id.* at 2-29-30.

⁶³ See *General Help: Legal Questions*, Network Solutions, Inc., at <http://www.networksolutions.com> (last visited Nov. 16, 1999). But see *infra* notes 136-38, and accompanying text, discussing the November 1999 amendment to the Trademark Dilution Act, which specifically prohibits the use of a registered trademark as a second-level domain name by one who does not rightfully own the intellectual property rights conferred upon registration of the mark under § 706 of Title 18 of the United States Code or § 220506 of Title 36 of the United States Code.

⁶⁴ See Nathenson, *supra* note 17, at 952 ("Eventually, the entire domain name, '.com' and all, may itself be registrable as a trademark.").

⁶⁵ See 15 U.S.C. § 1052(d).

⁶⁶ See *General Help: Legal Questions*, Network Solutions, Inc., at <http://www.networksolutions.com> (last visited Nov. 16, 1999).

form of their trade name, trademark, or products before anyone else snatches it up.⁶⁷ Without question, "the shorter the name, the more likely someone else either uses or wants to use the name."⁶⁸ Even as recently as 1994, however, only one-third of the Fortune 500 companies had registered "the most desirable forms of their trademarks" with NSI.⁶⁹ As a result, many major corporations "have had to cajole, pay thousands of dollars or even sue to gain the rights to domain names that match" the trademarks they failed to register years ago.⁷⁰

E. *What is a "Cybersquatter?"*

One of the first "cybersquatting" disputes evolved from one man's quirky personal challenge. Magazine journalist Joshua Quittner registered the name "mcdonalds.com" simply "to see if he could do it."⁷¹ In exchange for the rights to the Internet domain name, the journalist demanded that McDonald's donate \$3500 to a Brooklyn, New York school.⁷² In order to have use of the domain name, McDonald's expressed its willingness to pay the ransom.⁷³

In *Avery Dennison Corp. v. Sumpton*,⁷⁴ the court for the Central District of California was faced with the challenge of clearly characterizing the behavior of the defendants, who had purchased twelve hundred Internet domain names for subsequent commercial sale to the public.⁷⁵ The court was quick to identify the defendants as "cybersquatters," as that term has come to be commonly understood.⁷⁶ The court further explained:

⁶⁷ See Nathenson, *supra* note 17, at 967 ("Domain names . . . may be twenty-six characters long, and may comprise almost any alphanumeric character. Nevertheless, people want the shortest, simplest name . . . Further, the shorter the name, the more likely someone else either uses or wants to use the name."); see also *id.* at 922 (including table depicting a forty percent increase in domain name registration period in a two-year time period).

⁶⁸ Nathenson, *supra* note 17, at 967.

⁶⁹ Smith, *supra* note 57, at 1185 n.135 (citing Andre Brunel, *Billions Registered, But No Rules: The Scope of Trademark Protection for Internet Domain Names*, 3 J. PROPRIETARY RTS. 2, 3 (1995)).

⁷⁰ *Intermatic, Inc. v. Toeppen*, 947 F. Supp. 1227, 1234 (N.D. Ill. 1996) (quoting Greg Miller, *Cyber Squatters Give Carl's Jr., Others Net Loss*, L.A. TIMES, July 12, 1996, available at 1996 WL 11004750).

⁷¹ Smith, *supra* note 57, at 1189 (quoting James W. Morando & Christian H. Nadan, *Can Trademark Law Regulate the Race to Claim Internet Domain Names?*, 13 COMPUTER LAWYER 10, 10 (1996)); see generally Joshua Quittner, *Billions Registered: Right Now, There Are No Rules to Keep You from Owning a Bitchin' Corporate Name as Your Own Internet Address*, WIRED, Oct. 1994.

⁷² See Quittner, *supra* note 71.

⁷³ See *id.*

⁷⁴ 999 F. Supp. 1337 (C.D. Cal. 1998), *rev'd*, 189 F.3d 868 (9th Cir. 1999).

⁷⁵ See *id.*

⁷⁶ *Id.* at 1338.

Like all "cybersquatters," defendants merely "squat" on their registered domain names until someone else comes along who wishes to use them. Like all "cybersquatters," defendants usurp *all* of the accepted meanings of their domain names, so as to prevent others from using the same domain names in *any* of their accepted meanings. And like all "cybersquatters," defendants seek to make a financial return by exacting a price before consenting to allow others to use the domain names on which they have chosen to "squat."⁷⁷

The key to successful "cybersquatting" is proper timing. Critics of the NSI first-come, first-served domain name registration system say that this process not only allows for squatting, but encourages it.⁷⁸ The first person to register a given name is effectively in control of that name, despite trademark rights or other claims to ownership.

A review of this developing trend indicates that the typical "cybersquatter" does not operate the registered domain name for personal use.⁷⁹ Rather, after registration, the squatter may affirmatively offer the name to a prospective purchaser at a high price or simply wait for the captive market to appear on its own, toting a satisfactory ransom.⁸⁰ In order to discourage the squatting which is seemingly facilitated by its registration policy, NSI instituted the requirement that a domain name registrant put a domain name to use no more than ninety days after its registration.⁸¹

Given the growth of Internet use, especially in the commercial context, the reserved ninety days provides a considerable period during which a trademark holder may feel pressured to comply with a squatter's demands. During this time, a corporation is potentially out of the Internet reach of an infinite number of cyber-customers and market information-seekers. This is precisely the goal of the squatter, who capitalizes upon the corporation's immediate ambition to use the Internet to its fullest capacity to further its business.⁸²

What began as one man's challenge has evolved into a lucrative business. In

⁷⁷ *Id.*

⁷⁸ See Sterling, *supra* note 58, at 736-37 (citing Gary W. Hamilton, *Trademarks on the Internet: Confusion, Collusion or Dilution?*, 4 TEX. INTELL. PROP. L.J. 1, 3 (1995)).

⁷⁹ See Jennifer Golinveaux, *What's in a Domain Name: Is "Cybersquatting" Trademark Dilution?*, 33 U.S.F. L. REV. 641, 647 (1999); see also Sterling, *supra* note 58, at 737 (noting that the disparity in numbers of registered domain names and names actually in use is a good indicator of the prevalence of cybersquatting activity).

⁸⁰ See *id.*

⁸¹ See *General Help: Legal Questions*, Network Solutions, Inc., at <http://www.networksolutions.com> (last visited Nov. 16, 1999); see also Sterling, *supra* note 58, at 742.

⁸² See Swartz, *supra* note 53, at 1504.

order to prevent squatters from holding their preferred domain names for ransom, commercial entities have been forced to take preventative measures. In order to defend themselves against this type of activity, it is suggested that companies register every possible variation of their corporate name, logo, popular products, or other corporate identifier.⁸³ There is evidence to suggest that, faced with a continuing use of the first-come, first-served registration system, many Fortune 500 companies have heeded this warning.⁸⁴

II. APPLICATION OF THE LANHAM ACT TO "CYBERSQUATTING"

A. Congress' Commerce Clause Power

There is no explicit language granting Congress the power to regulate trademarks, but Congress has acted consistently pursuant to the Commerce Clause of the United States Constitution, which states that "Congress shall have Power To . . . regulate Commerce . . . among the several States."⁸⁵ Traditionally, Congress has regulated three broad categories of commercial activity: the channels of interstate and foreign commerce, the instrumentalities of interstate and foreign commerce, and those activities having a substantial effect on interstate and foreign commerce.⁸⁶

First, regulation of the channels of commerce relates to those modes of travel utilized in the course of commercial activity, including highways, waterways, and air traffic.⁸⁷ Second, Congress can regulate the instrumentalities of commerce.⁸⁸ This includes the people, machines, and other logistical items used in carrying out commercial activity. Finally, the broadest category of constitutionally-regulated activity includes those activities which have a "substantial effect" on interstate commerce.⁸⁹

⁸³ See Ughetta Manzone, *Panavision International, L.P. v. Toeppen*, 13 BERKELEY TECH. L.J. 249, 260-61 (1999) (citing Ian C. Ballon, *Intellectual Property Protection and Related Third Party Liability*, 482 PLI/PAT 559, 612 (1997)); see also *General Help: Legal Questions*, Network Solutions, Inc., at <http://www.networksolutions.com> (last visited Nov. 16, 1999).

⁸⁴ See Manzone, *supra* note 83, at 260-61. But see Smith, *supra* note 57, and accompanying text (noting that in 1994, only one-third of the Fortune 500 companies had registered "the most desirable forms of their trademarks").

⁸⁵ U.S. CONST. art. I, § 8, cl. 3.

⁸⁶ See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

⁸⁷ See *id.* at 558 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964)); *United States v. Darby*, 312 U.S. 100, 114 (1941).

⁸⁸ See *Lopez*, 514 U.S. at 558 (citing *Perez v. United States*, 402 U.S. 146, 150 (1971); *Shreveport Rate Cases*, 234 U.S. 342 (1914); *S.R.R. Co. v. United States*, 222 U.S. 20 (1911)).

⁸⁹ See *Lopez*, 514 U.S. at 559 (citing *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)); see also *Wickard v. Filburn*,

The historical analysis of whether the particular activity directly or indirectly affects interstate commerce has become largely irrelevant.⁹⁰ Rather, the activity in question must belong to a general class of activities that, taken together, substantially affect interstate commerce.⁹¹ Although perhaps not considered singularly economic, an activity may be deemed economic or commercial if the cumulative effect of the activity brings about an economic result.⁹²

In *Wickard v. Filburn*,⁹³ the Supreme Court sought to determine whether Congress had the power to regulate an individual farmer's wheat production in excess of a national legislative quota. Although the vast majority of the wheat the farmer produced was consumed by the farmer himself, the Supreme Court held that the small amount of wheat grown for entirely personal intrastate use, when considered in the aggregate with all such uses, had a substantial effect on interstate commerce and therefore could be regulated by Congress under its Commerce Clause power.⁹⁴ The use of the "substantial effects test" is an incredibly expansive view, yet it remains the prevalent standard today.

This sweeping grant of authority should be contrasted with the Supreme Court's more recent decision in *United States v. Lopez*,⁹⁵ which addressed a constitutional challenge to the Gun Free School Zone Act of 1990.⁹⁶ The federal government justified its power to regulate the possession of a hand gun within a specified and demarcated distance from a school under the Commerce Clause.⁹⁷ The government's principal argument was that the possession of a hand gun in a school zone had negative repercussions on the national economy in that it deteriorated the quality of students' education and their ability to focus on academic success.⁹⁸

Unlike the limited farming activity considered in *Wickard*, the Court reasoned that the possession of a gun within a school zone was not an economic activity at all, nor would it, through the occurrence of numerous similar incidents, substantially affect interstate commerce.⁹⁹ While recognizing the government's good intentions aimed at protecting children and preserving the quality and nature

317 U.S. 111, 125 (1942) ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . .").

⁹⁰ See *Lopez*, 514 U.S. at 555-56.

⁹¹ See *id.* at 559.

⁹² See *id.* at 559-60.

⁹³ 317 U.S. 111 (1942).

⁹⁴ See *Wickard*, 317 U.S. at 127-28.

⁹⁵ 514 U.S. 549 (1995).

⁹⁶ 18 U.S.C. § 922(q)(1)(a) (Supp. V 1993).

⁹⁷ See *Lopez*, 514 U.S. at 563-64 ("The government's essential contention, *in fine*, is that we may determine that [the Act] is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce.").

⁹⁸ See *id.* at 563-64.

⁹⁹ See *id.*

of education, the Court dismissed the argument that a tangible connection existed between gun possession in a school zone and the national economy.¹⁰⁰ Based on its application of the "substantial effects test," the Court held that the statute exceeded Congress' Commerce Clause power.¹⁰¹

B. *Federal Trademark Dilution Act*

The first legislative act to regulate trademarks was passed in 1870,¹⁰² but was rejected by the Supreme Court as an over-reaching application of Congress' power under the Commerce Clause.¹⁰³ Modern federal trademark law is contained in the Lanham Act, enacted by Congress in 1946.¹⁰⁴ Reliance upon the Commerce Clause power imports a critical limitation on Congress's enforcement of the Lanham Act, which only applies to those marks used in interstate and foreign trade.¹⁰⁵

In 1995, Congress enacted the Federal Trademark Dilution Act¹⁰⁶ ("the Act"), which became Section 43(c) of the Lanham Act. The Act reads, in pertinent part: "The owner of a famous mark shall be entitled . . . to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark"¹⁰⁷ Pursuant to the limitations on Congress' power under the Commerce Clause, non-commercial use of a mark is not actionable.¹⁰⁸

¹⁰⁰ See *id.* at 564-66.

¹⁰¹ See *id.* at 565-66.

¹⁰² Act of July 8, 1870, ch. 230, 16 Stat. 210, §§ 77-84.

¹⁰³ See *The Trademark Cases*, 100 U.S. 82, 96 (1879); see generally Smith, *supra* note 57, at 1179 (describing the history of the Lanham Act); Sterling, *supra* note 58, at 748 (describing the history of the Lanham Act).

¹⁰⁴ 15 U.S.C. §§ 1051-1127 (1994).

¹⁰⁵ See *id.* § 1051(a)(3)(C).

¹⁰⁶ *Id.* § 1125(c).

¹⁰⁷ *Id.* § 1125(c)(1).

¹⁰⁸ See *id.* § 1125(c)(4)(B). "Use in commerce" refers to:

the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this chapter, a mark shall be deemed to be in use in commerce—

(1) on goods when—

(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) the goods are sold or transported in commerce, and

(2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with

The Act serves a specific purpose which had gone unsatisfied by the Lanham Act prior to its amendment in 1995: it gave rise to a new cause of action, dilution, which would "protect the value of famous marks and the substantial investments made by the mark's owner against 'those who would appropriate the mark for their own gain.'"¹⁰⁹ At the same time, the Trademark Dilution Act reinforces the underlying purposes of the Lanham Act itself, which is "to protect the public so that it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get," and to protect the trademark owner's "investment from its misappropriation by pirates and cheats."¹¹⁰

The original legislative history of the Trademark Dilution Act seems to indicate that one proposed purpose for the amendment was bringing the activity of "cybersquatters" under the control of Section 43(a).¹¹¹ Recent amendments to the Act seem to clearly indicate that this is surely the case, by the inclusion of a provision specifically addressing "cybersquatting" activity, both within and beyond our national borders.

C. Application of Trademark Dilution Act to "Cybersquatting"

The most notable application of the Federal Trademark Dilution Act to the activity of a "cybersquatter" is *Panavision International v. Toeppen*.¹¹² The

the services.

Id. § 1127.

¹⁰⁹ Nathenson, *supra* note 17, at 963 (quoting H.R. REP. NO. 104-374, at 3 (1995), reprinted in 1995 U.S.C.C.A.N. 1029, 1030).

¹¹⁰ S. REP. NO. 79-1333 (1946), reprinted in 1946 U.S.C.C.A.N. 1274, 1274; see S. REP. NO. 100-515, at 4 (1988), reprinted in 1988 U.S.C.C.A.N. 5577, 5605 (1988 amendment); see also *Samson Crane Co. v. Union Nat'l Sales*, 87 F. Supp. 218, 222 (D. Mass. 1949), *aff'd per curiam*, 180 F.2d 896 (1st Cir. 1950) (highlighting as a special purpose of the Lanham Act, the elimination of "other forms of misrepresentations which are of the same general character even though they do not involve any use of what can technically be called a trade-mark."); DAVID LANGE ET AL., *INTELLECTUAL PROPERTY CASES & MATERIALS* 89 (1998).

¹¹¹ See 141 CONG. REC. S19312-01 (daily ed. Dec. 29, 1995) (statement of Sen. Leahy) ("Although no one else has yet considered this application, it is my hope that this antidilution statute can help stem the use of deceptive Internet addresses taken by those who are choosing marks that are associated with the products and reputations of others."); see also Nathenson, *supra* note 17, at 963; Sterling, *supra* note 58, at 749-50 ("Businesses in need of protection against domain name pirates look to sections 32 and 43(a) of the Lanham Act to create a cause of action against the unlawful use of registered or unregistered marks."). Courts have cited Senator Leahy's statements to support the application of the Act to "cybersquatters." See, e.g., *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1326 (9th Cir. 1998).

¹¹² 945 F. Supp. 1296, 1303 (C.D. Cal. 1996), *aff'd*, 141 F.3d 1316 (9th Cir. 1998).

defendant Toeppen purchased a number of Internet domain names containing famous registered trademarks belonging to several notable American corporations. One of these, Panavision, held registered trademarks in the name "Panavision," which it used to identify its product line of motion picture camera equipment.¹¹³

When Panavision attempted to register the Internet domain name "panavision.com" with NSI in December of 1995, it was refused the opportunity to do so since Dennis Toeppen had already registered that exact name.¹¹⁴ Panavision promptly notified Toeppen of its registered trademark in the name "Panavision," and based on its ownership rights, demanded that Toeppen relinquish the domain name using the registered mark.¹¹⁵ Toeppen generally refused but offered to sell the name to Panavision for \$13,000.¹¹⁶ Payment of the specified ransom also included Toeppen's promise not to "acquire any other Internet addresses which are alleged by Panavision Corporation to be its property."¹¹⁷

When Panavision refused his offer, Toeppen registered another Internet domain name using Panavision's other trademark, "Panaflex."¹¹⁸ On this site, Toeppen simply posted a message which read, "Hello."¹¹⁹ The "panavision.com" site, meanwhile, displayed a photograph of the town of Pana, Illinois.¹²⁰ Panavision responded by filing an action in the District Court for the Central District of California.¹²¹

The court identified the issue of trademark dilution as whether "the defendant violated federal . . . law by intentionally registering the plaintiff's trademarks as his Internet domain names for the purpose of exacting payment from the plaintiff in exchange for the termination of the registrations of the domain names."¹²² In order to find that Toeppen's actions constituted trademark dilution under section 43(c) of the Lanham Act, four questions had to be answered in the affirmative: (1) Was the "Panavision" trademark famous?; (2) Was Toeppen's use of "Panavision" trademark a commercial use?; (3) Did Toeppen's use of "Panavision" as a domain name actually dilute the trademark?; and (4) Did Toeppen's use of the mark begin after the mark became famous?¹²³

Toeppen did not dispute that the "Panavision" mark was famous.¹²⁴ Rather, he

¹¹³ See *id.* at 1298-99.

¹¹⁴ See *id.* at 1300.

¹¹⁵ *Panavision*, 141 F.3d at 1319.

¹¹⁶ See *id.*

¹¹⁷ *Id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² *Panavision*, 945 F. Supp. at 1298.

¹²³ See *Panavision*, 141 F.3d at 1324.

¹²⁴ See *id.*

challenged Panavision's assertion that his registration of trademarked domain names was a "commercial use," and that this use subsequently resulted in dilution.¹²⁵ Reaffirming a finding of dilution by the district court, the Ninth Circuit stated: "Toeppen did considerably more than simply register Panavision's trademarks as his domain names on the Internet. He registered those names as part of a scheme to obtain money from Panavision."¹²⁶

Courts have continued to extend the scope of the Trademark Dilution Act to cover the activity of "cybersquatters" based on an individual's intent to extract money from a trademark holder, as promulgated by the *Panavision* court.¹²⁷ As a primary example of the continued application of *Panavision* line of reasoning, Toeppen was challenged a second time in *Intermatic, Inc. v. Toeppen*.¹²⁸ The "use in commerce" requirement was summarily discussed, with the court concluding that it was satisfied merely by the utilization of the Internet as a commercial medium.

The Ninth Circuit again faced a corporation's challenge to a "cybersquatter" who held their trademarks for hostage in *Avery Dennison Corp. v. Sumpton*.¹²⁹ The defendant Sumpton, an Internet e-mail provider, registered the names "avery.net" and "dennison.net" as part of a business which provided "vanity" e-mail addresses.¹³⁰ Sumpton's prior registration prevented Avery Dennison from fully using its registered trademarks "Avery" and "Dennison" as part of their corporate home page address.¹³¹

Moving away from the intent-focused approach in the *Toeppen* cases, the court applied a limited interpretation of the "commercial use in commerce" requirement.¹³² The court highlighted the fact that Sumpton did not use Avery-Dennison's trademarks for their "non-trademark value."¹³³ In so noting, the court concluded that the marks were not being used in a way ordinarily considered to be commercial, and that the meaning of "commercial" would not be modified to encompass "cybersquatting" activity.¹³⁴

Courts have somewhat consistently followed *Panavision* in the majority of "cybersquatting" cases filed since, bending the Trademark Dilution Act to meet this highly-specialized and unanticipated activity.¹³⁵ It is unclear, however, how much

¹²⁵ See *id.*

¹²⁶ *Id.* at 1318.

¹²⁷ See Golinveaux, *supra* note 79, at 657 (noting further that squatting on a famous mark erases the mark's ability to identify goods or services on the Internet).

¹²⁸ 947 F. Supp. 1227, 1229 (N.D. Ill. 1996).

¹²⁹ 189 F.3d 868 (9th Cir. 1999).

¹³⁰ See *id.* at 872-73.

¹³¹ See *id.*

¹³² See *id.* at 879-80.

¹³³ See *id.* at 880.

¹³⁴ See *id.*

¹³⁵ See, e.g., *McRae's, Inc. v. Hussain*, 105 F. Supp. 2d 594, 598 (S.D. Miss. 2000); Shaw

longer *Panavision* will remain the primary source of guidance as courts are faced with the application of new statutory language specifically designed to address the activity of Dennis Toeppen and others like him.

D. *The Cyberpiracy Prevention Amendment*

On November 29, 1999, Congress amended Section 43 of the Lanham Act to include a provision specifically addressing the "cybersquatting" issue. Today found under the heading "Cyberpiracy Prevention" and dubbed the Anti-Cybersquatting Consumer Protection statute,¹³⁶ the amendment specifically provides protection for registrants of United States trademarks by prohibiting the registration or use of those trademarks as Internet domain names by anyone other than the mark's owner. In particular, the amendment creates a cause of action against the registrant of a domain name if that registrant has violated any intellectual property right of the mark's owner.¹³⁷

The amendment requires a positive showing of bad faith on the part of the registrant, and the plain language of the statute indicates that registration alone is enough to create such liability. The individual possessing such "bad faith intent" subsequently "registers, traffics in, or uses . . ." the United States registered trademark as a domain name.¹³⁸

Congress offers several specific factors which may be considered by the courts in making a determination of an individual's required bad faith intent. Most notably, this list includes a positive showing of the registrant's "prior use, if any, of the domain name in connection with the bona fide offering of any goods or services," the registrant's "bona fide noncommercial or fair use of the mark in a site accessible under the domain name," and the registration of numerous domain names which the registrant knows to be identical or to dilute registered trademarks.¹³⁹

Cases were filed shortly after the passage of the amendment. One of the first

v. Rizzoli Int'l Publ'ns., Inc., 51 U.S.P.Q.2d (BNA) 1097, 1105 (S.D.N.Y. 1999).

¹³⁶ See Lanham Act, § 43(d), 15 U.S.C. § 1125(d) (Supp. I 1999). The amendment provides, in relevant part, that:

- (1)(A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person—
 - (i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and
 - (ii) registers, traffics in, or uses a domain name that . . .
- (III) is a trademark, word, or name protected by reason of section 706 of title 18, United States Code, or section 220506 of title 36, United States Code.

Id.

¹³⁷ See *id.* § 1125(d)(1)(A)(i).

¹³⁸ *Id.* § 1125(d)(1)(A)(ii) (emphasis added).

¹³⁹ *Id.* § 1125(d)(1)(B)(i)(III), (IV), (VIII).

of such cases involved the National Football League and two of its affiliates, which assert, among other claims, that the Internet domain names owned and operated by Ken Miller of Clearlake, California dilute the strength of the NFL's distinctive trademark.¹⁴⁰ Miller operates web sites using the names "NFLtoday.com," "NFLtoday.net," and "NFLtoday.org," where he makes predictions about upcoming games, publishes statistics, and supplies links to other gambling-related sites and the NFL's official web site, "NFL.com".¹⁴¹ In addition, Miller uses the sites to advertise the sale of "NFL Today Power Picks."¹⁴²

In another case, Harvard College seeks redress in the form of a preliminary injunction against two individuals, Michael Rhys and Michael Douglas, for having registered and advertised for sale, numerous domain names which include the names "Harvard" and "Radcliffe."¹⁴³ The Harvard College Board of Trustees alleges that Rhys and Douglas have registered more than sixty-five such names, including "harvard-lawyer.com," "harvardcampus.com," and "harvard-doctor.com," to name a few.¹⁴⁴ The Board demands that the public sale of these names be enjoined and that Rhys and Douglas be compelled to remove all references to either Harvard or Radcliffe from these sites.¹⁴⁵

While none of these early filings has yet to come to judgment, one can only surmise that the immediate interest and application of the amendment will continue and will only increase in importance in terms of United States courts' dealing with future "cybersquatter" activity. It is therefore with increased urgency that we must closely examine the application of the Act to the actions of foreign-citizen "cybersquatters" as it relates to the constitutionality and practicality of protecting American trademarks on the World Wide Web.

III. "CYBERSQUATTING" IS NOT A COMMERCIAL ACTIVITY

A. The "Commercial Use in Commerce" Requirement

Although a seemingly redundant word choice, the Federal Trademark Dilution Act purposefully encompasses a two-part commercial activity requirement,

¹⁴⁰ See *NFL Uses New Cybersquatting Law to Seek Injunction Against Gambling Web Site*, 17 ANDREWS COMPUTER & ONLINE INDUS. LITIG. REP. 9 (2000), WL 17 No. 8 ANCOILR 9 [hereinafter *NFL*]; *NFL v. Miller*, 54 U.S.P.Q.2d 1574 (S.D.N.Y. Mar. 30, 2000) (denying defendant's motion to dismiss based on his claims that he is not subject to jurisdiction of any court in New York and that venue is improper).

¹⁴¹ See *NFL*, *supra* note 140.

¹⁴² See *id.*

¹⁴³ See *Harvard Sues Cybersquatters for Trademark Infringement*, 17 ANDREWS COMPUTER & ONLINE INDUS. LITIG. REP. 10 (2000), WL 17 No. 8 ANCOILR 10.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

"commercial use in commerce."¹⁴⁶ The second part of the requirement, "in commerce," is the statutory articulation of the limitations on Congress to regulate trademarks only to the extent that the marks fall within its power under the Commerce Clause.

Guided by the *Panavision* decision, most courts, to date, seem to think that "cybersquatting" constitutes the requisite "commercial use in commerce" of an Internet domain name. Indeed, many courts have rather automatically accepted the notion that Congress' Commerce Clause powers extend to "cybersquatting" activity based solely on the "broad jurisdictional powers upon the courts of the United States."¹⁴⁷

Turning to the language and legislative history of the Lanham Act, regulation has been justified with the argument that "cybersquatting" runs against the core purposes of federal trademark law.¹⁴⁸ A squatter's unauthorized use is precisely the object of the Lanham Act and therefore, curtailing the activity is deemed a rightful application of the statute's language.

The *Toeppen* precedents indicate that the primary basis for a finding of "commercial use in commerce" lies in a finding of the defendant's intent to ransom the registered domain name. Under this logic, the domain name itself is considered a "good,"¹⁴⁹ and is deemed sufficient to satisfy the "in commerce" requirement. For example, the *Panavision* court explained that, "Toeppen's 'business' is to register trademarks as domain names and then sell them to the rightful trademark owners It does not matter that he did not attach the marks to a product. Toeppen's commercial use was his attempt to sell the trademarks themselves."¹⁵⁰

The *Panavision* court speculated, however, that had Toeppen registered the domain names without demanding money to ransom the names to the trademark holder, this would perhaps not be considered "commercial use in commerce" of the marks at issue.¹⁵¹ If the turning point is the defendant's intent to ransom the domain

¹⁴⁶ Lanham Act § 43(c)(1), 15 U.S.C. 1125(c)(1) (Supp. I 1995).

¹⁴⁷ *Intermatic, Inc. v. Toeppen*, 947 F. Supp. 1227, 1239-40 (N.D. Ill. 1996) (quoting *Steele v. Bulova Watch Co.*, 344 U.S. 280, 283 (1952)); see *Planned Parenthood Fed'n of Am. v. Bucci*, 42 U.S.P.Q.2d (BNA) 1430, 1441 (S.D.N.Y. 1997) (giving "in commerce" broad interpretation), *aff'd*, 152 F.3d 920 (2d Cir. 1998), *cert. denied*, 525 U.S. 834 (1998).

¹⁴⁸ Cybersquatting is an "unauthorized use of a domain name which includes a protected trademark to engage in commercial activity over the Internet Such use is in direct conflict with federal trademark law." *Cardservice Int'l v. McGee*, 950 F. Supp. 737, 741 (E.D. Va. 1997), *aff'd*, 129 F.3d 1258 (4th Cir. 1997).

¹⁴⁹ See *Kimberly Alacantara, Trademarks in Cyberspace*, 486 PLI/PAT 429, 436 (1997) (noting that the product Toeppen was attempting to sell was the trademark itself).

¹⁵⁰ *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1325 (9th Cir. 1998).

¹⁵¹ *Id.* at 1324 ("Registration of a trade[mark] as a domain name, without more, is not a commercial use of the trademark and therefore is not within the prohibitions of the Act.") (quoting *Panavision Int'l v. Toeppen*, 945 F. Supp. 1296, 1303 (C.D. Cal. 1996)); see *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 960 (C.D. Cal. 1997)

name to its respective trademark holder, then not all uses of the Internet are commercial ones. Many domain name registrants are not engaged in any sort of commercial activity, but rather register their own name, nickname, or other favorable combination of alphanumeric characters in order to personalize their web site.¹⁵²

It is also important to note that the Trademark Dilution Act does not require that "commercial use in commerce" of a mark be in connection with goods or services, as is required for a finding of trademark infringement under Section 43(a) of the Lanham Act.¹⁵³ Courts have conceded that "cybersquatter" defendants rarely use the trademarks in their registered domain names in connection with goods or services.¹⁵⁴

There is no doubt that trademark holders' rights should be afforded protection in the Internet context, including protection from those who would hold hostage the valuable product of a company's research efforts, money, and good will. This is in keeping with the purpose of the Trademark Dilution Act.¹⁵⁵ It is not constitutionally permissible, however, to allow Congress to shelter the giant corporate registered trademark holders from foreign-citizen Internet users' attempts to sign up for recognizable or famous second-level domain names.

B. *Channels of Commerce*

The information which is displayed graphically on an Internet web site originates from a computer data file. Although technology is rapidly changing, as it works now, the information contained thereupon is electronically translated and sent across telephone lines.¹⁵⁶ The information is then viewable by all those with

(holding that NSI's acceptance of a domain name for registration is not a commercial use within the meaning of the Trademark Dilution Act); *Juno Online Servs., L.P. v. Juno Lighting, Inc.*, 979 F. Supp. 684, 691 (N.D. Ill. 1997) (explaining that "warehousing" of domain names is not sufficient to find commercial use).

¹⁵² See Smith, *supra* note 57, at 1197-98 (arguing that the mere purchase and maintenance of a web site is not commercial activity); Nathenson, *supra* note 17, at 965 n.314 ("[T]he mere fact that a personal home page is on the Internet, by itself, should not be enough to satisfy 'use in commerce.'").

¹⁵³ See 15 U.S.C. § 1125.

¹⁵⁴ See, e.g., *Intermatic, Inc. v. Toeppen*, 947 F. Supp. 1227, 1235 (N.D. Ill. 1996) (noting that Toeppen did not plan to use the "intermatic.com" domain name as a web site).

¹⁵⁵ See 4 MCCARTHY, *supra* note 12, § 24:70, at 24-126-27 (noting that "the underlying rationale of the dilution doctrine is that the gradual diminution or whittling away of the value of a trademark, resulting from use by another, constitutes an invasion of the senior user's property right and good will in his mark").

¹⁵⁶ See *AT&T Corp. v. City of Portland*, 216 F.3d 871, 874 ("A typical ISP connects with the Internet via leased telecommunications lines, which its consumers access through 'dialup' connections over ordinary telephone lines.").

access to the Internet. Based on the use of telephone lines to convey the electronically-coded data, the Internet already has been analogized to a highway or air route, leading to its identification as a channel of commerce.¹⁵⁷

To characterize the issue as one relating to a "channel of commerce," however, is to misinterpret completely the fundamental activity at occurrence. A "cybersquatter" may connect to the Internet from some location outside of the United States. Having accessed the NSI/InterNIC web site from his location beyond United States borders, he or she then selects a unique combination of alphanumeric characters which is then registered as a domain name by filling in the blanks of a form printed on an Internet web site.¹⁵⁸

At issue is not the activity of completing the registration, involving the transfer of rights in the name for the transfer of electronic financial consideration. Rather, the focus is on the rights themselves, the fact that one individual in a foreign country has something that American big business claims as its own. This ownership claim is a construct of traditional trademark law,¹⁵⁹ which as of yet bears no correlation in terms of ownership rights in Internet domain names. While modern trademark law is capable of protecting and preserving the intellectual property rights of those who avail themselves of American commerce, it is not as yet suited to police activity occurring in a geographically amorphous environment.

Modern trademark law has its roots in the common law, where ownership rights resulted from the use of an identifying mark in a geographically confined commercial setting.¹⁶⁰ In practical terms, this meant that rights to a given mark were only enforceable within the limited area in which it was commercially utilized.¹⁶¹ Regulation of the activity of "cybersquatters" through the Lanham Act, therefore, requires a drastic extension of traditional trademark law. It seems illogical to apply a statute which has a foundation in geographic precision and market penetration to a technology, quite unlike a highway or waterway, which has no physical form and knows no terrestrial boundaries.¹⁶²

¹⁵⁷ See Manzone, *supra* note 83, at 263 (citing Craig W. Harding, *Selected Issues in Electronic Commerce: New Technologies and Legal Paradigms*, 491 PLI/PAT 7, 9 (1997)).

¹⁵⁸ See *supra* notes 43-45 and accompanying text.

¹⁵⁹ See 4 MCCARTHY, *supra* note 12, § 2:14, at 2-31 (describing trademark rights in relation to common law property rights).

¹⁶⁰ See *Thrifty Rent-A-Car System, Inc. v. Thrift Cars, Inc.*, 831 F.2d 1177, 1180 (1st Cir. 1987) (recognizing that resolution of infringement issue "revolves around geographical market protection").

¹⁶¹ See Smith, *supra* note 57, at 1179.

¹⁶² See *supra* note 23 and accompanying text.

C. *Instrumentalities of Commerce*

Other courts have readily identified "cybersquatting" as commercial use based on the very nature of the Internet as a developing communications medium.¹⁶³ The District Court in *Panavision* found that Toeppen's use of the Internet satisfied the "in commerce" requirement "because communications transmit instantaneously on a world-wide basis."¹⁶⁴ This argument stems largely from the physical structure of the Internet as the "information superhighway."

The most outstanding characteristic of the Internet is its ability to reach computer users all over the world via transmission of data across interstate and international telephone lines.¹⁶⁵ Yet, the Internet's lack of physical boundaries distinguishes electronic communications from traditional telephone or postal communications. Regulation of interstate communications over the Internet is simply impossible because "no such communications exist."¹⁶⁶

The issue is clouded by a definition of the relevant commodity. "Cybersquatting" itself is not an act of Internet transmission, nor the passage of information over traditionally-regulated telephone lines. Rather, at issue is the second-level domain name itself, a commodity neither created exclusively for American use nor one to be claimed as of right by any other nation. Under the current system of registration, the second-level domain name belongs to whomever signs up first, regardless of nationality.¹⁶⁷

The second-level domain name is a select group of letters which, taken together, represent someone, something, or some organization. It is not a physical commodity able to be handled, shipped in the mail with an invoice and a return receipt, or bought and sold using conventional means. As a quasi-commodity available in the "global marketplace," second-level domain names within internationally available top-level domains are not within Congress' exclusive grasp.

¹⁶³ See Smith, *supra* note 57, at 1192 ("For years it has been recognized that the means through which information is disseminated is considered to be *in commerce* even if the person utilizing that means is not engaged in commercial activity.").

¹⁶⁴ *Panavision*, 945 F. Supp. at 1238-39 (quoting 1 GILSON, TRADEMARK PROTECTION AND PRACTICE, 5.122 (1996)); see Swartz, *supra* note 53, at 1513 (linking "the nature of Internet communications" with "courts' broad jurisdictional powers.").

¹⁶⁵ See *Planned Parenthood Fed'n of Am. v. Bucci*, 42 U.S.P.Q.2d (BNA) 1430, 1434 (S.D.N.Y. 1997).

¹⁶⁶ *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999).

¹⁶⁷ See *supra* notes 30-31, 51 and accompanying text.

D. *Substantial Effects on Commerce*

Using the analysis presented by the Supreme Court in *Wickard v. Filburn*,¹⁶⁸ it is argued that even private use of domain names may be considered activity within the realm of interstate commerce.¹⁶⁹ The farmer's activity is easily distinguished, however, from that of the "cybersquatter." By growing his own wheat in his own personal fields, Wickard purposefully withheld money and wheat from the aggregated, national market for wheat.¹⁷⁰ If many other farmers were to engage in a similar activity, the result would be a severe detriment to the national market for wheat and the quantity openly available for public consumption. An entirely local issue, therefore, when considered with all such uses on a national scale, becomes a national concern and thus justifies regulation by Congress.

In contrast, when a non-United States citizen "cybersquatter," sitting outside of United States borders becomes the first to register a trademarked domain name and then offers that domain name for sale to the trademark owner or the general public, his personal activity affects the worldwide market for generic TLDs. When registered domain names contain American corporate trademarks, trade names, or service marks, global electronic commerce is affected, based on the Internet's worldwide scope and the international availability of other TLDs.

Recall that big business intends to make use of the Internet's most powerful feature: the ability to reach the "global marketplace."¹⁷¹ The physical limitations of the Internet allow for only one of any particular set of alphanumeric characters to exist. The "cybersquatter" simply removes that one particular set of characters from the entire market for domain names. In doing so, he has not precluded the American corporation from reaching web consumers, nor has he precluded the corporation from registering an identical set of alphanumeric characters as a second-level domain name on a different top-level domain. Rather than diminish the national market for a particular good, the "cybersquatter" removes one name from the infinite list of possible names, but only within one specific TLD.

The desire to protect a registered or distinctive mark is indeed a valid one, not unlike the desire to keep firearms out of our nation's schools. However, as the Supreme Court recently noted, the Commerce Clause powers cannot be relied upon to bolster a valid social goal, however important, without some other constitutional safeguard.¹⁷²

¹⁶⁸ 317 U.S. 111 (1942).

¹⁶⁹ See Smith, *supra* note 57, at 1192-93 (noting the likelihood that all transmissions of information via the Internet, both for commercial and non-commercial purposes, will be deemed commercial activity).

¹⁷⁰ See *Wickard*, 317 U.S. at 114-15.

¹⁷¹ Sterling, *supra* note 58, at 733-34.

¹⁷² See *Lopez*, 514 U.S. at 567 (noting that reliance upon deference to congressional authority under the Commerce Clause would, in effect, create a general police power).

Should the trademark owner decide to purchase the domain name from the squatter, that is his choice. Use of a given combination of characters is not entirely prohibited, as it may be registered in another TLD. The mark in the preferred TLD, which was captured by the squatter, is still available for sale and simply worth a higher price. The issue is one of economics, pared down in its simplest form to a discussion of supply and demand. As domain name registration exists today, there is a low supply and a high demand. The point at which the two meet invariably results in the willing buyer paying more than he would have to at a time when supply was greater. In economic terms, therefore, the answer to the desperate pleas of American corporate trademark holders is as simple as increasing the supply of internationally available TLDs.

The ".com" TLD has reached its prominence as a locating device simply by the nature of its exclusivity as one of only a few globally registrable web locators.¹⁷³ Reduce its exclusivity by adding more TLDs and the web opens up to more users and more registrants alike, thus resulting in an increased consumer base.

The squatter's use of the Internet domain name, which he fortuitously captured, is his own province. Should he simply design the site to welcome visitors with the word "hi," he is not using the web site for any commercial purpose. By the same token, should he actively solicit ransom bids or wait patiently for the trademark owner to come calling, this is not a "commercial use in commerce" of a valid trademark as is intended in the specific language of the Lanham Act.¹⁷⁴

By definition, the "cybersquatter" does not use or intend to use the trademark to identify a particular source or quality,¹⁷⁵ nor does he use the trademark "in connection with the sale, distribution or advertising of goods and services."¹⁷⁶ Rather, he capitalizes upon the non-commercial value of a trademarked word or name by effectively preventing the trademark owner from making the most commercially viable use of the Internet.¹⁷⁷

Furthermore, the international "cybersquatter" logs on to NSI's web site from his personal computer, which is connected to the Internet in some location somewhere beyond United States borders. He is not, simply by accessing NSI/InterNIC's web site, participating in American commerce. Rather, he is a consumer bargaining in the "global marketplace," a yet relatively undefined and unstructured economic environment which, by the very nature of the Internet, is entirely international and *not* exclusively domestic.

¹⁷³ See Nathenson, *supra* note 17, at 922 (highlighting the international popularity of the ".com" top-level domain); see also *supra* notes 40-42 and accompanying text.

¹⁷⁴ See 15 U.S.C. § 1051 et. seq.

¹⁷⁵ See Golinveaux, *supra* note 79, at 662.

¹⁷⁶ Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 957 (C.D. Cal. 1997).

¹⁷⁷ See *supra* note 82 and accompanying text.

This is not to say that "cybersquatting" is an acceptable practice, nor is it meant to indicate that trademark owners are defenseless against "cybersquatters," both foreign and domestic. Rather, this simply suggests that the traditional application of the Trademark Dilution Act to this type of Internet activity is an unconstitutional application of Congress' Commerce Clause powers and would be better served by an international, collective forum. As an international medium of technology and communication, the Internet requires input from all potential users. No doubt the United States controls a large portion of the web and can offer great insight on the issue, but without the input from other nations, international "cybersquatting" is out of Congress' sole grasp.¹⁷⁸

IV. THE NEED FOR INTERNATIONAL REGULATION

While the Internet has certainly augmented the developing trends toward "global shrinking," bringing economies and cultures closer together than ever before possible, it simply does not follow that the "web" spun around the globe can capture Internet users and automatically subject them to the strictures of Congress' regulation.¹⁷⁹ Rather, the globalization of both communications and commerce suggests the importance of an international approach to a decidedly global problem. "The unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation Typically . . . jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet."¹⁸⁰

In order to prevent losing their valued trademarks to Internet domain names

¹⁷⁸ To date, most domain name disputes involving U.S. registered trademarks have been resolved in reference to U.S. law. See Angela Proffitt, Note & Comment, *Drop the Government, Keep the Law: New International Body for Domain Name Assignment Can Learn From United States Trademark Experience*, 19 LOY. L.A. ENT. L. REV. 601, 602 (1999).

¹⁷⁹ See Andrew E. Costa, Comment, *Minimum Contacts in Cyberspace: A Taxonomy of the Case Law*, 35 HOUS. L. REV. 453, 478 (1998) ("As the world becomes smaller, the courts' power over distant defendants increases. Seen in the light of technology feeding this expanding formulation of jurisdiction, the Internet is possibly 'the latest and greatest manifestation of these historical, globe-shrinking trends.'") (quoting CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996)).

¹⁸⁰ ACLU v. Johnson, 194 F.3d 1149, 1161 (10th Cir. 1999) (quoting Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997)) (noting the inability of state laws to effectively regulate the Internet based on the Commerce Clause).

Federal regulation in the area is analogous. Geographic boundaries no more exist on a federal level than they do on a state level. Demanding compliance with United States federal regulation of the Internet from foreign web users creates the same opportunity for inconsistent policy as does a state regulation promulgated by New Mexico, for example, regulating the Internet activity of a citizen of Oklahoma.

held by international "cybersquatters," today's commercial entities are encouraged to register their trademarks as domain names in all of the countries in which they do business or wish to advertise.¹⁸¹ This is because trademark dilution has been recognized as a cause of action in international courts only recently.¹⁸²

In an effort to recognize the effect of the domain name registration system on the international community, the United States Department of Commerce plans to restructure the present system, removing it from federal government control under Network Solutions, Inc.¹⁸³ In June of 1998, the Department of Commerce released its initial proposals in a Statement of Policy for privatizing the current system.¹⁸⁴

Referred to as "the Internet White Paper," the Statement specifically addresses the interests of the World Intellectual Property Organization (WIPO) and suggests that the international organization make recommendations for a dispute resolution policy.¹⁸⁵ Among other far-reaching goals, the Internet White Paper urges that potentially infringing domain names be evaluated in a court of law in the jurisdiction in which the domain name registry or registry database is located.¹⁸⁶ Transition from the current federally operated system through NSI is expected to be complete by September 30, 2000.¹⁸⁷

The new system will be facilitated by the Internet Corporation for Assigned Names and Numbers (ICANN), an American nonprofit organization which will oversee the competitive distribution of names and consider increasing the number of top-level domains.¹⁸⁸ As proposed, the ICANN Board of Directors would be comprised of members of the international community and highly specialized individuals to represent the multitude of interests involved.¹⁸⁹ In addition, the Department of Commerce plans to meet with members of the international community to solicit suggestions and comments regarding the new registration

¹⁸¹ See Proffitt, *supra* note 178, at 622 n.187; see also *supra* note 83 and accompanying text.

¹⁸² See David W. Maher, *A Cyberspace Perspective on Governance, Standards, and Control: Trademark Law on the Internet—Will It Scale? The Challenge to Develop International Trademark Law*, 16 J. MARSHALL J. COMPUTER & INFO. L. 3, 14 (1997) (further noting that the scope of international trademark law is changing with the development of new treaties specifically including protection from trademark dilution).

¹⁸³ See 4 MCCARTHY, *supra* note 12, § 25:73, at 25-153.

¹⁸⁴ See Statement of Policy on the Management of Internet Names and Addresses, at <http://www.ntia.doc.gov/ntiahome/domainname/6-T35-T398dns.htm> (last visited June 5, 1998).

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See W. Scott Petty, *The White Paper: Overhaul of the Internet by the Feds*, INTELL. PROP. TODAY, July 1998, at 24.

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

system.¹⁹⁰

International "cybersquatting" is a problem that implicates each web-using country's current definition of trademark rights and future definitions of Internet regulation. In order to preserve the interests of Internet users worldwide, the arena for this discussion must be a global one. The proposed new domain name registration system, as overseen by a United States-based organization as opposed to the federal government, is an affirmative step in the right direction though perhaps still not the most appropriate forum for equitable change.

The call for global participation simply cannot be too loud. All nations must step in, and do so immediately, in order to assert and protect their citizens' rights and interests. In these technology-based years immediately following the turn of the millennium, use of the Internet may well prove to be the make-it-or-break-it factor in economic and political success. Those who remain silent on these key issues today may find themselves completely silenced in the future.

CONCLUSION

The courts' traditional application of the Trademark Dilution Act to international "cybersquatters" is the result of an obviously Ameri-centric view of technology and commerce, as is the recent amendment to the Lanham Act, the Anti-Cybersquatting Consumer Protection statute.¹⁹¹ The apparently preferred ".com" TLD is not, as it is often supposed, an American exclusive and should not be treated as such by American courts or government.

Failure to reserve a company's trademark in the ".com" TLD would not, in fact, preclude the company from achieving a commercially viable utilization of the Internet. Concurrent names may exist amongst the varying TLDs. Therefore, a name reserved in the ".com" TLD would not preclude the registration of the exact same combination of alphanumeric characters in any of the other TLDs.¹⁹²

New policies being implemented by ICANN and the United States Department of Commerce stress the need for more top-level domains and would reduce the competition and concern over names within the ".com" TLD. The International Ad Hoc Committee, specifically charged with researching the viability of such policies, has suggested that an additional seven top-level domains become available, including ".nom" for individuals, ".firm" for businesses, ".web" for the World Wide Web, ".info" for information service providers, ".shop" for retail merchants, ".arts" for cultural activities, and ".rec" for recreation.¹⁹³

¹⁹⁰ See *id.*

¹⁹¹ See Lanham Act, § 43(d), 15 U.S.C. § 1125(d) (Supp. I 1999).

¹⁹² See Golinveaux, *supra* note 79, at 643.

¹⁹³ See Petty, *supra* note 187, at 24.

The Internet is not constrained by physical borders or governmental policies.¹⁹⁴ As one of his principal arguments, defendant Dennis Toeppen argued that any injury which may have resulted from his registration en-masse of famous trademarks as domain names occurred not clearly within any particular jurisdiction, but rather in "cyberspace."¹⁹⁵

The unique nature of the Internet stems from the fact that it is the first truly international communications medium. In *ACLU v. Reno*,¹⁹⁶ the court explains that the purpose of the Internet is "to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world."¹⁹⁷ The United States government could never have realized that the result of its research directive for a new communications medium in the 1960s would revolutionize international communications and commerce.¹⁹⁸

Certainly, in a civil law system, older regulations are capable of adaptation to unanticipated changes in policy, technology, and economics. Just as controversial issues such as abortion, gun-free school zones, and euthanasia could never have been foreseen by the Framers of the Constitution, neither could the Internet. Whereas abortion, school zones, and euthanasia can be discussed and negotiated on a domestic level in the state and federal forums, the Internet is distinguished by its inherent physical limitations. Discussion concerning such a global issue requires a town meeting to which the world's population is invited. Furthermore, perhaps the best answer to the problem is not an adaptation, legislative or judicial, of an existing law; rather, the equitable solution may lie in the drafting of highly specialized language negotiated by all of the world players, taking into account the needs of all peoples and all corporate entities, not just those fortunate enough to be sitting within United States borders.

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¹⁹⁴ See *Reno v. ACLU*, 521 U.S. 844, 851 (1997) (noting that cyberspace is "located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet"); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370-71 (1996) (noting that cyberspace lacks territorial boundaries); see also *ACLU v. Reno*, 929 F. Supp. 824, 838 (E.D. Pa. 1996) ("From a user's perspective, it may appear to be a single, integrated system, but in reality it has no centralized control point.").

¹⁹⁵ *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998).

¹⁹⁶ 929 F. Supp. 824 (E.D. Pa. 1996).

¹⁹⁷ *Id.* at 836.

¹⁹⁸ See *United States v. Lopez*, 514 U.S. 549; 583-86 (1995) (Thomas, J., concurring) (acknowledging that the modern advances in communication and technology were simply not foreseen or imagined by the Framers of the Constitution).