

APPEAL NO'S. 04-2011 and 04-2122

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

CHRISTOPHER LAMPARELLO,

Plaintiff-Appellant/Cross-Appellee,

v.

JERRY FALWELL AND JERRY FALWELL MINISTRIES,

Defendants-Appellees/Cross-Appellants.

On Appeal from a Judgment
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Case No. 03-CV-1503-A
THE HONORABLE CLAUDE M. HILTON, CHIEF JUDGE

**BRIEF *AMICI CURIAE* OF INTELLECTUAL PROPERTY LAW
FACULTY IN SUPPORT OF REVERSAL**

BERKMAN CENTER FOR
INTERNET AND SOCIETY
HARVARD LAW SCHOOL
Clinical Program in Cyberlaw
Phillip R. Malone
Bruce P. Keller
Jeffrey P. Cunard
Baker House
1587 Massachusetts Ave.
Cambridge, MA 02138
Telephone: (617) 495-7547
Counsel for Amici Curiae
Intellectual Property Law Faculty

On the Brief:

Rebecca Tushnet
Visiting Associate Professor of Law
Georgetown University Law Center
424 McDonough Hall
600 New Jersey Ave., N.W.
Washington, DC 20001
Telephone: (202) 662-9935

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**STATEMENT OF CONSENT PURSUANT TO
FED. R. APP. P. 29(a)**

Both plaintiff-appellant Christopher Lamparello, and defendants-appellees Jerry Falwell and Jerry Falwell Ministries have consented to the filing of this Brief *Amici Curiae* of Intellectual Property Law Faculty In Support of Reversal.

I. INTRODUCTION

The parties listed at Appendix A submit this brief as *amici curiae* urging reversal of the summary judgment granted to defendants-appellees Jerry Falwell and Jerry Falwell Ministries (“Falwell”) on their Lanham Act claims. The Lanham Act applies only to unauthorized *commercial* uses of trademarks. A website, such as Falwell.com, that provides critical commentary, proposes no commercial transaction and is operated for no monetary gain, is not commercial and cannot fall within the ambit of the Lanham Act.

The District Court confused two distinct concepts: (1) “use in commerce,” which is the jurisdictional predicate for the Lanham Act (enacted under Congress’s Commerce Clause authority); and (2) commercial use, which represents the dividing line between those unauthorized uses of trademarks that are actionable and those that are not. Because the sole purpose of the Lanham Act is to guard against the misuse of trademarks in ways that are likely to lead to mistaken purchasing decisions, confusing commercial uses are proscribed, but noncommercial uses of marks in commerce are not.

I. STATEMENT OF INTEREST

The amici listed on Appendix A are 12 faculty members who research, teach and write scholarly articles and books about intellectual property and technology at law schools nationwide.¹ None received any compensation for participating in this brief. Amici's sole interest in this case is in the evolution of sound and balanced legal rules for trademark law. Amici believe that this brief will assist the Court in its consideration of the legal standards involved in this case.

II. ARGUMENT

A. Commerciality Is A Core Requirement For Lanham Act Liability.

The principal evil trademark law was designed to combat is the unfair practice of confusing the public as to the source of goods or services. *See* 1 *McCarthy on Trademarks and Unfair Competition* § 2:7 (4th ed. 2004) (“[T]rademark law is a species of the generic law of unfair competition.”). Because trademarks developed to help consumers identify the goods of a

¹ Amici wish to acknowledge the invaluable assistance of Harvard Law School and Berkman Center Clinical Program in Cyberlaw students Ari Waldman and Eric Priest in the preparation of this brief.

particular producer in *trade*, they are only protected in commercial contexts. *See, e.g., Indus. Rayon Corp. v. Dutchess Underwear Corp.*, 92 F.2d 33, 35 (2d Cir. 1937) (“The owner of the mark acquires the right to prevent the goods to which the mark is applied from being confused with those of others and to prevent his own trade from being diverted to competitors through their use of misleading marks. There are no rights in a trade-mark beyond these.”). This Circuit recently reiterated this bedrock principle: “There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed.” *Int’l Bancorp, LLC v. Societe Des Bains De Mer Et Du Cercle Des Etrangers A Monaco*, 329 F.3d 359, 364 (4th Cir. 2003) (quoting *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918)).

Congress codified these concepts in the Lanham Act² (“the Act”). *See Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 428 (2003) (“The broader law of unfair competition . . . was largely codified in the Trademark Act of 1946 (Lanham Act).”). Whether a claim is brought under the

² 15 U.S.C §§ 1051-1129 (2004).

infringement,³ dilution,⁴ or cybersquatting⁵ provisions of the Act, the statutory language, legislative history, and historical application of the Act all reveal that the core requirement of commerciality runs throughout the Act's provisions:

The Lanham Act seeks to prevent consumer confusion that enables a seller to pass off his goods as the goods of another. . . . [T]he relevant confusion is that which affects the purchasing and selling of the goods or services in question. . . . Trademark infringement protects against mistaken purchasing decisions and not against confusion generally.

Lang v. Retirement Living Publ'g Co., Inc. 949 F.2d 576, 582-83 (2d Cir.

1991) (internal citations and quotation marks omitted). “The basic objectives of trademark law are to encourage product differentiation, promote the production of quality goods, and provide consumers with information about the quality of goods.” *CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456, 461 (4th Cir. 2000).

For example, under the Lanham Act's infringement provision, confusion with the plaintiff's mark *must* arise in a commercial context to be

³ 15 U.S.C § 1114 (2004).

⁴ 15 U.S.C. § 1125(c) (2004).

⁵ 15 U.S.C. § 1125(d)(1) (2004).

actionable. See *Newton v. Thomason*, 22 F.3d 1455, 1463 (9th Cir. 1994) (in a Lanham Act claim, “[t]o raise an inference of a likelihood of confusion, [a plaintiff] must show that, in selecting his name, [defendant] ‘intended to **profit** by confusing **consumers**’”) (emphasis added) (citing *Toho Co. v. Sears, Roebuck & Co.*, 645 F.2d 788, 791 n.2 (9th Cir. 1981)); *Beneficial Corp. v. Beneficial Capital Corp.*, 529 F. Supp. 445, 450 (S.D.N.Y. 1982) (“[T]he trademark laws are intended to protect those members of the public who are or may become customers of either from **purchasing the products** of one of them under the mistaken assumption that they are buying a product produced or sponsored by the other.”); *Restatement (Third) of Unfair Competition* § 20 cmt. b (1995) (“not every instance of potential confusion . . . constitute[s] infringement.”)

This requirement flows from the plain language of the Act, which imposes infringement liability on an unauthorized use in commerce of:

(a) . . . any reproduction, counterfeit, copy, or colorable imitation of a registered mark **in connection with the sale, offering for sale, distribution, or advertising of any goods or services** on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive

15 U.S.C. § 1114 (2004) (emphasis added).⁶ Accordingly, unless the unauthorized trademark use is in connection with commercial activities, it is outside the purview of the statute. Any other result ignores Congress's purpose, which was to provide a remedy against the potential misappropriation of a mark by competitors:

The purpose underlying any trade-mark statute is twofold. One is to protect the public so 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. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats.

S. Rep. No. 1333, at 3 (1946).

The central flaw underlying the District Court's ruling is that it conflated the phrase "use in commerce," which "simply denotes Congress's authority under the Commerce clause" to enact a trademark statute, JA 237, with the distinct and additional requirement of commercial use. As the plain language of the Lanham Act makes clear, infringing uses made in

⁶ The labeling provision in 15 U.S.C. § 1114(b) repeats the same language. *See also* 15 U.S.C. § 1125(a) (prohibiting, *inter alia*, false or misleading descriptions of fact "in connection with any goods or services . . . in commerce.").

connection with the offering of a service also must involve situations where the service is offered “for sale.” 15 U.S.C. § 1114.

B. Recent Extensions Of The Lanham Act Maintain the Commerciality Requirement.

Commerciality also is a threshold requirement for the Act’s anti-dilution provision, the Federal Trademark Dilution Act (“FTDA”).⁷ FTDA requires that the allegedly diluting use be commercial:

The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, 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

15 U.S.C. § 1125(c) (2004) (emphasis added). To underscore this point, FTDA expressly exempts “noncommercial use” of a mark from liability. 15 U.S.C. § 1125(c)(4)(B). In fact, the use of the somewhat awkward phrase “commercial use in commerce” underscores that “commercial use” is an additional predicate to liability that exists separately from the jurisdictional prerequisite of “use in commerce” needed to invoke the commerce clause.

⁷ 15 U.S.C. § 1125(c) (2004). The opinion below does not invoke FTDA as a basis for liability. FTDA remains relevant, however, as further evidence of Congress’s determination to impose commercial use as a prerequisite to liability under any provision of the Act.

See Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 903 (9th Cir. 2002) (discussing “ungainly” but comprehensible statutory language).

Congress limited liability under FTDA to commercial uses to avoid giving trademark owners a monopoly in their marks that could conflict with the constitutional right to free speech. “The proposal adequately addresses legitimate First Amendment concerns The [FTDA] will not prohibit or threaten ‘noncommercial’ expression, as that term has been defined by the courts.” H.R. Rep. No. 104-374, at 4 (1995).⁸

⁸ This Circuit has defined “commercial speech” as speech that “does ‘no more than propose a commercial transaction.’” *CPC Int’l, Inc. v. Skippy Inc.*, 214 F.3d 456, 462 (4th Cir. 2000) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). *See also Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1017 (9th Cir. 2004) (defendant’s use of “[n]egative commentary about [plaintiff] does more than propose a commercial transaction and is, therefore, non-commercial”). Under this standard, Lamparello’s website is noncommercial.

Similarly, the Anticybersquatting Consumer Protection Act (“ACPA”), 15 U.S.C. § 1125(d), also requires a commercial context.⁹

ACPA states:

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

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

(ii) registers, traffics in, or uses a domain name [that is confusingly similar to another’s mark or dilutes another’s famous mark].

15 U.S.C. § 1125(d)(1)(A) (2004) (emphasis added). ACPA’s use of the words “bad faith intent to *profit*” serves the same function, in the specific context of cybersquatting, as the other commerciality requirements in the Act. It makes clear that the law targets *commercial trafficking* in domain names.

ACPA is limited in its scope because Congress sought to prohibit very specific kinds of conduct, namely, the registration of others’ distinctive

⁹ ACPA was enacted “to protect consumers and American businesses, to promote the growth of online commerce, and to provide clarity in the law for trademark owners by prohibiting the bad-faith and abusive registration of distinctive marks as Internet domain names with the *intent to profit* from the goodwill associated with such marks—a practice commonly referred to as ‘cybersquatting.’” *Sporty’s Farm v. Sportsman’s Mkt.*, 202 F.3d 489, 495 (2d Cir. 2000) (quoting S. Rep. No. 106-140, at 4 (1999)) (emphasis added).

marks as domain names (1) with the intention of selling them to the trademark owners at a profit (typically engaging in wide-scale domain name arbitrage); (2) “to warehouse those marks with the hope of selling them to the highest bidder, whether it be the trademark owner or someone else”; (3) ”to prey on consumer confusion by misusing the domain name to divert customers from the mark owner’s site to the cybersquatter’s own site, many of which are pornography sites that derive advertising revenue based on the number of visits, or ‘hits,’ the site receives”; or (4) to “defraud consumers, including to engage in counterfeiting activities.” S. Rep. No. 106-140, at 5-6 (1999). Under any of these scenarios, a cybersquatter stands to profit financially from registering another’s mark as a domain name, therefore satisfying the commercial use requirement of ACPA.

C. The District Court Overlooked The Lanham Act’s Fundamental Commerciality Requirement.

The District Court’s fundamental error was holding that Lamparello’s “provision of information and viewpoints critical” of Falwell was a commercial “‘service[.]’ within the meaning of the Lanham Act.” JA 237. Even accepting that the dissemination of critical ideas and opinions about the views of an important public figure constitutes a “service” (in the most

generic sense), that marks the beginning, not the end, of the inquiry. The Lanham Act also requires that the use of a trademark be made in connection with services *in a commercial context*. Had the District Court focused on that additional requirement, it would have concluded the undisputed record demonstrates that Lamparello's website is purely noncommercial.

Lamparello's site is devoted to criticizing and offering alternatives to Rev. Jerry Falwell's views on homosexuality and the Bible, subjects of ongoing social and political debate. JA 92-93, 116. Lamparello has never sold or offered to sell any goods or services on his website, has never tried to raise funds on his website, and has never received any payment or other revenue for anything connected to his website. JA 65, 92-93, 116. His website is "exclusively related to [Falwell's] opinions and his statements about religious and political matters" and has never referred to Falwell's business operations of "the 'money' side of what [Falwell] does." JA 94, 116. Lamparello has never offered to sell this or any other website, or the domain name, to anyone. *Id.*

These undisputed facts led the District Court to state that "the majority of [Lamparello's] activities are not undertaken for profit," JA 237, and "[f]inancial profit was a minor motive in the use of the website at issue."

JA 245. The *sole* fact in the record, upon which the District Court rested its conclusion about Lamparello’s “minor” profit motive, is that, for some limited period of time ending three years ago, within Lamparello’s website there was a link to Amazon.com which directed users to a book by Daniel Helminiak entitled *What the Bible Really Says About Homosexuality*.¹⁰ JA 65, 95. Lamparello, however, did not sell the book, did not author the book and had no business or other relationship with the book’s author or publisher or Amazon.com. *Id.* He never expected or received any commercial benefit or gain from posting the link or referring to the book or from any sales of the book. JA 66, 95, 116.

Instead, the link was there because Lamparello believed that book “did a much more thorough job” of expressing Lamparello’s views about the interpretation of the Bible as it relates to homosexuality than he could do himself. JA 95. Nevertheless, the District Court, without citing any evidence, summarily concluded that this link somehow constituted a minor

¹⁰ The link was removed from Lamparello’s site sometime in 2001. JA 65-66, 96. While the record is unclear as to precisely how long the link was accessible, it was less than two years and, for much of that time, the book apparently was out of print. JA 95-96.

“profit” aspect to Lamparello’s website. JA 243, 245. That was clear error absent any evidence that Lamparello somehow financially profited from the link. Instead, the record supports only that the link was a wholly expressive act, promoting not the book *per se*, but the overall purpose of Lamparello’s website. JA 65, 95, 116. *Cf. Universal City Studios v. Corley*, 273 F.3d 429, 456-57 (2d Cir. 2001) (recognizing that a hyperlink has both a “speech and a nonspeech component”; affirming grant of injunction under Digital Millennium Copyright Act based on link’s “functional capacity”).

In addition to mistaking the record, the District Court cited no authority to support that including a single, uncompensated link to an unaffiliated site that itself sells goods is sufficient to satisfy the commercial use requirement of the Lanham Act. The unworkable consequences of the District Court’s approach are obvious: Any noncommercial website that links to a news story on the *New York Times* website or virtually any other news site would be deemed to be commercial because the *Times* sells subscriptions and other materials at its website.

That is an impermissibly overbroad approach. Where, as here, (1) the site consists entirely of critical commentary and other First Amendment-protected speech, (2) there is no evidence of any intent to profit from the sale

of a domain name, and (3) there also is no evidence that the website had business purpose at all (as evidenced by a lack of any charges imposed or payments made in connection with its operation), the District Court's decision stands alone as an improper attempt to prohibit speech based on the Lanham Act.¹¹

Falwell also argued that this Court's decision in *People for the Ethical Treatment of Animals (PETA) v. Doughney*, 263 F.3d 359 (4th Cir. 2001), stands for the proposition that “[u]nder the law, even one [link to Amazon] is sufficient to establish the commercial use requirement of the Lanham Act.” JA 138. This reading of *PETA* is unfounded.

First, it would put *PETA* in direct tension with *CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456 (4th Cir. 2000). In *Skippy*, this Court refused to force the owner of skippy.com, a website for the cartoon comic strip Skippy, to remove comments critical of the maker of Skippy Peanut Butter and its

¹¹ It may be that the District Court was misled by Falwell's reliance on *United We Stand Am., Inc. v. United We Stand Am. N.Y., Inc.*, 128 F.3d 86 (2d Cir. 1997). June 4, 2004 Defendants' Reply Brief at 3. In *United We Stand*, however, the Second Circuit repeatedly emphasized, as having been correctly decided, those cases holding that the Lanham Act cannot be used to suppress the use of trademarks in connection with commentary about the mark's owner. See 128 F.3d at 91-93.

conduct in a trademark dispute between the two. There was no doubt that aspects of the defendant's skippy.com site were commercial. It promoted the owner's commercial comic strip and offered for sale various posters, pins, dolls and other Skippy comic-character memorabilia. *Id.* at 462.

Nonetheless, applying a much more refined analysis of the site than that Falwell urges based on *PETA*, this Court noted that "CPC's trademark has not been used for any commercial gain," *id.* at 461, and the critical "speech on the Skippy web site did not propose a commercial transaction." *Id.* at 462. Amici respectfully suggest that *Skippy*, which looks to whether a commercial transaction has occurred or is proposed, is the proper approach to determining whether the use of a mark is commercial.¹²

Second, *PETA* dealt with a significantly different set of facts. The defendant's conduct smacked of classic cybersquatter behavior: In addition

¹² Alternatively, should the Court read *PETA* as broadly as the District Court did, finding it in conflict with *Skippy* on this point, the proper course would be to follow the earlier-decided (and not overruled) decision in *Skippy*. See *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) ("[W]e have made it clear that, as to conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions.").

to PETA.org, he registered 50-60 domain names evoking myriad personalities and trademarks. 263 F.3d at 362. This substantially undermined his claim that he registered the PETA.org site as a good-faith parody site. The defendant also stated that, should PETA “want one of my domains, they should make me an offer,” betraying a potential underlying commercial purpose.¹³ *Id.* at 363, 368. Lastly, he had numerous links on his website to more than thirty “commercial operations offering goods and services.” *Id.* at 363, 366.

This record could not be more different. Except for Fallwell.com, Lamparello has not registered any domain names that evoke another person’s trademark. JA 94, 116. He has never offered to sell his domain name to Falwell or anyone else. JA 116. His website is and always has been devoted to criticism of Rev. Falwell’s views on topics of political and social importance. JA 93, 116. The only link Lamparello posted to an external web page pointed interested visitors to a single book that, in his view, helped explain some of the very ideas and opinions on his website, and

¹³ There was no suggestion that his reference to PETA making “an offer” for the domain name occurred in the context of possible settlement negotiations, which might raise different issues.

he received no money or other commercial gain for posting that link. JA 95, 116. Lamparello’s behavior, unlike that of the defendant in *PETA*, is consistent with the good faith registration of a legitimate criticism website.

Third, in explaining its conclusion that a defendant need not directly sell goods or services on a website for the site to be considered commercial, this Court in *PETA* cited the “sparse, existing caselaw” and then relied in part on *OBH, Inc. v. Spotlight Magazine, Inc.*, 86 F. Supp. 2d 176 (W.D.N.Y. 2000). 263 F.3d at 365. *OBH*, however, plainly involved a classic commercial link: The “defendants’ use of the plaintiffs’ mark was in connection with goods or services ***because it contained a link to the defendants’ apartment-guide website,***” as well as links to a variety of local news sources that were direct competitors of the mark holder. *Id.* (internal citation omitted) (emphasis added).¹⁴

¹⁴ The Ninth Circuit has concluded that a website owner must have a financial interest in supplying links in order for the links to be deemed commercial. *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002 (9th Cir. 2004). In *Nissan*, the owner of an otherwise noncommercial protest website with advertisements to various kinds of products “received a payment each time a user clicked through to an advertiser’s website.” *Id.* at 1007. Trademark infringement was found with respect to links that would cause confusion because the defendant

Absent such traditional indicia of commerciality, reading *PETA* as broadly as Falwell urges produces untenable results. For example, it would render any website, even a consumer-oriented site containing critical reviews of a particular product or service, subject to Lanham Act liability if that site also linked to one selling goods or services in competition with the critiqued company. Such a reading also would bar noncommercial gripe sites from providing a link to a commercial entity's *own* website (as Lamparello did), because the commercial nature of the trademark owner's website automatically would render the critical site "commercial".

It also cannot be the case that if an unrelated third party—such as Amazon.com or the author of the book linked to Lamparello's site—receives some commercial benefit from a link, the commerciality requirement is met. The reason is obvious: Every critical or negative product review on the World Wide Web is likely to have the effect of commercially benefiting competitors of that product. The chilling effects of such a rule would be substantial.

"financially benefited because it received money from every click" on those links. *Id.* at 1019.

Finally, it is worth noting the absence of any principled distinction between a narrative statement by Lamparello on his website citing or discussing the book *What the Bible Really Says About Homosexuality*—which plainly would not render his site commercial—and the presence of html code that creates a link to the book’s web page on Amazon.com. Anyone visiting Lamparello’s site could, a moment after reading that narrative statement, type the book’s name into a search engine to find it on Amazon’s site and thus be exposed to the opportunity to buy the book. The presence of a bit of software code alone does not trigger the Lanham Act; rather, the appropriate question must be whether Lamparello used Falwell’s mark to sell or advertise goods or services. Accordingly, had Amazon, or the author of the book, paid Lamparello to advertise on Lamparello’s site even *without* an html link, it is possible Lamparello could have been found to have acted commercially. The complete absence of any evidence of such a commercial relationship in this case, however, precludes such a result.

D. Adverse Effects Alone Cannot Constitute Commercial Use.

Falwell also argued for an “effect on commerce” test, under which the noncommercial use of a mark would be transformed into a commercial use because of its potential impact on commerce. JA 139-41. Lamparello’s use

of Falwell's mark in his website domain name had no effect on Falwell; but even if it did, that would not render it a commercial use within the ambit of the Lanham Act.

First, the parties stipulated that "Lamparello's domain name and website at www.fallwell.com had no measurable impact on the quantity of visits to defendants' website at www.falwell.com." JA190.

Second, this Court previously rejected, albeit implicitly, this "effects" approach. In *Skippy*, this Court rightly refused to force the owner of skippy.com to remove editorial and historical comments critical of the owner of Skippy Peanut Butter simply because such commentary "vex[ed] CPC." 214 F.3d at 462. This Court noted that, "just because speech is critical of a corporation and its business practices is not a sufficient reason to enjoin the speech," and "if a trademark owner could 'enjoin the use of his mark in a noncommercial context found to be negative or offensive, then a corporation could shield itself from criticism by forbidding the use of its name in

commentaries critical of its conduct.”” *Id.* (quoting *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 33 (1st Cir. 1987)).¹⁵

In fact, one of the key principles underlying *Skippy* was the recognition by this Court that trademarks should

not be “transformed from rights against unfair competition to rights to control language.” Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1710-11 (1999). Such a transformation would diminish our ability to discuss the products or criticize the conduct of companies that may be of widespread public concern and importance. *See id.* “Much useful social and commercial discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made

¹⁵ The First and Ninth Circuits also have expressly rejected the adoption of an “effect on commerce” test to determine whether the use of a mark is commercial. The Ninth Circuit in *Nissan Motor Co.*, faced with an argument that “disparaging remarks or links to websites with disparaging remarks at nissan.com is commercial because the comments have an effect on [Nissan Motor’s] own commerce,” emphasized that it had “never adopted an ‘effect on commerce’ test to determine whether speech is commercial and decline[d] to do so [now].” 378 F.3d at 1017 (citing *Skippy*, 214 F.3d at 461-63). In *L.L. Bean*, the First Circuit explained that, even where use of a mark is negative or offensive, “[t]he Constitution does not” permit trademark law “to encompass the unauthorized use of a trademark in a noncommercial setting such as an editorial or artistic context. . . . [The defendant] has not used Bean’s mark to identify or market goods or services; it has used the mark solely to identify Bean as the object of its parody. 811 F.2d at 33; *see also Ford Motor Co. v. 2600 Enters.*, 177 F. Supp. 2d 611 (E.D. Mich. 2001) (rejecting the commercial harm theory because it is overly expansive).

reference to a person, company or product by using its trademark.” *New Kids on the Block v. News America Publ’g, Inc.*, 971 F.2d 302, 307 (9th Cir. 1992).

214 F.3d at 462; *see Nissan*, 378 F.3d at 1017.

Despite this, Falwell (based on arguments made below) may attempt to rely on *PETA* to argue that an alleged infringer need not use a mark for his own commercial benefit in order to fall within the proscriptions of the Lanham Act but need only have prevented users from obtaining or using plaintiff’s goods or services. Such an argument should be rejected for two reasons: First, *PETA* should be limited to its particular facts, and *amici* urge this Court to harmonize it with the pre-existing conclusion in *Skippy*: It is incorrect to conclude that potential harm to a commercial entity alone renders the offending conduct commercial. 214 F.3d at 462.

Second, *PETA* assumed that Internet users would readily give up trying to find a business’s website if their first guess about the domain name was wrong. This concern, expressed without any citation to evidence and at a time when relatively less empirical evidence as to commercial behavior on the World Wide Web was available, has been undermined by the growing availability of that evidence. *See* Eric Goldman, *Deregulating Relevancy in*

Internet Trademark Law, 54 Emory L.J. [] (forthcoming 2005) (currently available at <http://law.marquette.edu/goldman/deregulatingrelevancy.pdf>).

The Ninth Circuit has recently recognized, in *Nissan*, that a consumer who clicked on nissan.com expecting to find Nissan automobiles but instead found information on computers ““would realize in one hot second that she was in the wrong place and either guess again or resort to a search engine to locate”” the site she was seeking. 378 F.3d at 1019 (quoting *Interstellar Starship Servs. v. Epix, Inc.*, 304 F.3d 936, 946 (9th Cir. 2002); see also *Chatam Int’l Inc. v. Bodum, Inc.*, 157 F. Supp. 2d 549, 559 & n.17 (E.D. Pa. 2001) (“Thousands of Internet users every day take a stab at what they think is the most likely domain name for a particular website.’ . . . Internet surfers are inured to the false starts and excursions awaiting them in this evolving medium.”) (quoting *Network Network v. CBS Inc.*, No. CV 98-1349 NM(ANX), 2000 WL 362016, at *5 (C.D. Cal. Jan. 18, 2000)).

That is especially true here, because Lamparello’s site displayed, near the top of the first page, a direct link to Falwell’s official site as well as a prominent disclaimer. JA 94-95, 116-17. These features, like the direct link and disclaimer cited by the court in *Taubman Co. v. Webfeats*, 319 F.3d 770, 777 (6th Cir. 2003), remove any theoretical risk of consumers giving up on

finding Falwell's site in "anger, frustration, or the belief that [Falwell's] home page does not exist." *PETA*, 263 F.3d at 366. By contrast to Falwell's unsupported inference of harm, confining the Act to commercial contexts avoids the need for speculation about commercial "effects."

E. Initial Interest Confusion Must Be Linked To A Commercial Context.

Although the District Court's decision does not discuss the doctrine of initial interest confusion, Falwell raised it below, JA 203, so it is worth a brief discussion. Even assuming that this Court were to determine that initial interest confusion has some bearing on the outcome of this case (it appears yet to have applied the doctrine), an inquiry into initial interest is concerned solely with the overall likelihood of confusion in a commercial context and does not support affirmance.

For example, in *Interstellar Starship Servs. v. Epix, Inc.*, 304 F.3d 936 (9th Cir. 2002), the Ninth Circuit distinguished initial interest confusion involving websites that did not sell any product or service from those

situations (more closely linked to the origins of the doctrine¹⁶) involving competing products or other commercial contexts:

Overall, **the ISS website had little to do with commerce.** The website contained no contact information for ISS or Tchou, and it was otherwise unable to interface with users. Indeed, Epix adduced no evidence that ISS or Tchou ever sold any product or service through its website. **Under these circumstances, we discern no likelihood of consumer initial interest confusion.**

304 F.3d at 946 (emphasis added).

Similarly, in *Nissan*, the Ninth Circuit held that “[t]o evaluate the likelihood of confusion, including initial interest confusion,” the traditional likelihood of confusion factors still apply. 378 F.3d 1002 at 1018 (citation and internal quotation marks omitted). In the context of the Internet, the three most important of those factors are the similarity of the marks, “the relatedness of the goods or services, and the parties’ simultaneous use of the internet in marketing.” *Id.*; see also *Chatam Int’l*, 157 F. Supp. 2d at 558 (“Where companies are non-competitors, initial interest confusion does not have the same consequence, because there is no substituted product to buy

¹⁶ See *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 523 F.2d 1331 (2d Cir. 1975).

from the junior user, and the senior user does not bear the prospect of harm. Initial interest confusion can be viewed as a variation on the practice of the ‘bait and switch.’”) (internal citations and quotation marks omitted); *Northland Ins. Cos. v. Blaylock*, 115 F. Supp. 2d 1108, 1120 (D. Minn. 2000) (finding initial interest confusion inapplicable where protest site provided no “financial[]” or “commercial[]” benefit to defendant; he was seeking to attract attention to criticize, not to compete, and therefore “while defendant may arguably be trying to ‘bait’ Internet users, there is no discernable ‘switch’”).

Consequently, the only proper role of initial interest confusion is as a probative factor in a traditional likelihood of confusion analysis where a commercial transaction involving related or competing goods is involved. *See Checkpoint Systems, Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 294 (3d Cir. 2001). It does not stand alone as the basis for infringement liability, nor does it provide any reason to abandon basic concepts of commerciality. *See* Michael Grynberg, *The Road Not Taken: Initial Interest Confusion, Consumer Search Costs, and the Challenge of the Internet*, 28 Seattle U. L. Rev. 97, 103, n.35 (2004).

F. The District Court Erroneously Found “Bad Faith Intent To Profit” Under ACPA.

ACPA, like the rest of the Lanham Act, requires a commercial context and, in particular, “a bad faith intent to **profit**” from use of another’s mark. 15 U.S.C. § 1125(d)(1)(A) (2004) (emphasis added). ACPA’s use of the words “bad faith intent to **profit**” makes clear that the law targets **commercial trafficking** in domain names.¹⁷

To that end, ACPA expressly lists, as a factor disproving bad faith intent to profit, the “bona fide noncommercial or fair use of the mark in a site accessible under the domain name.” 15 U.S.C. § 1125(d)(1)(B)(i)(IV). Just as FTDA does not prohibit a noncommercial use of a mark, Congress included this factor to underscore its intention that ACPA not reach noncommercial uses of a mark, and to preserve the public’s constitutional right to use a mark for criticism and other forms of free expression: “[N]oncommercial uses of a mark, such as for comment, criticism, parody, news reporting, etc . . . are beyond the scope of the [ACPA’s] prohibitions” S. Rep. No. 106-140, at 9 (1999). Ignoring the

¹⁷ See *supra* note 9 (quoting legislative history).

noncommercial nature of Lamparello's use would ride roughshod over Congress's express direction as to when ACPA is inapplicable.

For that reason, in *TMI, Inc. v. Maxwell*, 368 F.3d 433, 438 (5th Cir. 2004), the Fifth Circuit found that ACPA could not be applied to a "gripe site" with a domain name (trendmakerhome.info) substantially similar to the trademark holder's mark and domain (trendmakerhomes.com) where the plaintiff failed to show that the defendant had "engaged in the business of selling domain names," that the defendant's use was "in the ordinary course of business," or that it "had any business purpose at all." *Id.* at 438. No commercial use existed, even though the site included an electronic bulletin board on which readers could provide information about the plaintiff's competitors. *Id.* Central to that decision was that the defendant "never accepted payment for a listing on the [bulletin board], and he charged no money for viewing it . . . [and there was no evidence that he] had any intent to ever charge money for using the site," and "the site's purpose as a method to inform potential customers about a negative experience with the company is key." *Id.* at 438-39.

Below, however, the District Court avoided engaging in any type of similar analysis because it summarily declared that Lamparello's "website

was commercial; he used www.falwell.com to sell a book via a hyperlink to amazon.com.” JA 243. The record simply does not support that and, elsewhere in the opinion, the District Court actually acknowledged Lamparello’s lack of intent to profit financially. It noted “it appears that . . . ***the only goal***” of Lamparello’s site was “to divert consumers from [Falwell’s] website to www.falwell.com . . .” and that “it is clear he specifically intended to divert individuals from [Falwell’s] own websites in an effort ***to provide those diverted individuals with commentary and criticism*** of [Falwell’s] beliefs and actions.” JA 243 (emphasis added).

For these reasons, the record shows Lamparello did not engage in the kind of trafficking ACPA was designed to address. *See Lucas Nursery & Landscaping v. Grosse*, 359 F.3d 806, 810-11 (6th Cir. 2004) (finding no bad faith on the part of a dissatisfied consumer who registered business’s name as domain name “in the spirit of informing fellow consumers about the practices of a . . . company she believed had performed inferior work,” as distinguished from “[t]he paradigmatic harm that the ACPA was enacted to eradicate—the practice of cybersquatters registering several hundred domain names in an effort to sell them to the legitimate owners”). Using a mark to expose website visitors to commentary and criticism of a public figure is not

“bad faith intent to profit” under ACPA. Accordingly, Falwell’s effort to excise the requirement of commerciality from ACPA should be rejected.

G. The First Amendment Precludes Broader Application Of The Lanham Act.

Falwell’s efforts to induce this Court to apply the Act to gripe sites that deliver no financial benefit to the registrant raise serious constitutional concerns. This Court should eschew such an interpretation of the Act, especially when that interpretation finds no support in the plain language, purpose or principles of the Act. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”) (internal quotation marks and citations omitted).

Although a full recitation of the constitutional conflicts that would result from Falwell’s approach is beyond the scope of this brief, two points are worth noting. First, an individual’s right to criticize even a commercial entity has long been protected under the First Amendment. *See, e.g., Bakery and Pastry Drivers, Local 802 v. Wohl*, 315 U.S. 769 (1942). For that

reason, a website that proposes no commercial transaction deserves the full protection of the First Amendment, especially when the domain name at issue assists a dissatisfied customer in reaching other potential customers.

Nissan, 378 F.3d at 1017.¹⁸

Second, courts have acknowledged that “domain names may be sufficiently expressive to constitute protected speech.” *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 588 (2d Cir. 2000). In cases like this, where a website’s content erases any possible confusion, a domain name substantially identical to the mark may be essential to the expressive message insofar as it ensures that the protester’s complaints reach the intended audience. In that sense, it is analogous to a particular piece of ground from which protestors wish to broadcast their message to best target

¹⁸ For First Amendment purposes, courts could distinguish between a social critic’s use of a mark to criticize the trademark holder and use “to attract an unwitting and possibly unwilling audience” for noncommercial speech *unrelated* to the trademark holder. *Cf. Coca-Cola Co. v. Purdy*, 382 F.3d 774, 787 (8th Cir. 2004). Yet even unrelated noncommercial content may merit full First Amendment protection: use of the domain name supportstarwars.com in a political context, like the use of that trademark in offline political discourse, should not be suppressed. *See, e.g., Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931, 934 n.2 (D.D.C. 1985) (rejecting liability for use of “Star Wars” in political debate).

the appropriate audience. “It is well established that the location of a demonstration may be ‘an essential part of the message sought to be conveyed,’ as well as ‘essential to communicating with the intended audience.’” *Coalition to Protest Democratic Nat. Convention v. City of Boston*, 327 F. Supp. 2d 61, 72 (D. Mass. 2004) (quoting *Nationalist Movement v. City of Boston*, 12 F. Supp. 2d 182, 192 (D. Mass. 1998)). The Supreme Court articulated long ago the basic principle on which this reasoning rests: “[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). Critical, expressive websites are an inexpensive and effective way to convey opinions about a public figure or debate or complaints about a business to the very audience the protester seeks to reach. *Cf. Martin v. City of Struthers*, 319 U.S. 141, 144 (1943) (“[D]oor to door distribution of circulars is essential to the poorly financed causes of little people.”). Courts should be careful not to circumscribe those communications.

III. CONCLUSION

For the foregoing reasons, *amici curiae* intellectual property law faculty respectfully request that this Court reverse the District Court's grant of summary judgment in favor of defendants-appellees.

Dated: November 24, 2004

Respectfully submitted,

By: _____
Phillip R. Malone

Bruce P. Keller
Jeffrey P. Cunard
Berkman Center for
Internet and Society
Clinical Program in Cyberlaw
Harvard Law School
Baker House
1587 Massachusetts Ave.
Cambridge, MA 02138
Telephone: (617) 495-7547

*Counsel for Amici Curiae
Intellectual Property Law Faculty*

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 21(a)(7)(C)**

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached Brief *Amici Curiae* of Intellectual Property Law Faculty Supporting Reversal is proportionally spaced, has a typeface of 14 points, and contains 6883 words (based on Microsoft Word 2002, the word processing system used to prepare the brief), exclusive of the tables, certificates, Appendix, and cover.

Dated: November 24, 2004

Respectfully submitted,

Phillip R. Malone
Clinical Program in Cyberlaw
Berkman Center for
Internet and Society
Harvard Law School
Baker House
1587 Massachusetts Ave.
Cambridge, MA 02138
Telephone: (617) 495-7547

APPENDIX A

AMICI CURIAE

Amici file this brief in their individual capacities, and not as representatives of the institutions with which they are affiliated. Institutional affiliations are listed for identification purposes only.

Barton Beebe
Assistant Professor of Law
Benjamin N. Cardozo School of Law
Yeshiva University
Brookdale Center, 55 Fifth Avenue
New York, New York 10003

James Boyle
William Neal Reynolds Professor of Law
Duke University Law School
Science Drive & Towerview, Box 90360,
Durham, NC 27708-0360

Irene Calboli
Assistant Professor of Law
Marquette University Law School
Sensenbrenner Hall
Milwaukee, WI 53201-1881

Stacey Dogan
Associate Professor
Northeastern University School of Law
400 Huntington Ave.
Boston, MA 02115

Eric Goldman
Assistant Professor
Marquette University Law School
Sensenbrenner Hall 109E
Milwaukee, WI 53201-1881

Mark A. Lemley
William H. Neukom Professor of Law
Stanford Law School
Director, Stanford Program in Law, Science and Technology
Crown Quadrangle, 559 Nathan Abbott Way
Stanford, CA 94305-8610

Tyler T. Ochoa
Professor of Law
Co-Academic Director, High Technology Law Institute
Santa Clara University School of Law
500 El Camino Real
Santa Clara, CA 95053

John Palfrey
Baker House
1587 Massachusetts Avenue
Cambridge, MA 02138

Malla Pollack
Visiting Associate Professor
University of Idaho, College of Law
Moscow, ID 83844

Katherine J. Strandburg
Assistant Professor of Law
DePaul College of Law
25 East Jackson Blvd.
Chicago, IL 60604

Rebecca Tushnet
Visiting Associate Professor of Law
Georgetown University Law Center
424 McDonough Hall
600 New Jersey Avenue, N.W.
Washington, DC 20001

Jonathan Zittrain
1525 Massachusetts Ave
Cambridge, MA 02138

CERTIFICATE OF SERVICE

I, Phillip R. Malone, hereby certify that I am a member of the bar of this Court. On November 24, 2004, I caused the attached Brief *Amici Curiae* of Intellectual Property Law Faculty Supporting Reversal to be filed by causing it to be delivered to the United States Postal Service for Express Mail overnight delivery, and to be served by First Class U.S. Mail, pursuant to Fed. R. App. P. 25(c), to counsel for plaintiff-appellant Christopher Lamparello at the following address:

Paul Alan Levy
Public Citizen Litigation Grp.
1600 20th Street
Washington, DC 20009

and to counsel for defendants-appellees Jerry Falwell and Jerry Falwell Ministries at the following address:

John H. Midlen, Jr.
Midlen Law Center
7618 Lynn
Chevy Chase, MD 20815

Dated: November 24, 2004

Phillip R. Malone