

# INTERNET DOMAIN NAMES, CYBERSQUATTING, AND THE RIGHT OF PUBLICITY: WHERE DOES THE RIGHT BELONG IN CYBERSPACE?

## I. INTRODUCTION

There has long been in place protections for rights of publicity, but the recent growth of the Internet has posed a particular problem concerning this right; especially, the right of publicity and its involvement with the Internet. Furthermore, the right of publicity and its role in Internet domain names is another problem. For example, a person is not allowed to register the Internet domain name *jerryseinfeld.com* just because the name is available. The registrant must have the right to use that name. Indeed, cybersquatters have realized the power of using a third party's trademark in Internet domain names, and have thereby sought out registration of the names for the sole purpose of selling them back to the true owner, at a later time, for an inflated price.<sup>1</sup>

These types of new problems have forced trademark holders to examine the best way to protect themselves and their right of privacy on the Internet.<sup>2</sup> In light of these recent problems, new protections have been introduced to aid the trademark holder in protecting their mark.<sup>3</sup>

This Comment will examine both past protections for the right of publicity, and the newer protections dealing with the right of publicity on the Internet, including the Anticybersquatting Consumer Protection Act (ACPA),<sup>4</sup> recent protections put into place by the World Intellectual Property Organization (WIPO),<sup>5</sup> and the Internet

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1. John B. Lunseth II, *E-Commerce Disputes: Legislation and Litigation are the Brave New World*, 68 Def. Counsel J. 280, 284 (2001).

2. See generally e.g. Leah Phillips Falzone, Student Author, *Playing the Hollywood Name Game in Cybercourt: The Battle over Domain Names in the Age of Celebrity-Squatting*, 21 Loy. L.A. Ent. L.J. 289 (2001).

3. Donna L. Howard, Student Author, *Trademarks and Service Marks and Internet Domain Names: Giving ICANN Deference*, 33 Ariz. St. L.J. 637, 638 (2001).

4. 15 U.S.C. § 1125(d) (2001).

5. World Intellectual Property Organization, *WIPO Home* <<http://www.wipo.org/>> (accessed Oct. 2, 2002) (providing links to WIPO resources).

Corporation for Assigned Names and Numbers (ICANN).<sup>6</sup> Further, this Comment will discuss the best way to resolve this right of privacy on the Internet issue, and where the law is headed in the future.

## II. HISTORICAL PERSPECTIVE

### A. RIGHT OF PUBLICITY

The right of publicity is “[t]he right to control the use of one’s own name, picture, or likeness and to prevent another from using it for commercial benefit without one’s consent.”<sup>7</sup> Traditionally, the right of publicity was borne out of the right of privacy, but it specifically protected “prominent persons” and focused narrowly on the prominent persons’ right to control their name and likeness.<sup>8</sup> Modernly, publicity rights are protected both by statute and common law.<sup>9</sup> Although there is no federal statute that specifically governs the right of publicity, the Lanham Act<sup>10</sup> is often regarded as “[a] close [relative] to the right of publicity.”<sup>11</sup> In short, a claim of right of publicity infringement, which includes the following elements: “(1) [C]ommercial appropriation (2) of a person’s name, likeness, or other indicia of identity (3) for purposes of trade,”<sup>12</sup> remains a state law claim and can only be brought in federal court under diversity jurisdiction.<sup>13</sup> On the state level, California and New York are the two states where right of publicity claims are brought most often,<sup>14</sup> and therefore both states have statutes that speak directly to the issue.<sup>15</sup>

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6. The Internet Corporation for Assigned Names and Numbers, *ICANN Home* <<http://www.icann.org>> (accessed Oct. 2, 2002) (providing links to ICANN resources).

7. *Black’s Law Dictionary* 1325 (Bryan A. Garner ed., 7th ed., West 1999).

8. Mark D. Robins, *Publicity Rights in the Digital Media*, (pt. 1), 17 *Computer & Internet Law* 1, 1-2 (2000).

9. *Id.* at 2.

10. 15 U.S.C. § 1125. Note that the ACPA is an amendment to the Lanham Act. Congress passed the ACPA Amendment in 1999 and it is codified as 15 U.S.C. § 1125(d).

11. Julian S. Millstein, Jeffrey D. Neuburger & Jeffrey P. Weingart, *Doing Business on the Internet: Forms and Analysis* § 11.05[2] (L.J. Press 2001).

12. Robins, *supra* n. 8, at 2.

13. Millstein, Neuburger, & Weingart, *supra* n. 11, at § 1105[2].

14. Robins, *supra* n. 8, at 2.

15. Cal. Civ. Code § 3344 (West 2001); N.Y. Civ. Rights Law § 51 (McKinney 2001).

The California Civil Code states that knowing uses of “another’s name, voice, signature, photograph, or likeness for advertising or selling or soliciting purposes” is a violation of their right of privacy.<sup>16</sup> This statute prohibits “knowing activity,” has no requirement that consent be in writing, and includes a cause of action for violating publicity rights of the deceased.<sup>17</sup> Whereas, in New York, section 51 of the New York Civil Rights Law prohibits the use of “any person’s ‘name, portrait, picture or voice’ for ‘advertising purposes’ or ‘purposes of trade’ without the person’s prior ‘written consent,’ ” and, in contrast to the California statute, applies only to the living.<sup>18</sup>

## B. RIGHT OF PUBLICITY AND THE INTERNET

### 1. Internet Domain Names

An Internet domain name is part of a Uniform Resource Locator (URL).<sup>19</sup> This URL is the online equivalent of a real world business’ mailing address.<sup>20</sup> The domain name contains what is called a second-level domain, a “dot” that is located to the right of the second-level domain, and a top-level domain (TLD) which appears after the “dot.”<sup>21</sup> For example, with the domain name mtv.com, “mtv” is the second-level domain, and “com” is the TLD.<sup>22</sup> Originally, Internet domain names were “designed to facilitate connectivity between computers through the Internet,” but they have since become a sort of “business identifier,”<sup>23</sup> or, in other words, an “online storefront.”<sup>24</sup>

A business or individual will often use their trademark as their Internet domain name hoping to attract customers to their Web site and,

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16. Cal. Civ Code § 3344.

17. Robins, *supra* n. 8, at 2.

18. *Id.* (citing N.Y. Civ. Rights Law § 51).

19. Philip G. Hampton II, *Understanding Basic Trademark Law 2001: Legal Issues in Cyberspace* 585, 593 (P.L.I. Pats., Copys., Trademarks, & Literary Prop. Course Handbook Series No. 663, 2001).

20. *Id.*

21. *Id.*

22. *Id.*

23. World Intellectual Property Organization (WIPO), Press Release, *Study Finds Current International Protection System for Names Inadequate to Deal With All On-Line Abuses* (Sept. 3, 2001) [¶ 6] <<http://www.wipo.org/pressroom/en/releases/2001/p281.htm>> (accessed Oct. 2, 2002).

24. Hampton, *supra* n. 19, at 593.

in turn, increase their market visibility. In fact, most advertising today includes a Web site address as a matter of routine.<sup>25</sup> For example, the Gap clothing store recently began placing their Web site address, or Internet domain name, at the bottom of the screen during each television commercial, and at the bottom of each page of print advertising. This practice seems to have become an integral part of their advertising campaign. All types of other businesses, not just clothing stores or famous personalities, are using their Web site addresses in advertising.<sup>26</sup>

Domain names are comprised of everything from product names, to trademarks, to nicknames, and more.<sup>27</sup> Moreover, the growth of the Internet has brought domain names into conflict with trademarks, and the WIPO believes that this conflict stems from a lack of connection between a system for registering trademarks, and the system for registering domain names.<sup>28</sup> In essence, domain names are assigned without reference to who is actually entitled to that name, and as a result, it is possible, even simple, to register a domain name that contains a trademark owned by someone else.<sup>29</sup> This practice is commonly known as cybersquatting.<sup>30</sup>

## 2. *Cybersquatting*

Cybersquatting is “[t]he act of reserving a domain name on the Internet, [especially] a name that would be associated with a company’s trademark, and then seeking to profit by selling or licensing the name to the company that has an interest in being identified with it.”<sup>31</sup> Congress’s recent definition of cybersquatting is “registering, trafficking in, or using domain names that are identical or confusingly similar to trademarks with the bad faith intent to profit from the goodwill of the trademarks.”<sup>32</sup> Also, a Senate report defined

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25. WIPO, *supra* n. 23 (stating that the WIPO thinks that the growing number of cybersquatting disputes is a direct reflection of the premium that businesses place on domain names).

26. *Id.*

27. Hampton, *supra* n. 19, at 593.

28. WIPO, Press Release, *supra* n. 23.

29. Hampton, *supra* n. 19, at 601.

30. *Black’s Law Dictionary* at 392.

31. *Id.*

32. Hampton, *supra* n. 19, at 600.

cybersquatting as “the deliberate, bad-faith, and abusive registration of domain names in violation of the rights of trademark owners.”<sup>33</sup> Cybersquatters cybersquat for myriad reasons, ranging from greed to mistake, and frequently they fail to think any wrong has been committed, especially if the domain name they have registered is not an exact trademarked name, but rather, is some variation.<sup>34</sup> Because of this type of misunderstanding several protections have been put into place.

### C. *THE ANTICYBERSQUATTING CONSUMER PROTECTION ACT*

In 1999, “President Clinton signed into law the Anticybersquatting Consumer Protection Act (ACPA), which offers a greater level of protection for trademark owners” than the Lanham Act did alone.<sup>35</sup> The goal of the ACPA was to deal with the increasing problem of cybersquatting.<sup>36</sup> In fact, the ACPA amended the existing Lanham Act by adding provisions that protect the holders of distinctive or famous marks from improper registration of their personal names as Internet domain names.<sup>37</sup>

In order to recover under the ACPA, these elements must be proved: (1) The defendant must have a bad faith intent to profit from the mark; (2) the mark must be a distinctive or famous mark, including a personal name; and (3) the domain name in question must be identical or confusingly similar to the mark.<sup>38</sup> Precedent has already been set by the courts as they have held that adding a TLD to a protected mark satisfies the element of “identical or confusingly similar.”<sup>39</sup> The key to an ACPA claim is bad-faith.<sup>40</sup> In light of this, the ACPA lists nine factors that may be used by a court when determining whether a person has acted in bad-faith. These factors include: (1) The trademark rights of the person in the domain name; (2) the extent to which the domain name relates to the legal name of the person; (3) the person’s prior use; (4) the person’s fair use of the mark

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33. Allon Lifshitz, *Cybersquatting*, 38 Harv. J. on Legis. 529, 529 (2001).

34. Hampton, *supra* n. 19, at 600-01.

35. Lifshitz, *supra* n. 33, at 529.

36. Howard, *supra* n. 3, at 638.

37. Lunseth, *supra* n. 1, at 284.

38. 15 U.S.C. § 1125(d)(1)(A)(i), (ii)(I-III)(2001).

39. Howard, *supra* n. 3, at 653.

40. *Id.*

under the domain name; (5) the person's intent to divert consumers away from the mark's owner for financial gain; (6) the person's offer to transfer, sell, or assign the domain name to the owner for financial gain; (7) the person's provision of material and misleading contact information when applying for the registration of the domain name; (8) the person's registration of multiple domain names which the person knows are identical or confusingly similar; and (9) whether the mark is registered.<sup>41</sup> In sum, the ACPA "continues to recognize fair use,"<sup>42</sup> "establishes remedies for the bad faith registration of domain names that are the same as or confusingly similar to marks and for the bad faith registration of personal names,"<sup>43</sup> and "provides for both injunctive relief and actual damages."<sup>44</sup> Another protection that helps guard against cybersquatters has been implemented by the World Intellectual Property Organization.

#### D. THE WORLD INTELLECTUAL PROPERTY ORGANIZATION

##### 1. Purpose

The WIPO is an international organization intended to promote and protect works of intellectual property.<sup>45</sup> It is one of the sixteen specialized agencies of the United Nations system of organizations, and it administers twenty-three international treaties dealing with intellectual property protection.<sup>46</sup> In addition, the WIPO provides an Internet domain name dispute resolution service.<sup>47</sup>

##### 2. The Uniform Dispute Resolution Procedure

The resolution service provided by the WIPO is called the Uniform Dispute Resolution Policy (UDRP).<sup>48</sup> In April 1999, after a

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41. 15 U.S.C. § 1125(d)(B)(i)(I)-(IX)(2001).

42. Howard, *supra* n. 3, at 654.

43. Lunseth, *supra* n. 1, at 284.

44. Lifshitz, *supra* n. 33, at 542.

45. WIPO, *About WIPO* <<http://www.wipo.org/about-wipo/en/>> (accessed Oct. 2, 2002).

46. *Id.*

47. Hampton, *supra* n. 19, at 619.

48. WIPO, *Uniform Dispute Resolution Policy* <<http://arbiter.wipo.int/domains/gtld/index.html>> (accessed Oct. 2, 2002) (providing information on UDRP procedures).

year of intensive consultations to address problems caused by the conflict between domain names and trademarks, the WIPO published a series of recommendations, one of which was the UDRP.<sup>49</sup> The WIPO, along with the Internet Corporation for Assigned Names and Numbers (ICANN) designed the current UDRP, which has been the basis for settling conflicts about trademark on the Internet since December, 1999.<sup>50</sup> ICANN, formed in October 1998, “is the non-profit corporation that was formed to assume responsibility for the IP [Internet provider] address space allocation, protocol parameter assignment, domain name system management, and root server system management previously performed under U.S. government contract.”<sup>51</sup> In short, the ICANN controls and manages the allocation of Internet domain names.

#### a. UDRP Rules and Procedures

The UDRP rules and procedures are as follows: (1) Plaintiff must select a resolution provider; (2) plaintiff must then submit a complaint to the chosen provider; (3) notice must then be given to the civil court jurisdiction as to where the registrar of the domain name resides; (4) plaintiff then chooses whether one or three panelists will conduct the proceedings; (5) the chosen provider then sends notice to the domain name holder within three days; (6) the provider appoints the resolution panel; (7) provider sets the date for the decision; (8) the registrar of the domain name has twenty days to respond; (9) the resolution panel renders their decision; (10) the provider sends the decision to both parties; and (11) plaintiff must pay the fee for the service.<sup>52</sup>

#### b. Elements of a UDRP Claim

The panels of the UDRP examine three elements in determining whether a domain name has, in fact, infringed upon a trademark,<sup>53</sup> including a personal name.<sup>54</sup> First, the panel investigates whether a

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49. WIPO, Press Release, *WIPO to Probe New Issues Relating to Domain Name Abuse* (July 10, 2000) <<http://www.wipo.org/pressroom/en/>> (accessed Oct. 2, 2002).

50. *Id.*

51. ICANN, *About ICANN* <<http://www.icann.org/general/abouticann.htm>> (accessed Sept. 3, 2002).

52. Hampton, *supra* n. 19, at 621-22.

53. Falzone, *supra* n. 2, at 303.

54. See WIPO, Press Release, *supra* n. 23.

domain name is “identical or confusingly similar to a trademark or service mark in which the complainant [or plaintiff] has rights.”<sup>55</sup> This “right” can be demonstrated through registration or use.<sup>56</sup> Second, the panel determines whether the registrant, or defendant, has any real interest in the domain name.<sup>57</sup> This interest may be shown in three ways: (1) If the registrant uses the domain name “ ‘in connection with a bona fide offering of goods or services’ ”; (2) if the registrant can show that they “ ‘have been commonly known by the domain name’ ”; and (3) if the registrant makes “ ‘a legitimate noncommercial or fair use of the domain name without intent for commercial gain to misleadingly divert consumers or to tarnish’ the mark.”<sup>58</sup> Finally, the panel looks to see if the domain name was registered in bad faith.<sup>59</sup> If the panel finds that all three elements are met, the plaintiff will be awarded rights in the domain name, and the registrant will lose his ability to use the name.<sup>60</sup>

The UDRP includes dispute resolution for generic top level domains (gTLDs), which currently include .com, .org, .net, as well as the seven new gTLDs selected by ICANN on November 17, 2000, which include .aero, for the air transport industry, .biz, for business, .coop, for non-profit cooperative, .info, for general, .museum, for museums, .name, for individuals, and .pro, for professionals.<sup>61</sup> The final component in need of discussion is the enforcement of the panel’s decision.

### c. Enforcement

When a complainant files their complaint with the WIPO, notice is sent to the respondent.<sup>62</sup> However, if the respondent chooses to

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55. Falzone, *supra* n. 2, at 303.

56. *Id.*

57. *Id.*

58. *Id.* at 303-04 (citing ICANN, *Uniform Domain Name Dispute Resolution Policy* § 4 (a)(ii) <[http://www.ican.org/udrp/udrp-policy-24 oct 99.htm](http://www.ican.org/udrp/udrp-policy-24%20oct%2099.htm) (last visited Jan. 16, 2001)).

59. *Id.* at 304 (citing ICANN, *Uniform Domain Name Dispute Resolution Policy* § 4 (c)(i) <[http://www.ican.org/udrp/udrp-policy-24 oct 99.htm](http://www.ican.org/udrp/udrp-policy-24%20oct%2099.htm) (last visited Jan. 16, 2001)).

60. *Id.* (citing ICANN, *Uniform Domain Name Dispute Resolution Policy* § 4 (c)(ii) <[http://www.ican.org/udrp/udrp-policy-24 oct 99.htm](http://www.ican.org/udrp/udrp-policy-24%20oct%2099.htm) (last visited Jan. 16, 2001)).

61. *Id.* at 301.

62. WIPO, *Arbitration Rules: General Provisions* <<http://arbiter.wipo.int>



ignore the notice, proceedings begin without them.<sup>63</sup> The WIPO panel's decision is final, but is not binding in a court of law.<sup>64</sup> The arbitration and mediation procedure is without prejudice to recourse to competent courts, and the standard of review in the court system is *de novo*.<sup>65</sup> To make enforcement somewhat simpler, the WIPO decided that the remedies available would be restricted to the status of the domain name registration itself, and would not include monetary damages or rulings concerning the validity of trademarks.<sup>66</sup> The WIPO also decided that any decisions by a competent court, that is a member of both the Paris Convention<sup>67</sup> and the TRIPS Agreement,<sup>68</sup> should prevail over the administrative determination of the panel.<sup>69</sup>

### III. AUTHOR'S ANALYSIS: RECENT MEASURES TAKEN TOWARD ENDING CYBERSQUATTING

#### A. THE WIPO

The first report on Internet domain names was published by the WIPO in April 1999, which focused on the problems that were emerging between trademarks and Internet domain names.<sup>70</sup> This first report led to the current UDRP that "has provided the means for

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/arbitration-rules/general.html> (accessed Oct. 4, 2002).

63. WIPO, *The Final Report of the WIPO Internet Domain Name Process, The Management of Internet Names and Addresses: Intellectual Property Issues* <<http://wipo2.wipo.int/process2/index.html>> (accessed Oct. 4, 2002).

64. *Id.* at ¶ 196.

65. *Id.*

66. *Id.* at ¶ 183.

67. The Paris Convention is an international agreement that was signed in 1883, and was the first true "internationalization" movement in the field of intellectual property law. The Paris Convention established a "minimum standard[ ] of protection that must be recognized by all signatories in their national laws. For example, it sets limits on domestic legislation. . . ." Robert Patrick Merges, *Patent Law and Policy, Cases and Materials* Ch. 4, 457 (2d ed., Michie 1997).

68. The TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement is another international agreement in which member signatory countries agreed upon substantive minimum standards for intellectual property coverage. Arthur R. Miller & Michael H. Davis, *Intellectual Property, Patents, Trademarks, and Copyright in a Nutshell* Ch. 28, § 28.7, 437 (3d ed., West 2000).

69. WIPO, *The Final Report*, *supra* n. 63, at ¶ 196.

70. WIPO, *Second WIPO Internet Domain Name Process: Announcement* <<http://wipo2.wipo.int/process2/index.html>> (accessed Oct. 4, 2002).

solving thousands of conflicts relating to cybersquatting on the Internet.”<sup>71</sup> In addition, the first report pointed out certain issues relating to intellectual property that were left unresolved.<sup>72</sup>

Since that time, the WIPO has published *The Recognition of Rights and the Use of Names in the Internet Domain Name System*, a second, and final report that investigated the interface between trademarks and Internet domain names.<sup>73</sup> The Second WIPO report concerned “a range of identifiers other than trademarks and [was] directed at examining the bad faith and misleading registration and the use of those identifiers as domain names.”<sup>74</sup> Included were international nonproprietary names for pharmaceutical substances, the names and acronyms of international intergovernmental organizations, personal names, geographical identifiers, and trade names.<sup>75</sup> As the WIPO suggests, “the international legal framework for the protection of these other identifiers is not as developed as it is for the protection of trademarks.”<sup>76</sup> The second WIPO report uncovered considerable evidence that registrants were using these types of names and identifiers as Internet domain names without any connection to the naming system in question.<sup>77</sup> In other words, cybersquatters, in bad-faith, were registering the identifiers, including personal names.<sup>78</sup> In particular, cybersquatters were registering names of individuals who were targets of abusive registration simply because they were distinguished or famous.<sup>79</sup> In addition, cybersquatters were registering the personal names along with geographical identifiers and trade names without any consent or rational connection.<sup>80</sup> Currently, the UDRP protects only personal names that also qualify as trademarks, whether registered or unregistered.<sup>81</sup> The second WIPO report recommended

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71. WIPO, Press Release, *supra* n. 23.

72. *Id.*

73. WIPO, *The Recognition of Rights and the Use of Names in the Internet Domain Name System: Executive Summary* <<http://wipo2.wipo.int/process2/report/html/executivesummary.html>> (accessed Oct. 4, 2002).

74. *Id.*

75. *Id.*

76. *Id.*

77. WIPO, Press Release, *supra* n. 23.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

that no modification be made to accommodate a broader protection for personal names.<sup>82</sup>

Two recent examples of cases that were resolved by the WIPO's Arbitration and Mediation Center, using the UDRP, are *Dion v. Burgar*,<sup>83</sup> and *Springsteen v. Burgar*.<sup>84</sup> Although the same respondent was involved in these cases, each case was decided differently.

In *Dion*, the Internet domain name at issue, was "www.celinedion.com," of the singer celebrity Celine Dion.<sup>85</sup> The name under which respondent registered the name was "Celine Dion Fan Club," which could be found on his Web site "celebrity1000.com."<sup>86</sup> Complainant claimed that the domain name in dispute was identical to her trademark, a trademark that was fully established due to her "music recordings, videos, live performances and other merchandise, well before the Respondent first registered the domain name."<sup>87</sup> Complainant also asserted that respondent had no interest in the name, and that he registered the name in bad faith.<sup>88</sup> Further, complainant averred that "no bona fide business [was] being conducted by the named Registrant 'Celine Dion Club,' which amount[ed] only to an operating name for the Respondent."<sup>89</sup> The bottom line was that complainant believed that the respondent had registered the domain name for the sheer purpose of tricking Internet users into thinking that the address "www.celinedion.com" was the singer's official Web site, and thereby attracting users to his "celebrity 1000" Web site for commercial purposes.<sup>90</sup>

The panel found that complainant had satisfied the element of "identical or confusingly similar," because it is well settled that simply

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82. WIPO, *The Recognition of Rights*, *supra* n. 73.

83. WIPO Arbitration and Mediation Center, *Administrative Panel Decision, Dion v. Burgar*, Case No. D2000-1838 (Feb. 13, 2001) <<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1838.html>> (accessed Oct. 4, 2002).

84. WIPO Arbitration and Mediation Center, *Administrative Panel Decision, Springsteen v. Burgar*, Case No. D2000-1532 (Jan. 25, 2001) <<http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1532.html>> (accessed Oct. 4, 2002).

85. *Id.* at § 2.

86. *Id.* at § 5B.

87. *Id.* at § 5A.

88. *Id.*

89. *Id.*

90. *Id.*

adding a “gTLD suffix makes no essential difference.”<sup>91</sup> The panel also found that respondent had no interest in the name since it was the exact, identical name of the famous singer.<sup>92</sup> Further, it was determined by the panel that respondent acted in bad-faith because he admitted to owning seventy-five domain names that were identical to famous celebrity names, and that his “celebrity1000.com” contained advertising.<sup>93</sup> The panel then described respondent’s actions as a “stock-piling of leading [artists’] names” so that he could benefit from the “hits,”<sup>94</sup> albeit mistaken “hits,” from unsuspecting Internet users looking for Celine Dion’s Web site.<sup>95</sup>

In short, the panel held that respondent’s actions were clearly in violation of complainant’s trademarked and famous name, and required that the domain name be transferred to the complainant.<sup>96</sup> When the panel determines that a transfer is in order, the registrant is required to transfer the domain name back to the complainant, and the registrant receives no type of reimbursement of costs of initial registration.<sup>97</sup>

Similarly, in *Springsteen* the Internet domain name at issue was “bruce.springsteen.com,” that of the singer celebrity Bruce Springsteen.<sup>98</sup> In this case, the domain name was registered by respondent under the name “Bruce Springsteen Club.”<sup>99</sup> Complainant claimed infringement upon his name, but did not claim it was a registered trademark.<sup>100</sup> Instead, complainant relied upon the common law rights acquired as the result of his fame.<sup>101</sup> Complainant claimed that the registered name was identical or substantially similar to his mark, and asserted his common law rights in his name.<sup>102</sup>

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91. *Id.* at § 6(2).

92. *Id.* at § 7.

93. *Id.* at § 6.

94. A “hit” is defined in Internet terms as “an instance of connecting to a particular World Wide Web site <a million hits per day>.” Merriam-Webster’s Online Collegiate Dictionary <<http://www.m-w.com>> (accessed Oct. 4, 2002).

95. WIPO Arbitration and Mediation Center, *Dion*, *supra* n. 83, at § 6.

96. *Id.* at § 7.

97. WIPO, *The Final Report*, *supra* n. 63, at ¶ vi.

98. WIPO Arbitration and Mediation Center, *Springsteen*, *supra* n. 84, at § 2.

99. *Id.* at § 4.

100. *Id.*

101. *Id.* (explaining that Bruce Springsteen has sold millions of albums throughout the world since the release of his first album in 1972).

102. *Id.* at § 5.

Complainant further claimed that respondent has registered over 1,500 names, and that many of those names take the Internet user to respondent's Web site "celebrity1000.com."<sup>103</sup>

In his defense, respondent believed that complainant had given no evidence of any common law rights concerning his name, and that complainant's name had already been registered as an Internet domain name by his record company some years ago as "brucespringsteen.net."<sup>104</sup> Furthermore, respondent claimed that he neither used the domain name for commercial purposes, nor did he mislead or trick Internet users into visiting his Web site.<sup>105</sup> In short, respondent claimed he did not act in bad-faith.<sup>106</sup>

The panel found that the name of Bruce Springsteen was, in fact, protected by common law, but that respondent had not infringed upon it because respondent had not acted in bad-faith when registering the Internet domain name.<sup>107</sup> The panel held that complainant had not adequately shown that respondent had intent for commercial gain.<sup>108</sup> Ultimately, the panel found that complainant had not met the necessary criteria to sustain a complaint under the UDRP.<sup>109</sup>

The main difference between the *Dion* and *Springsteen* cases is that in the latter, there was no evidence that the registrant obtained the domain name for the purpose of selling, renting, or otherwise transferring it to the complainant.<sup>110</sup> It was not proven that the defendant acted in bad-faith.

#### B. THE ACPA

Since the enactment of the ACPA in 1999, cybersquatters can be sued for infringement of a registered or unregistered mark.<sup>111</sup> An example of a recent case involving an ACPA claim is *Porsche Cars North America, Inc. v. Spencer*.<sup>112</sup>

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at § 6.

108. *Id.*

109. *Id.*

110. *Id.*

111. Hampton, *supra* n. 19, at 623.

112. 2000 WL 641209 (E.D. Cal. May 18, 2000).

In *Porsche*, the plaintiff sought a preliminary injunction enjoining the defendant from using the Internet domain name “porschesource.com” for commercial benefit, and requiring that the Internet domain name be transferred to plaintiff.<sup>113</sup> The court found that the defendant had made a practice of registering Internet domain names consisting of car manufacturers with a gTLD.<sup>114</sup> Further, the court found that defendant was in the business of registering the Internet domain names for the purpose of selling them to the mark owner, or anyone for that matter, in order to make a profit.<sup>115</sup> The court stated:

When Porsche visited “[porschesource.com],” it found the following: Domains for Sale! Internet domain names are a precious resource. My company does web page development and website hosting. Along the way, we reserved a few domains for customers and for ourselves. . . . you can make us an offer!<sup>116</sup>

The court in *Porsche* determined that the mark was “famous” by using the criteria set forth in the ACPA, namely, that the mark was distinctive, had been used for an extended period, was recognizable, was advertised, and that there were no similar marks used by any third parties.<sup>117</sup> Since the court found the mark to be “famous” it held that the mark fell under the protection of the ACPA.<sup>118</sup> In an ACPA analysis, plaintiff must also show that the registrant acted with a bad-faith intent to profit from plaintiff’s mark.<sup>119</sup> The factors in determining a bad-faith intent were evident in *Porsche* because defendant had no rights in the mark, porschesource.com was neither defendant’s name or a name that was used to refer to him, and defendant clearly intended to sell the Internet domain name to the highest bidder.<sup>120</sup> These factors were evidenced by the message plaintiff encountered when he went to visit “porschesource.com.”<sup>121</sup> In short, the court held that the defendant had likely infringed upon

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113. *Id.* at \*1.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at \*2.

118. *Id.*

119. *Id.*

120. *Id.* at \*\*3-5.

121. *Id.* at \*1.

plaintiff's mark with the bad faith intent of profiting from it.<sup>122</sup> This case is a good example of an Internet domain name dispute that makes its way into the court system. However, the reality is that most disputes of this sort do not find their way into the courts, but rather, end up in the dispute resolution service provided by the WIPO.

Some jurisdictions have also held that the ACPA is retroactive where prospective or injunctive relief is at issue.<sup>123</sup> In fact, a good example is *Diller v. Steurken*.<sup>124</sup> In *Diller*, defendants assumed a business name and established a Web site that they used as an Internet domain name brokerage site.<sup>125</sup> Defendants were in the business of cybersquatting.<sup>126</sup> Defendants registered the domain name "barrydiller.com," and their site contained several different uses of Diller's name and also use of his picture and his company name.<sup>127</sup> Furthermore, defendants offered the sale of "barrydiller.com" on their Web site for 10,000,000 dollars.<sup>128</sup> Plaintiffs soon wrote a letter to defendants demanding removal of all references to Barry Diller and USAi, and that defendants transfer the Internet domain name "barrydiller.com" to its rightful owner, Barry Diller.<sup>129</sup> In response to plaintiffs' letter, defendants removed the picture and reference to USAi, but did not stop trying to sell the domain name.<sup>130</sup> Plaintiffs then filed suit against defendants for civil rights violation under Section 51 of the New York Civil Rights Law.<sup>131</sup>

Although the plaintiffs filed under the New York Civil Rights Law, the court recognized that, in addition to provisions of state law that would provide plaintiff with support for an injunction, the recently

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122. *Id.* at \*6.

123. *Sporty's Farm v. Sportsman's Market*, 202 F.3d 489, 502 (2d Cir. 2000) (Before the ACPA was signed into law, owner of Internet domain name "sportys.com" brought action against the trademark owner seeking declaration that owner had right to use its domain name. The court held that owner had infringed, and the court of appeals affirmed. During the suit, the ACPA was passed and the court held that the Act was retroactive where injunctive relief was at issue.).

124. 712 N.Y.S.2d 311 (Sup. Ct. 2000).

125. *Id.* at 312.

126. *See id.*

127. *Diller*, 712 N.Y.S.2d at 313. "Barry Diller is the chairman and chief executive officer of USAi, a diversified media and e-commerce company." *Id.* at 312-13.

128. *Id.* at 313.

129. *Id.*

130. *Id.*

131. *Id.*

enacted ACPA would provide both the requested injunctive relief, and also include the desired transfer of the Internet domain name.<sup>132</sup> “Moreover, domain name transfer is a remedy of choice in anticybersquatting actions,”<sup>133</sup> and therefore, the court thought it a particularly applicable statute in this case, even though it was not in effect when the defendants registered “barrydiller.com.”<sup>134</sup> Furthermore, since the defendants had “indicated a willingness to consent to an injunction in their opposition papers, the court grant[ed] plaintiffs’ request for injunctive relief,” and ordered “defendants to transfer ownership of ‘barrydiller.com’ to the plaintiffs.”<sup>135</sup> In short, the court relied on the Second Circuit’s ruling in *Sporty’s Farm* that where prospective or injunctive relief is at issue the ACPA applies retroactively.<sup>136</sup>

### C. CURRENT TRENDS

#### 1. Trends in the United States

There are several current trends in the United States regarding Internet domain names. One example is *Shields v. Zuccarini*.<sup>137</sup> In *Shields*, like in *Porsche*, the owner of a “famous” mark was seeking injunctive relief, among other remedies under the ACPA, arising out of an alleged cybersquatter’s use of domain names similar to owner’s “joecartoon.com” name.<sup>138</sup>

Plaintiff is a graphic artist who creates, exhibits, and markets cartoons under the names “Joe Cartoon” and “The Joe Cartoon Co.,” and has done so for the past fifteen years.<sup>139</sup> “[Shield’s] creations

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132. *Id.* at 314.

133. *Id.*; see *Toys “R” Us v. Abir*, 1999 WL 61817 at \*1 (S.D.N.Y. Feb. 10, 1999) (stating that plaintiffs requested that the defendant not only be stopped from using the domain name, but that the name improperly in use by defendant be transferred to plaintiff; and that the court held that the transfer of the domain name to the rightful owner is a remedy of choice in anticybersquatting actions).

134. *Diller*, 712 N.Y.S.2d at 314.

135. *Id.*

136. *Sporty’s Farm v. Sportsman’s Market*, 202 F.3d 489, 502 (2d Cir. 2000) (ACPA is retroactive where prospective or injunctive relief is at issue.).

137. 254 F.3d 476 (3d Cir. 2001).

138. *Id.* at 476.

139. *Id.* at 479.



include the popular 'Frog Blender,' 'Micro-Gerbil' and 'Live and Let Dive' animations."<sup>140</sup> Further, plaintiff licenses his cartoons for use on myriad merchandise, including T-shirts and coffee mugs that are sold at gift stores across the country.<sup>141</sup> Shields registered the "joecartoon.com" Internet domain name in 1997 and has operated it as a Web site since.<sup>142</sup> He won a "shock site of the day" award in 1998, and at the time, averaged over 700,000 "hits" per month.<sup>143</sup>

Defendant, in 1999, registered five variations of plaintiff's Web site,<sup>144</sup> all of which featured advertisements for other sites and credit card companies.<sup>145</sup> Once a visitor entered one of these knock-off sites, they were "mousetrapped" and were unable to exit without clicking on a succession of advertisements.<sup>146</sup> Each time a "mousetrapped" visitor clicked on an advertisement, the defendant made money.<sup>147</sup>

The court in *Shields* found that "Joe Cartoon" was distinctive and qualified as "famous" because of the duration plaintiff had used the name professionally, the amount of Internet traffic the Web site received, and the "huge following" due to the work of Shields, and thereby, his trademark and Internet domain name were awarded protection under the ACPA.<sup>148</sup> Indeed, the court also found that the defendant's registered domain names were confusingly similar to plaintiff's Web site address, and that defendant's purpose was to divert Internet traffic to his sites, in part because defendant admitted that he regularly registered domain names "because they are likely misspellings of famous marks or personal names."<sup>149</sup> Cybersquatters, like defendant, anticipate that Internet consumers will make spelling mistakes when typing Web addresses, and the court in *Shields*

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 479-80 (indicating that the five variations registered were "joescartoon.com, joecarton.com, joescartons.com, joescartoons.com, and cartoonjoe.com").

145. *Id.* at 480.

146. *Id.*

147. *Id.* The defendant testified that he had more than 3000 Web sites that earned between \$800,000 and \$1,000,000 a year. *Id.* at 486.

148. *Id.* at 482-83.

149. *Id.* at 483.

determined that this type of behavior is exactly what the ACPA prohibits.<sup>150</sup>

The court also determined that the defendant in *Shields* acted with a bad faith intent to profit from plaintiff's famous mark because defendant had no rights in the mark.<sup>151</sup> None of the domain names Zuccarini registered were in his own name, or names that were used to refer to him, and even though there was no evidence that defendant intended to sell the Internet domain names to the highest bidder, he did show a clear intent to profit off of the domain names as is shown by the procedure of "mousetrapping" visitors.<sup>152</sup> In sum, the court held that the defendant had infringed upon the trademark rights of Shields, and further, that he would have to pay attorney's fees in light of his "flagrant" conduct, because he showed no remorse for his actions.<sup>153</sup> To reiterate, as it stands today, many disputes still find their way into the court system, but the test of time has shown that the WIPO and its use of the UDRP seems to be more efficient, and the preferred avenue for those fighting to get control of an Internet domain name.

Another example of a current trend case is *Backstreet Productions, Inc. v. Zuccarini*.<sup>154</sup> This case involves the same defendant as *Shields*, and accuses him of the same type of infringement, but this case was filed with the WIPO rather than the court system.<sup>155</sup>

Complainant, the popular singing group the Backstreet Boys, filed a complaint with the WIPO Arbitration and Mediation Center for trademark infringement from a cybersquatter.<sup>156</sup> John Zuccarini had registered eleven variations of the band's name.<sup>157</sup> Complainant owns

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150. *Id.* at 484.

151. *Id.*

152. *Id.* at 486.

153. *Id.* at 487.

154. WIPO Arbitration and Mediation Center, *Administrative Panel Decision, Backstreet Prods., Inc. v. Zuccarini*, Case No. D2001-0654 (Aug. 24, 2001) <<http://arbiter.wipo.int/domains/decisions/word/2001/d2001-0654.doc>> (accessed Oct. 4, 2002).

155. *Id.* at § 3.

156. *Id.* at § 7(A).

157. *Id.* at § 6. (indicating the variations: <backstreeboys.com>, <backstreetboys.com>, <backstreetboypics.com>, <backstreetboyspictures.com>, <bakstreetboys.com>, <backstretboys.com>, <bacstreetboys.com>, <backtreetboys.co>, <backstreetsboys.com>, <backsteetboys.com>, and <backstreetboyz.com>).

a U.S. Trademark in the name the Backstreet Boys,<sup>158</sup> which evidences the Backstreet Boys' exclusive use of the Backstreet Boys mark in many international instances as well.<sup>159</sup> The Backstreet Boys have licensed many products that bear their trademark, and the projected revenue from the licensed products was, at the time, likely to result in over twenty million dollars.<sup>160</sup> The complainant operated a Web site at "http://www.backstreetboys.com" which featured news and information regarding the band, future releases, tour dates, photos and video clips, along with licensed merchandise available for online sale.<sup>161</sup> Respondent did not attempt to sell any goods or services through the registered Internet domain names, but rather, as was the case in *Shields*, "mousetrapped" Internet users into a maze of advertisements that they must click on in order to exit.<sup>162</sup>

"Complainant assert[ed] that the Backstreet Boys have common law and statutory trademark rights in the Backstreet Boys trademark based on their celebrity status and success as well as the registered trademark."<sup>163</sup> As was mentioned in section II(D)(2)(b) above, the complainant must prove that the names registered by Zuccarini were either identical or confusingly similar to the trademarked name, that the respondent had no rights in the name, and that the respondent registered the domain name with a bad-faith intent.<sup>164</sup>

Here, the arbitration panel found that the domain names were confusingly similar to the complainant's mark, and defendant's argument that the words "back," "street," and "boys" are all common terms, and thus are not warranted trademark protection, does nothing to rebut the prima facie case against him.<sup>165</sup> In fact, the panel commented that Zuccarini should know better than to use this argument because

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158. *Id.* (United States Trademark Registration No. 2,241,482).

159. *Id.* (indicating that the international instances include: International Class 9—pre-recorded CDs, audio cassettes and video cassettes featuring music; International Class 14—jewelry; International Class 16—paper goods/printed matter; International Class 18—leather goods; International Class 25—clothing; and International Class 41—entertainment in the nature of live performances by a musical group).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at § 7(A).

164. Falzone, *supra* n. 2, at 303-04.

165. WIPO Arbitration and Mediation Center, *Backstreet Prod.*, *supra* n. 154, at § 8(A).

they had already denied this argument previously when they held against him in a similar matter.<sup>166</sup> Further, the panel conceded that some uses of typographic-error domain names might actually be legitimate; for instance, those registered to prevent customer loss.<sup>167</sup> However, the panel decided that respondent's use did not fit into this category, and therefore, did not possess a legitimate interest in the domain name.<sup>168</sup> Last, the panel found that respondent registered the names in bad-faith because his use of the domain names was to divert users to unrelated advertisements, and therefore was an example of "classic bad faith."<sup>169</sup> Perhaps since respondent has had such a large number of cases filed against him with the WIPO's Arbitration and Mediation Center, the panel has lost their interest in him altogether.<sup>170</sup> The respondent was ordered to transfer the domain names to the complainant.<sup>171</sup> In addition to current trends in the United States, there are also current trends taking place in foreign countries.

## 2. Trends Outside the United States

Because the WIPO is an international organization, it deals with cases in foreign countries as well as those in the United States.<sup>172</sup> One

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166. *Id.* In *Miller v. Zuccarini*, respondent registered a domain name similar to the trademarked name of complainant "www.astrologyzone.org," and, just as he had done in *Shields*, and *Backstreet Productions*, "mousetrapped" Internet users by forcing them to click on advertisements before they were allowed to leave the site. WIPO Arbitration and Mediation Center, *Administrative Panel Decision, Miller v. Zuccarini* Case No. D2001-0064 § 4(b) (Apr. 25, 2001) <<http://arbitr.wipo.int/domains/decisions/html/2001/d2001-0064.html>> (accessed Oct. 4, 2002). Respondent argued that the word "astrology" was common and could not be protected by a trademark. *Id.* at § 4(C). The panel's response was that "many well-known trademarks are comprised of generic terms." *Id.* at § 5(b).

167. WIPO Arbitration and Mediation Center, *Backstreet Prod.*, *supra* n. 154, at § 8(B) (stating that in these types of instances, an owner of the Internet domain name may intentionally register alternative misspellings of the name in order to direct a customer, or Internet user, who is actually looking for the Web site, but may have made a typographical error).

168. *Id.*

169. *Id.* at § 8(C).

170. For instance, when a search for "Zuccarini" was entered at the Arbitration and Mediation section of the WIPO Web site, 411 results were shown.

<<http://search.wipo.int/query.html?col=&ht=0&qp=&qs=&qc=&pw=100%25&ws=1&la=en&qm=1&si=0&ct=1091973029>> (accessed Oct. 4, 2002).

171. WIPO Arbitration and Mediation Center, *Backstreet Prod.*, *supra* n. 154, at § 9.

172. WIPO, *supra* n. 45.

recent case concerned the German Porsche company.<sup>173</sup> In this case, the dispute was over the domain name “porshe.com.”<sup>174</sup> The name was registered with the Canadian Internet company Tucows, and a complaint was filed with the WIPO by Doctor.Ing.h.c. F.Porsche AG, a company organized and existing under the laws of Germany, and represented by Doctor Rolf Diekmann of Lichtenstein, Körner & Partners.<sup>175</sup>

Complainant, Porsche, asserted and provided evidence that they had “manufactured high-performance cars for over 50 years,” and had been using the name Porsche as a “prominent and distinctive part” of their trade name since.<sup>176</sup> Complainant also asserted that it owns numerous trademarks involving and incorporating the name Porsche, which has worldwide recognition and reputation.<sup>177</sup> Further, the complainant stated that it first acquired protection for its mark, the word Porsche, in 1954.<sup>178</sup> The complainant also stated that it operates Web sites under the Internet domain names “<porsche.de>” and “<porsche.com>.”<sup>179</sup>

In *Porsche*, complainant claimed that the domain name was confusingly similar to their trade name because the domain name was nearly identical except for the omission of the “c.”<sup>180</sup> Further, complainant alleged that the “disputed domain name was intentionally registered to capture users seeking information about the Complainant who inadvertently mipel[led] or mistyped the Complainant’s name.”<sup>181</sup> In this case, as in *Shields* and *Backstreet Productions*, once the Internet user typed in the domain name they were “mousetrapped” or “captured” and forced to click on many individual advertisements before they could leave the site.<sup>182</sup> Complainant further submitted that

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173. WIPO Arbitration and Mediation Center, *Administrative Panel Decision, Doctor. Ing.h.c.f. Porsche AG v. Stonybrook Inv. Ltd.*, Case No. D2001-1095 (Oct. 26, 2001) <<http://arbiter.wipo.int/domains/decisions/html/2001/d2001-1095.html>> (accessed Oct. 4, 2002).

174. *Id.* at § 2.

175. *Id.* at §§ 1-3.

176. *Id.* at § 4.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at § 5(A).

181. *Id.*

182. *See id.*

this “capture” was magnified because once the user entered the Web site, that user was taken “hostage.”<sup>183</sup> The complainant also stated that the respondent, in its opinion, was nothing but a “notorious typosquatter” who was in the business of registering domain names with the intention of trapping Internet users who misspell or mistype well known trademarks while attempting to visit these Web sites.<sup>184</sup> As it turned out, respondent had been involved in previous WIPO Internet domain name disputes.<sup>185</sup>

The WIPO panel found that complainant had proved its trademark in the name “PORSCHE” by extensive evidence, and decided that the domain name in dispute was, in fact, identical to that trade name except for the omission of the “c.”<sup>186</sup> Furthermore, the panel found that the respondent had “no rights or legitimate interests in respect of the domain name” because it had not provided any formal response, and the panel found it appropriate to draw an adverse inference from this failure.<sup>187</sup> Moreover, the panel decided that respondent had registered the domain name for the primary purpose of attempting to obtain commercial gain by luring Internet users to their Web site by creating a likelihood of confusion in using a confusingly similar name to the Porsche name.<sup>188</sup>

One interesting aspect of this case, which is likely a current trend in the way the WIPO panels look at a set of facts, is that this panel took complainant’s comments that the respondent was a “typosquatter,” into account in their decision.<sup>189</sup> In fact, the panel actually reviewed the past decisions in which the respondent had been involved.<sup>190</sup> In reviewing these previous decisions in which respondent was a party, the panel found that the prior cases demonstrated a “course of conduct,

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183. *Id.*

184. *Id.*

185. *Id.* (stating that seven previous panel decisions were referred to by complainant, in which respondent was ordered to transfer forty-five different misspellings of other trademarked names to their rightful owners). The following trade names are examples of misspellings: <ayhoo.com>, <chatyahoo.com>, <eeeyahoo.com>, <eocities.com>, <geocities.com>, <myyahoo.com>, <alfavista.com>, <altavispa.com>, <mcrosoft.com>, <kodack.com>, and <zerox.com>. *Id.*

186. *Id.* at § 6.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

and a pattern of behavi[or]" of the respondent that was probative in showing bad faith.<sup>191</sup>

In sum, the panel decided that the domain name was confusingly similar to complainant's trade name, that the respondent had no rights in the name, and that the domain name was registered and used in bad faith.<sup>192</sup> Therefore, according to the UDRP, the panel required that the domain name be transferred to complainant.

#### IV. CONCLUSION

Internet domain names, cybersquatting, and the right of publicity: where does the right belong in cyberspace? With the combination of the relatively recent issue of the right of publicity, and the rapid growth of the Internet, this is a difficult question to answer. The logical answer is that the right belongs with the trademark owner. Further, decisions by both the courts and the WIPO seem to indicate that the right belongs with the owner even if the trademark is not registered in the traditional sense, but rather, is a name that is well known from fame, or use in the marketplace over an extended period of time. To be sure, new protections have been put into place recently to help keep this right where it belongs, and the WIPO is one of the best to date. Everyday the WIPO settles more and more disputes regarding Internet domain names,<sup>193</sup> and the growing trend seems to favor the WIPO's UDRP over traditional courts, and their enforcement via the ACPA. With the easy to understand steps utilized in the UDRP, the WIPO panelists can handle a large number of cases in a short period of time, thus making it preferable to a long and laborious court battle. It is only fitting that the process for settling Internet domain name disputes be as fast and efficient as the Internet itself.

*Christina M. Lemon\**

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191. *Id.*

192. *Id.* at § 7.

193. WIPO, *Subscribe to WIPO Arbitration and Mediation Center Mailing Lists* <<http://arbiter.wipo.int/subscribe/index.html>> (accessed Oct. 4, 2002).

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