

Unit 20

727-740; Supp 90-95; CB 765-784; supp 96-105; CB 791-799; CB 799-806; supp 105-109; 807-829; supp 109-116

PANAVISION INTERNATIONAL v. TOEPPEN 141 F.3d 1316 (9th Cir. 1998) [727]

Held, Toeppen *did* make 'commercial use' of the mark, hence violated the FTDA.

Toeppen's web page displayed photos of City of Pana, Illinois.

He offered to sell it for \$13K, and offered not to squat on them again.

They refused; he registered more names. In fact, he's a very frequent registrant.

The Federal Trademark Dilution Act provides:

The owner of a famous mark shall be entitled ... to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark

15 U.S.C. §1125(c).

The California Anti-dilution statute is similar. *See* Cal. Bus. & Prof. Code §14330. It prohibits dilution of "the distinctive quality" of a mark regardless of competition or the likelihood of confusion. The protection extends only to strong and well recognized marks.

In order to prove a violation of the Federal Trademark Dilution Act, a plaintiff must show that (1) the mark is famous; (2) the defendant is making a commercial use of the mark in commerce; (3) the defendant's use began after the mark became famous; and (4) the defendant's use of the mark dilutes the quality of the mark by diminishing the capacity of the mark to identify and distinguish goods and services. 15 U.S.C. §1125(c). Toeppen does not challenge the district court's determination that Panavision's trademark is famous, that his alleged use began after the mark became famous, or that the use was in commerce. Toeppen challenges the district court's determination that he made "commercial use" of the mark and that this use caused "dilution" in the quality of the mark.

Problem: "registration of a DN, without more, is not a commercial use" - caselaw view.

Court says the "more" is that Toeppen sells DN's as a business. (like T-shirts?)

Also have to show dilution from this use. Here case for 'blurring' and 'tarnishment' are almost zero. Instead, court finds that

Toeppen's conduct diminished "the capacity of the Panavision marks to identify and distinguish Panavision's goods and services on the Internet." *Id. See also Intermatic*, 947 F. Supp. at 1240 (Toeppen's registration of the domain name, "lessens the capacity of Intermatic to identify and distinguish its goods and services by means of the Internet."). [731]

Toeppen argues he is not diluting the capacity of the Panavision marks to identify goods or services. He contends that even though Panavision cannot use Panavision.com and Panaflex.com as its domain name addresses, it can still promote its goods and services on the Internet simply by using some other "address" and then creating its own web page using its trademarks. **We reject Toeppen's premise that a domain name is nothing more than an address.** A significant purpose of a domain name is to identify the entity that owns the web site. "A customer who is unsure about a company's domain name will often guess that the domain name is also the company's name." *Cardservice Int'l v. McGee*, 950 F. Supp. 737, 741 (E.D. Va. 1997). "[A] domain name mirroring a corporate name may be a valuable corporate asset, as it facilitates communication with a customer base." *MTV Networks, Inc. v. Curry*, 867 F. Supp. 202, 203-204 n.2 (S.D.N.Y. 1994).

Ok, so far, maybe, but this is really dumb:

...potential customers of Panavision will be discouraged if they cannot find its web page by typing in "Panavision.com," but instead are forced to wade through hundreds of web sites. This dilutes the value of Panavision's trademark.

That argument could go *really* far....

OTOH, this has more surface plausibility (but means that the reach of dilution is v. broad):

Toeppen's use of Panavision.com also puts Panavision's name and reputation at his mercy. *See Intermatic*, 947 F. Supp. at 1240 ("If Toeppen were allowed to use 'intermatic.com,' Intermatic's name and reputation would be at Toeppen's mercy and could be associated with an unimaginable amount of messages on Toeppen's web page.").

Summary

Key points here are (1) strong bad faith on part of mass "cyber squatter"; court finds the necessary "commercial use" for ACPA not in any use of the name as a source identifier of goods, but rather in the offering of the name for sale.

In traditional TM terms this doesn't make a whole lot of sense; whether it fits the intent of the ACPA is debatable, but more plausible.

Question: doesn't this fit rather well with the 'breakfast with batman' view of trademarks?

Avery Dennison [732]

EVERY DENNISON CORP. V. SUMPTON 189 F.3d 868 (9th Cir. 1999) [732]
avery.net, dennison.net

Held, no commercial use, avery dennison mark not famous

Held, famousness requirement is key to keeping dilution in check. Need more than distinctiveness - need to 'be truly prominent and renowned.' (*Lund*). Although not necessarily in the whole country:

fame in a localized trading area may meet the threshold element under the Act if plaintiff's trading area includes the trading area of the defendant. S. Rep. No. 100-515, at 43; *Washington Speakers Bureau, Inc. v. Leading Auths., Inc.*, 33 F. Supp. 2d 488, 503-04 (E.D. Va. 1999) (citing *I.P. Lund*, 163 F.3d at 46; *Teletech Customer Care Mgt., Inc. v. Tele-Tech Co.*, 977 F. Supp. 1407, 1413 (C.D. Cal. 1997)). The rule is likewise for specialized market segments: specialized fame can be adequate only if the "diluting uses are directed narrowly at the same market segment."

Avery & Dennison are common surnames. Yes, AD has registrations for them, but still, as there is widespread use of these by many parties, and "when "a mark is in widespread use, it may not be famous for the goods or services of one business""

[survey were no use in establishing fame since they only surveyed their customers]

Also, global sales does not equal global fame:

Avery Dennison - like any company marketing on the Internet - markets its products worldwide. *See* 15 U.S.C. §1125(c)(1)(D). By itself, this factor carries no weight; worldwide use of a non-famous mark does not establish fame. Because famousness requires more than mere distinctiveness, and Avery Dennison's showing goes no further than establishing secondary meaning, we hold that Avery Dennison has not met its burden to create a genuine issue of fact that its marks are famous

Plus registration w/out intent to sell is not 'commercial use' of the MARK even if 'commercial use' of the DN:

Commercial use under the Federal Trademark Dilution Act **requires the defendant to be using the trademark as a trademark, capitalizing on its trademark status.** See *Panavision*, 141 F.3d at 1325. Courts have phrased this requirement in various ways. In a classic “cybersquatter” case, one court referenced the defendants “intention to arbitrage” the registration which included the plaintiff’s trademark. *Intermatic*, 947 F. Supp. at 1239. Another court, whose decision we affirmed, noted that the defendant “traded on the value of marks as marks.” *Panavision Int’l, L.P. v. Toeppen*, 945 F. Supp. 1296, 1303 (C.D. Cal. 1996), *aff’d*, 141 F.3d 1316 (9th Cir. 1998). In our *Panavision* decision, we considered the defendant’s “attempt to sell the trademarks themselves.” 141 F.3d at 1325.

All evidence in the record indicates that Appellants register common surnames in domain-name combinations and license e-mail addresses using those surnames, with the consequent intent to capitalize on the surname status of “Avery” and “Dennison.” **Appellants do not use trademarks qua trademarks as required by the caselaw to establish commercial use. Rather, Appellants use words that happen to be trademarks for their non-trademark value.** The district court erred in holding that Appellants’ use of <avery.net> and <dennison.net> constituted commercial use under the Federal Trademark Dilution Act, and this essential element of the dilution causes of action likewise mandates summary judgment for Appellants....

Summary

9th Circuit says AVER DENNISON isn't diluted by avery.com or dennison.com Starts by saying it's no famous enough [733]. There's a very useful discussion of distinctiveness. Ditto the discussion of channels of trade. Note that these familiar terms are used in a new context, FTDA, but the court weighs them much as it would in an infringement case.

The discussion of commercial use on [736] is interesting: the court here reads commercial use not a 'use in commerce' but rather as 'use trademarks qua trademarks'. Using them for vanity email addresses -- for money! -- doesn't cut it.

TCPIP Holding Co. v. Haar Communications, Inc., 57 U.S.P.Q.2d 1969 (2d. Cir. 2001). [737]

FTDA was inapplicable, because plaintiff failed to show that its mark was both distinctive and famous. Judge Laval said that **distinctiveness is a separate requirement from fame that can only be satisfied by a showing of inherent distinctiveness rather than acquired distinctiveness.** He reasoned that descriptive marks, no matter how famous, lack the requisite distinctiveness and that THE CHILDREN’S PLACE, as descriptive of plaintiff’s chain of children’s apparel and accessory stores, was not entitled to protection under the FTDA:

statute states: “In determining whether a mark is distinctive and famous, a court may consider . . . (A) the degree of inherent or acquired distinctiveness of the mark,” among other listed factors. *Id.* § 1125(c)(1)(A).

As to the second argument, it is incorrect that the concept of acquired distinctiveness has no discernable function in the statute, unless as a substitute for inherent distinctiveness. The list of factors set forth in § 1125(c)(1)(A)-(H) is relevant to two separate questions. The factors are listed as pertinent to the court’s “determination whether a mark is distinctive and famous.” 15 U.S.C. §1125(c)(1) (emphasis added). The “degree of . . . acquired distinctiveness of the [plaintiff’s] mark” is directly relevant to the determination whether the mark is “famous,” as the Act requires. Acquired distinctiveness is the essential ingredient in the determination of fame, within the meaning of the statute. The statute’s requirement of fame is not satisfied by any kind of fame. The mark must have become famous as the designator of the plaintiff’s goods or services. A merchant’s taking a famous name--Shakespeare or Zeus--as the mark for its product would not thereby satisfy the statute’s requirement of fame. It is true, such a mark would be famous in the sense that universal recognition would attach to the name Shakespeare or Zeus. To satisfy the statute, however, the mark must be famous in its capacity as a mark designating the plaintiff’s goods. In other words, to be famous within the meaning of the statute, the mark must have achieved a high “degree of . . . acquired distinctiveness,” meaning that it must have become very widely recognized by the U.S. consumer public as the designator of the plaintiff’s goods.

Because a high “degree of . . . acquired distinctiveness” is crucial to a finding of fame, there is no merit to the proposition that the statute’s reference to acquired distinctiveness would be meaningless unless the element of distinctiveness could be satisfied by acquired distinctiveness. Indeed, it is just the other way around. If the statute’s requirement of distinctiveness could be satisfied by “acquired distinctiveness,” as opposed to “inherent distinctiveness,” the reference to inherent distinctiveness would become superfluous. Why is this so? In order to qualify for the Act’s protection, the mark must be famous. By definition, every mark that is famous, in the sense intended by the Act, has a high degree of acquired distinctiveness. Thus, no mark can qualify for the Act’s protection without acquired distinctiveness. If that acquired distinctiveness satisfies not only the fame requirement, but also the distinctiveness requirement, then there will never be a case when a court needs to consider whether the mark has inherent distinctiveness. The statute’s invitation to courts to consider the mark’s degree of inherent distinctiveness would serve no function.

We therefore understand Clause (A) of § 1125(c)(1) to invite two inquiries: (1) Has the plaintiff’s mark achieved a sufficient degree of consumer

recognition (“acquired distinctiveness”) to satisfy the Act’s requirement of fame?
(2) Does the mark possess a sufficient degree of “inherent distinctiveness” to satisfy the Act’s requirement of “distinctive quality.” The latter requirement cannot be satisfied by the mere fact that the public has come to associate the mark with the source. Thus, weak, non-distinctive, descriptive marks do not qualify for the Act’s protection, even if famous.

Summary

FTDA case

2nd circuit rules not only that "distinctiveness" is a separate requirement from "fame", but that the distinctiveness can only be satisfied by *inherent* distinctiveness not mere *acquired* distinctiveness (2nd meaning). This despite the language of § 1125(c)(a)(A)! Judge Sweet says that the FTDA-relevant role of 2ndary meaning is to take an inherently distinctive mark and make it famous in the sense of making a strong connotation to the source.

This is a tough test.

NB. the notes -- especially 1, 4 [the *Terri Wells* case in n4 (there's a later CTA case in the supp in ch. 12) --even a very famous mark is subject to fair use, and "nominative fair use"--calling a thing by its name (so long as you don't overdo it)] and 8.

Ty v. Perryman [Supp 90-95]

*Please note that the supplement is in error - cert was **denied** by 123 S.Ct. 1750.*

P. makes Beanie Babies

D. sells second hand ones online via www.bbargain-beanies.com

Ty says this is dilutive. (*Note that under the Champion line of cases there infringement case would be very weak*)

CTA agrees the TM are famous. The use is commercial. But Posner asks "what is dilution?"

He offers 3 possible (law & econ) answers...

1. Raising cost of search ('blurring' is one form of dilution)

2. Tarnishment (but see V. Secret?)

3. Free riding in the absence of (1) and (2)

...but it's a bit dicata-ish since he says whatever view you take, there's none of it here.

Note that a contrary ruling would allow famous mark holders to control the aftermarket for their goods. That would be Bad. Very Bad.

Posner also speculates on the relationship between fame and genericism. Well worth thinking

about.

Note especially the questions in the supplement at p. 95 -- and esp question 10 on the issue of "niche market fame".

ACPA [768]

Key features to note:

what exactly is covered

non-exhaustive list of factors

READ CAREFULLY JURISDICTIONAL PROVISIONS (page 784)

Sporty's Farm [770]

This was the first ACPA case in a circuit court. D registered a name somewhat like P's registered mark.

DCT held

CTA affirms DCT on different grounds (ACPA instead of FTDA)

CTA's ACPA ruling depends on a mere 'distinctiveness', notes that there was famousness found in DCT but doesn't reach it. Hence 2nd cir thinks that mere distinctiveness suffices for an ACPA claim. (Compare to Avery Dennison, above).

Court notes [755] that the record shows clear intimations of (attempted? contemplated?) unfair competition by P. against D, and holds that this amounts to bad faith intent to profit from domain name. Key fact is TIMING. Even so, it's weird to say that there was no "wilful" act under FTDA, but bad faith under ACPA. That doesn't really compute.

NB statutory damages in ACPA! First ever in TM law! Also note that ACPA isn't an exclusive remedy; bringing an ACPA claim can be in parallel to dilution, infringement.

MoFo v. Wick [777]

Major issues: Wick's intent. More generally, is being mean to someone you hate 'bad faith' under the statute? Wick argues he's parodying law firms. Court is dubious, it seems to think that his noncommercial web sites could confuse the public and disparage MoFo (question: where in ACAP are these prohibited?) Court finds the commercial use in the diversion of traffic! (Note that this will *always* happen).

Strongest factor for the decision is the finding that Wick might have planned to sell domain names, and his testimony to the contrary wasn't credible. [781] He also at some times falsified his WHOIS contact info -- usually treated as a strong sign of bad faith.

Question: Would a SINGLE hatred site be allowed under the *MoFo* court's reading of ACPA?

Side note: A very odd aspect of this case. p. 778: court doesn't understand you can't register a 3rd level domain name!

A useful reminder: p. 779:: incontestible name is presumptively inherently distinctive

NB how stupid a remedy a 'cancellation' is... the name becomes available for anyone to re-register it.

Jurisdiction under ACPA [784-85]

ACPA creates a new type of jurisdiction that might be called "quasi in rem" or even "para-quasi in rem"

supp 96-105;

Harrods Ltd. v. Sixty Internet Domain Names [Supp 96] (4th Cir. 2002)

HarrodsUK has valid TMs

So does Harrods BA

HUK sued the 60 names in rem in the EDVA (where the registrar and registry are located) under ACPA.

Issue: are constitutional minimum contacts required for an in rem ACPA action, and if required do they exist.

Constitutional Issue

CTA cites *Shaffer* for proposition that usually the 'presence of the property' in the jurisdiction satisfies the constitutional minimum. But what sort of 'property' is this?

Statutory Issue

CTA distinguishes exercise of jurisdiction under §1125(d)(2) from (d)(1).

IE does the act grant jurisdiction only for "bad faith registration with intent to profit" or also, via (d)(1), for infringement and dilution?

The answer -- after a long parsing of the statute that is worth following carefully -- is YES, ACPA grants quasi in rem jurisdiction to bring claims based on infringement, dilution, or bad faith registration. [Note, however, the limited nature of the possible remedies if the jurisdictional basis is just para-quasi-in-rem: § 43(d)(2)(D)(i)]

Hartob v. SWIX.com (EDVA 2001) [791]

Holds that bad faith *intent* is a required element of the ACPA offense.

Proving intent is hard; it tends to be circumstantial. Note the list of factors in ACPA and the way the court applies them at [797-81], and the safe harbor [781]

UDRP [799]

The UDRP is a contract of adhesion imposed by ICANN on all registrants in the gTLDs (.com, .org, .net, .biz etc.)

The UDRP is much faster than an ordinary lawsuit. It's slower than a TRO. UDRP doesn't allow for damages; lawsuits do (except in some ACPA cases against parties who cannot be served). UDRP gives only transfer/cancellation of a mark.

The UDRP outcomes can be challenged in court in the form of a declaratory judgment action. They are not 'appealed' as they are not court decisions or even arbitrations but rather, in law, a private administrative procedure run entirely by private, non-government, parties.

Here's an excerpt from an article of mine that may help you with the UDRP:

Strangely, most of the defining domain name conflicts have not been between competing trademark holders with the same name in different trademark classes, nor between firms with the same name in similar trades located in different places. The modern domain name crisis really began when a small band of speculators – soon dubbed "cybersquatters" – discovered that they could register names that corresponded to trademarks, then try to resell them to trademark holders for large profits. And as attractive domain names in .com began to become scarce, more and more speculators began to register names. Since until recently .com names could be registered with no money down, and thirty days or more to pay, domain name speculation seemed a low-risk, and potentially high-reward business. (Indeed, some time later, Bank of America reportedly bought "Loans.com" for \$3 million dollars.) As the speculators moved from generic names to names that equaled, resembled, or contained, trademarked words belong to large and small corporations, disputes over domain names became increasingly common, and spilled over into the court system. ...

Even with the law on their side, however, trademark holders were increasingly worried and unhappy for three reasons. First, trademark law imposes a substantial burden of monitoring on the holder of a mark. Failure to contest adverse use can result in loss of all or part of one's trademark rights; this need to police trademark rights makes intellectual property lawyers err on the side of aggressiveness. Second, even a successful federal

court case is expensive in money and management time; domain name speculators understood this, and the gap between a \$100 or so registration fee, and the several thousand dollar cost of prosecuting even an easy case provided a substantial profit opportunity. Third, businesses that were slow to come to the Internet found that the names they wanted were already registered to others, and that since these names worked everywhere, they necessarily worked in the locations where the business with the trademark was established, even if the domain name registrant was in the same line of business far away. The obvious technical solution to this problem was to create new TLDs so that everyone could have the second level domain name they wanted– but that only threatened to make the first two problems worse. ...

Meanwhile, the US Department of Commerce, which had become the lead agency for DNS policy, decided that it would prefer not to mediate between dot.coms calling for new TLDs and trademark holders arguing against them. Instead, Commerce decided to 'privatize' the DNS – not incidentally removing itself from the line of fire. It called for a non-profit corporation to form to take over the DNS – a call quickly answered by the founders of ICANN. ...

Commerce charged ICANN with technical coordination of the DNS, but also instructed it to do something about cybersquatting. ... In the UDRP, ICANN imposed on all current and future registrants in .com, .org and .net a requirement that they agree to a third-party beneficiary clause in favor of any person, anywhere, who believes that the registrant's domain name registration infringed the complainant's trademark right. This clause is not optional: ICANN's contract with registrars requires them to include this clause in every registration contract, and to modify existing contracts with their customers; any registrar who failed to do so would find his registrations refused. Under the UDRP, a complainant with a trade or service mark has the burden of demonstrating: (1) that the domain name is identical or confusingly similar to the registrant's use of the domain name; (2) that the registrant has no rights or legitimate interests in respect of the domain name; and (3) that the domain name was registered *and* is being used in bad faith. The UDRP provides a non-exhaustive list of factors that constitute bad faith, such as registering in order to sell it to the mark-holder, and also some defenses, such as legitimate non-commercial use.

The UDRP offers much to trademark registrants seeking to claim domain names from registrants, as the proceeding can cost under \$1000 for one panelist, depending on the complainant's choice of dispute resolution provider. The arbitration runs on a very fast track, with each side entering only exhibits and one short pleading. Save in the most exceptional case (which has yet to occur), there is neither a live hearing nor online argument. Proceedings normally take forty-five days or less from complaint to conclusion. If the Respondent loses, he has ten more days to file a challenge in a competent court, or the domain name is transferred to the Complainant. It is no surprise, therefore that [over 6000 by 2003] cases have been filed under the policy since it began;

of the cases that proceeded to decision to date, more than 75% have been decided for the complainant.

The UDRP's advantages to complainants come, however, at the price of a substantial reduction in registrants' legal rights. First, rather than both sides having equal input into who will decide the case, the complainants choose the arbitral tribunal from a small list of approved providers maintained by ICANN. Respondents have no say in which provider will manage the case, and no peremptory challenges to arbitrators they may fear are biased. Respondents can, however, pick one member of a three-person panel—at their own expense if the complainant opted for a single panelist and the respondent decides three are needed. Overall the system gives dispute resolution providers an economic incentive to compete by being complainant-friendly.

Second, the UDRP does not require actual notice to respondents, only attempted notice for a relatively short period of time. The mere *sending* of the complaint to postal-mail, fax, and e-mail addresses found via whois, and by email to postmaster@<the contested domain name> plus any e-mail address shown or e-mail links on www.domainname suffices to start the 20-day clock going for the respondent's only chance to reply. The decision to forgo requiring actual notice in absolutely all cases is understandable, given the efforts that the sleaziest registrants go to hide their contact details in shady registrations. The short deadlines, on the other hand, are completely unfair. Respondents who happen to take a three-week vacation without e-mail can lose their chance to explain why they should keep their domain name without ever knowing it was endangered.

Third, and most significantly, the consequences of the arbitration discriminate against registrants. UDRP decisions are not “binding”; if the complainant loses, the arbitration does not preclude an attempt to bring the case in court. Non-bindingness is a feature, not a bug, because a summary procedure, in which each side has only one submission, and in which there is neither testimony, cross-examination, briefing, nor argument cannot by itself hope to make reliable credibility determinations or sort out complex competing claims. If the system by design can only resolve the clearest cases of trademark infringement, it follows that complainants with more complex cases should lose, but still be entitled to have their day in court—where sometimes they will deserve to prevail. The problem is that losing respondents are much worse off than losing complainants. A losing registrant has to sue to keep the name, taking on the burden of proof, and possibly being subject to different courts, rules of procedure, language, and choice of law than if the complaint had been forced to litigate where the registrant resides. Worse, under the UDRP a losing respondent is given only ten days to file an action in a court with jurisdiction over the complainant—or in the jurisdiction where the registrar is located—to halt the transfer of the domain name. No injunction is needed, as mere filing of an ordinary complaint suffices to stop the clock, but this still means that either the losing respondent must have hired and probably paid a lawyer in advance, or the loser will need to find representation in a great hurry. This contrasts very unfavorably with the choices

facing a losing complainant, who has as much time to go to court as statutes of limitations or laches will allow – months, or even years. The rule has particularly harsh effects in legal systems such as Mexico's that restrict, or even prohibit, amendments to a complaint once it has been filed, since it means the domain name registrant who loses a UDRP arbitration has less than ten days to find a lawyer and work out his theory and statement of the court case, and no chance to correct errors or omissions caused by the rush.

It can be seen from this list of problems that the procedures used by the UDRP suffer from substantial due process flaws – flaws which would have made the program obviously illegal if the U.S. government had attempted to implement it directly rather than having it done via a ICANN, which is formally an arms-length private body. [5] Worse, although the UDRP's basic substantive rules – which are the sort of compromise that left both sides unhappy – probably are fundamentally sound, what's written down has less effect than one would expect: The dirty secret of the UDRP is that a noticeable fraction of the arbitrators simply don't follow the rules as they are written. For example, as noted above the UDRP states clearly that complainants must have a trademark in order to bring a complaint, that the domain name must be identical or confusingly similar to the trademarked term, and the respondent must have no legitimate right to use the name. Each of these requirements has been ignored with sufficient frequency to make the rapid and inexpensive UDRP seem an attractive gamble to some parties engaged in "reverse domain name hijacking" – seeking to obtain a domain name that they would not be able to get in court. On paper, U.S. federal trademark law after the most recent amendments is more favorable to trademark plaintiffs than the UDRP. Yet, arbitrators under the UDRP have been willing to find names such as directlinesucks, dixonssucks, freeservesucks, guinness-beer-really-really-sucks, guinness-really-really-sucks.com, natwestsucks, standardcharterededsucks, and walmartcanadasucks are "identical or confusingly similar" to a trademarked term without the "sucks" while under standard trademark principles it is very unlikely that a court would find that a consumer would be likely to think that these pejorative terms indicated sponsorship by the company being mocked. Yet, the arbitrator in the walmartedsucks.com case concluded that it "is by no means necessarily" the case that the name "would be recognised as an address plainly dissociated from" Wal-Mart. Although the arbitrator allowed that "Some will treat the additional 'sucks' as a pejorative exclamation and therefore dissociate it after all from the Complainant" he seemed to think that some people were not clever enough to make this distinction and would be "confused." Courts usually have a more robust view of the IQ of consumers. Furthermore, in the U.S., most of the 'sucks' sites would be constitutionally protected speech, even if they were potentially confusing, so long as they were purely non-commercial.