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# The First Amendment on the Internet: Challenges in a New Media

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## THE FIRST AMENDMENT ON THE INTERNET: CHALLENGES IN A NEW MEDIA

Eric D. Paulsrud<sup>†</sup>

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### I. INTRODUCTION

With the passage of time and the advent of unforeseen advances in technology, constitutional law faces new challenges. Over the past half century, major breakthroughs in communications technology have greatly expanded the breadth of human communication. The Internet is the latest of these revolutions in communications. The Internet provides an unprecedented level of access to persons who wish to state their point of view or sell their goods or services. The rising level of speech on the Internet, some of it raw and harsh, spurred the inevitable calls for regulation, civility and censorship. In response, Congress reacted with the Communications Decency Act of 1996 (CDA). The United States Supreme Court responded by declaring the CDA unconstitutional and firmly stated that communications over the Internet are entitled to the full protection of the First Amendment. As a result, disputes over domain names, "cybergripping," and web page content are guided

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by First Amendment principles.

## II. HISTORICAL DEVELOPMENTS

There have been three major technological innovations over the past five hundred years that have radically transformed the dissemination of information and the power of the speaker. The first major transformation was Gutenberg's invention of movable type for the printing press and the printing of the Gutenberg Bible over 500 years ago. The movable type printing press not only eased the ability to make copies, but also radically changed the power of speakers and allowed them to reach a vastly expanded audience through the medium of printed works.

The second major revolution was the advent of electronic broadcasting. Radio and television further expanded the reach of speakers, but still at a relatively high cost to the speaker. Both of these prior revolutions also quickly developed to interpose editorial control over the message.

The third major revolution was the Internet. Unlike the prior two revolutions, the Internet revolution has virtually no barrier to entry to any speaker wishing to set forth his or her viewpoint. With those barriers down, businesses face increasing attacks from unfamiliar quarters. Such challenges to a company's reputation and brand were extremely rare when the speaker was faced with the high cost barriers posed by the print and broadcast media. "Each new media, as it was introduced, changed the balance of power in the constitutional equation involving the First Amendment."<sup>1</sup> The Internet permits both sophisticated businesses and the activist gadfly nearly equal opportunity to convey their message across the entire Internet. In addition, virtually all editorial controls have been removed.

## III. THE INTERNET AND THE FIRST AMENDMENT

The Supreme Court has recognized the dramatic impact of the Internet in widely opening the opportunity for expressive speech.

This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a

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1. Ford Motor Co. v. Lane, 67 F. Supp. 2d 745, 753 (E.D. Mich. 1999).

voice that resonates farther than it could from any soap-box. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer .... [T]he content on the Internet is as diverse as human thought.<sup>2</sup>

### A. *Obscene Speech*

As with other mediums before it, the level of First Amendment protection to be afforded the new medium of the Internet was decided in the context of obscene and indecent speech. "Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards."<sup>3</sup> "Sexual expression which is indecent but not obscene is protected by the First Amendment."<sup>4</sup> The government is pressured to regulate "indecent" expression in each new medium.

#### 1. *Broadcast Media*

The Supreme Court observed that "[e]ach new medium of expression ... may present its own problems."<sup>5</sup> With the emergence of the radio and television broadcast media, the Supreme Court recognized special justifications for the regulation of the broadcast media that are not applicable to print media.<sup>6</sup> As a result, material that would be acceptable in other contexts may be prohibited from broadcast on the public airwaves.

In *FCC v. Pacifica Foundation*,<sup>7</sup> the Supreme Court held that the FCC could regulate speech which was merely indecent but not obscene. George Carlin's comedy monologue of Seven Filthy Words, admittedly protected speech, could therefore be regulated on the public airwaves. The factors that the Supreme Court relied on in upholding this restriction on speech in the public broadcast medium are: (1) an extensive history of Government regulation in the

2. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

3. *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978); *see also Miller v. California*, 413 U.S. 15, 23 (1973); *Roth v. United States*, 354 U.S. 476, 492 (1957).

4. *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1975).

5. *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975).

6. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (upholding FCC regulation of "obscene, indecent, or profane" language used in public broadcast medium); *see also Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) (upholding FCC regulation requiring broadcasters to permit response time to subjects of criticism).

7. 438 U.S. at 748.

broadcast medium, (2) the scarcity of available frequencies, and (3) the invasive nature of the medium.<sup>8</sup>

## 2. *The Communications Decency Act Of 1996*

The Communications Decency Act of 1996 (CDA)<sup>9</sup> was Congress' attempt to regulate indecent speech on the Internet. The CDA sought to prohibit the transmission of obscene or indecent messages<sup>10</sup> or "patently offensive" messages<sup>11</sup> to persons under 18 years of age. The Supreme Court found the CDA unconstitutional in *Reno v. American Civil Liberties Union* because the factors justifying the regulation of public broadcast media were "not present in cyberspace."<sup>12</sup> The Court also found that the argument that government's interest in protecting children justified the restriction on speech intended for adults was unpersuasive.

[T]hat interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not reduc[e] the adult population ... to ... only what is fit for children. [R]egardless of the strength of the government's interest in protecting children, [t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.<sup>13</sup>

The Supreme Court has plainly ruled that the Internet is to receive the same broad level of First Amendment protection that the traditional print media has enjoyed. The Court stated "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."<sup>14</sup> The special factors justifying closer regulation of broadcast media do not apply to the Internet.<sup>15</sup> As a result, the Internet presents and will continue to present a "rough and tumble" environment for presenting opposing views and opinions. That does not mean, however, that the Internet is an open forum with no restrictions on expression. Just

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8. *Reno*, 521 U.S. at 867.

9. 28 U.S.C. §§ 223(a)-(e) (2000).

10. *Id.* § 223(a).

11. *Id.* § 223(d).

12. *Reno*, 521 U.S. at 847.

13. *Id.* at 875 (quoting Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996); *Bolger v. Young Drugs Prods. Corp.*, 463 U.S. 60, 74-75 (1983); *Sable Communications of Cal.*, 492 U.S. at 128).

14. *Reno*, 521 U.S. at 869.

15. *Id.* at 868-69.

as the First Amendment has boundaries in other media, it also has boundaries on the Internet.

### B. *False And Deceptive Speech*

Just as with any other media, false or deceptive speech does not enjoy First Amendment protection on the Internet. Justice Oliver Wendell Holmes recognized that “[t]he most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic.”<sup>16</sup> The application of the truthful or deceptive principle for the protection of speech can bring some general harmony to a number of disputes involving brands used in domain names, metatags, and search engines. A growing body of precedent has established that trademarks cannot be used or misused as domain names when the intent of the domain name holder is to deceive the audience. It is equally important, however, to recognize that the use of a trademark by someone other than the trademark owner in a domain name can be expressive speech and therefore protected by the First Amendment.

Domain names ... per se are neither automatically entitled to nor excluded from the protections of the First Amendment, and the appropriate inquiry is one that fully addresses particular circumstances presented with respect to each domain name. Whether a particular domain name is entitled to protection under the First Amendment depends on the extent of its communicative message.<sup>17</sup>

Thus, use of another’s trademark is entitled to First Amendment protection when the use of the mark is part of a communicative message.<sup>18</sup>

Use of the mark as part of the domain name for the purpose of deceiving Internet users into accessing a web site not associated with the trademark owner is not entitled to protection under the First Amendment.<sup>19</sup> For example, a person opposing the views of the organization “Jews for Jesus” could not use the domain name “Jews for Jesus” to deceive a person who is looking for information

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16. *Shenck v. United States*, 249 U.S. 47, 52 (1919).

17. *OBH, Inc. v. Spotlight Magazine, Inc.*, 86 F. Supp. 176, 197 (W.D.N.Y. 2000).

18. *Id.*

19. *Id.*

on the legitimate organization.<sup>20</sup> Planned Parenthood won a similar victory over the owner of *plannedparenthood.com* who sought to present an opposing viewpoint by misleading Internet users.<sup>21</sup> Likewise, the organization, Persons for the Ethical Treatment of Animals, commonly known as PETA—successfully blocked and forced the transfer of the domain name “*peta.org*” to the legitimate organization.<sup>22</sup> “*Peta.org*” had been used by an individual who opposed PETA’s viewpoint and claimed that his use of the acronym stood for “Persons Eating Tasty Animals.” This humorous jibe at PETA’s views did not obviate the fact that the use of “*peta.org*” misdirected individuals looking for the original organization.

In each of these examples a visitor to the deceptive site would quickly realize the deception and would not likely be confused for any appreciable amount of time. The courts were not impressed with this argument. Each of the domain names was used in a deceptive manner to misdirect Internet users seeking the genuine site. In addition, the domain name in each of these examples did not itself contain an expressive message; the domain names were simply the trademarks of the company. “Use of another entity’s mark is entitled to First Amendment protection when [the] use of that mark is part of a communicative message, not when it is used to identify the source of a product.”<sup>23</sup>

In these cases, the domain names actually “mis-identified” the source of the web page that the user accessed. While each of the web sites themselves contained speech normally protected by the First Amendment, the deceptive nature by which the legitimate company’s name was used for the domain name was not entitled to receive First Amendment protection. In each of these examples the plaintiff’s mark could have been used as part of a domain *if* the use of the mark had been used as part of a nondeceptive expressive message.

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20. *Jews for Jesus v. Brodsky*, 993 F. Supp. 282 (D.N.J. 1998), *aff’d*, 159 F.3d 1351 (3rd Cir. 1998).

21. *Planned Parenthood Fed’n of Am., Inc. v. Bucci*, No. 97 Civ. 0629, 1997 WL 133313, at \*1 (S.D.N.Y. Mar. 24, 1997), *aff’d*, 152 F.3d 920 (2d Cir.), *cert. denied*, 525 U.S. 834 (1998).

22. *People for the Ethical Treatment of Animals, Inc. v. Doughney*, 113 F. Supp. 2d 915 (E.D. Va. 2000).

23. *Planned Parenthood Fed’n of Am., Inc.*, 1997 WL 133313, at \*10; *see also Morrison & Forester LLP v. Wick*, 94 F. Supp. 2d 1125, 1134 (D. Colo. 2000).

### C. *Cybergripping*

These examples of a deceptive use of a company's name should be contrasted with nondeceptive use of a company's name in a domain name.

[D]omain names may be employed for a variety of purposes, both functional and expressive elements, ranging from the truly mundane street address or telephone number-like identification of the specific business that is operating the web site, to commercial speech and even core political speech squarely implicating First Amendment concerns.<sup>24</sup>

Where the domain name uses the company's brand in such a manner that it is expressive and not likely to deceive a consumer, the First Amendment may prohibit the trademark owner from wresting away the domain name or otherwise shutting down a site that is engaged in protected speech. This is what happened to Bally Total Fitness when a disgruntled former member began using the phrase "Bally Sucks" in his domain name.<sup>25</sup> Even if the criticisms of Bally were unjustified, Justice Brandeis long ago stated, "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."<sup>26</sup> This enduring principle of more speech versus restricting speech is a valued principle in First Amendment jurisprudence.

"Registering domain names in the form of [company name]sucks.com to provide a forum for critical commentary is not uncommon and is part of an Internet phenomenon known as 'cybergripping.'"<sup>27</sup> For a continuing example of this principle, simply go to [walmartsucks.com](http://walmartsucks.com). While Wal-Mart does not appear to have challenged the owner of [walmartsucks.com](http://walmartsucks.com), the company has been successful in an administrative Uniform Domain Name Dispute Resolution Policy (UDRP) proceeding<sup>28</sup> against the registrants of

24. *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 585 (2d Cir. 2000).

25. *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1162 (C.D. Cal. 1998).

26. *Id.* at 1166.

27. *Lucent Techs., Inc. v. LucentSucks.com*, 95 F. Supp. 2d 528, 536 n.9 (E.D. Va. 2000).

28. On October 24, 1999, the Internet Corporation for Assigned Names and Numbers (ICANN) approved the Uniform Domain Name Dispute Resolution Policy (UDRP). The sole function of this policy is to resolve disputes between trade-



walmartcanadasucks.com, wal-martcanadasucks.com, walmartuksucks.com and walmartpuertoricosucks.com.<sup>29</sup> Wal-Mart was successful against the registrant of these domain names because the UDRP Panel found the domain names were not registered "in order to express opinions or to seek the expression of opinions of others. The record indicates that [the registrant's] intention was to extract money from [Wal-Mart]."<sup>30</sup>

Two relatively new federal statutes have been enacted to give trademark owners greater protection of their mark: the Federal Trademark Dilution Act<sup>31</sup> and the Anti-Cybersquatting Consumer Protection Act (ACPA).<sup>32</sup> Both of these statutes provide protection for First Amendment speech.<sup>33</sup> The UDRP also recognizes a de-

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mark holders and domain name registrants. The policy is effectively incorporated into every generic top level domain (gTLD) (e.g. .com, .net and .org) registration. ICANN is the non-profit corporation that was formed in October 1998 to take over responsibility for the IP address space allocation, protocol parameter assignment, domain name system management, and root server system management functions performed under United States government contract by the Internet Assigned Numbers Authority (IANA) and other entities. ICANN, Uniform Domain Name Dispute Resolution Policy, at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (approved Oct. 24, 1999).

29. Wal-Mart Stores, Inc. v. Walsucks and Walmart Puerto Rico, Case No. D2000-0477 (WIPO, July 20, 2000), at <http://arbiter.wipo.int/domains/decisions/html/d2000-0477.html>.

30. *Id.*; see also Nat'l Westminster Bank PLC v. Purge I.T., Case No. D2000-0636 (WIPO, Aug. 13, 2000), at <http://arbiter.wipo.int/domains/decisions/html/d2000-0636.html>. In the National Westminster Bank UDRP action, the domain name natwestsucks.com was registered for the purpose of preventing protesters from using the site and selling the site to National Westminster Bank at a premium. The arbitrator concluded that the registrant acted in bad faith in registering the domain name because it was actually motivated by a desire to suppress free expression and profit by selling the site to the bank. *Id.*

31. 15 U.S.C. § 1125(c) (2000).

32. *Id.* § 1125(d).

33. *Id.* § 1125(c) (4). The Federal Trademark Dilution Act does not apply to noncommercial use of a mark and all forms of news reporting and news commentary. *Id.* In the First Amendment context, the Supreme Court has defined "commercial speech" as "speech which does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). The Congressional Record amply supports that the bill was not intended to alter existing case law of what constitutes "commercial speech." H.R.REP. NO. 103-374, reprinted in U.S.C.C.A.N. 1029, or affect the First Amendment protection afforded to parodies and other forms of noncommercial speech. 141 CONG. REC. S19,312-01 (daily ed. Dec. 29, 1995) (statement of Sen. Leahy) ("parody, satire, editorial, and other forms of expression will remain unaffected by this legislation"); 141 CONG. REC. S19,306-10 (daily ed. Dec. 29, 1995) (statement of Sen. Hatch) ("The bill will not prohibit or threaten noncommercial expression, such as parody, satire, editorial and other forms of expression that are not part of a commercial transaction."); and 141 CONG. REC. H14,317-01 (daily ed. DEC. 12,

fense for “legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.”<sup>34</sup>

#### D. Parody

In addition to “cybergripping” sites, parody sites are also popular on the Internet and a constant source of irritation to the individuals or companies that are the subject of the sometimes caustic sites. “Parody is a humorous form of social commentary and literary criticism that dates back as far as Greek antiquity.”<sup>35</sup> The Supreme Court has observed that “parody has an obvious claim to transformative value” that, like other forms of criticism, is deserving of First Amendment protection.<sup>36</sup>

A parody “must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is not the original and is instead a parody.”<sup>37</sup> A parody depends on the lack of confusion to make its point.<sup>38</sup> The fact that the parody may be coarse or fail, or that some persons (particularly the person or company who is the brunt of the parody) may not see the humor does not deprive the parody of protection.<sup>39</sup> The fact that the parody is associated with a product that makes a commercial profit does not strip it of First Amendment protection. Speech “is protected even though it is carried in a form that is ‘sold’ for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute

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1995) (statement of Rep. Moorehead) (same).

The ACPA requires a finding of “bad faith” in order for the plaintiff to prevail. The statute provides that “bad faith intent ... shall not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful.” 15 U.S.C. § 1125(d)(1)(B)(ii) (2000).

34. ICANN Uniform Domain Name Dispute Resolution Policy, § 4(c)(iii) (1999), at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (approved Oct. 24, 1999).

35. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 28 (1st Cir. 1987), cert. denied, 483 U.S. 1013 (1987).

36. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

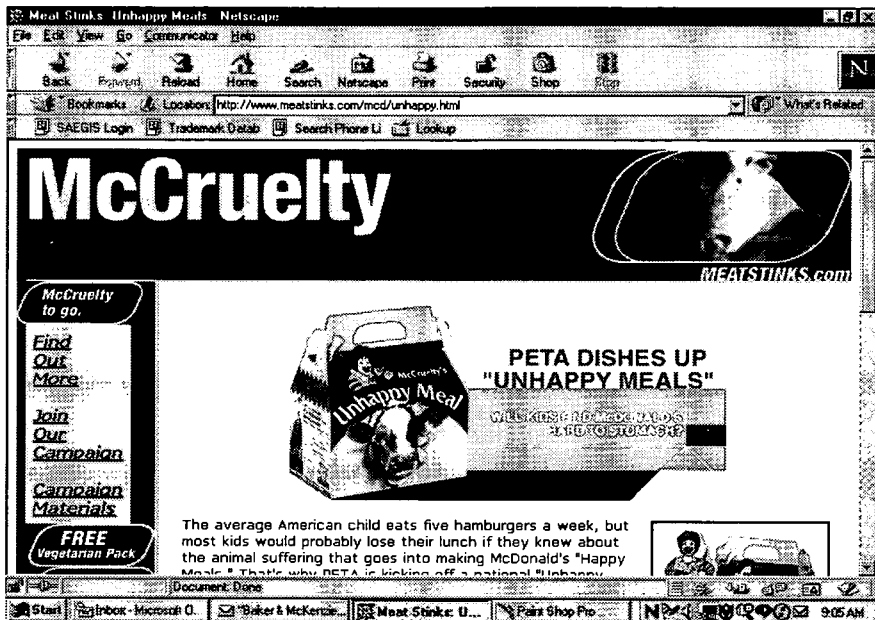
37. *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 503 (2d Cir. 1996).

38. *Id.*; see also *Cardtoons, L.C. v. Major League Baseball Players Ass’n.*, 95 F.3d 959, 970 (10th Cir. 1996); *Jordache Enter., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1486 (10th Cir. 1987); *L.L. Bean, Inc.*, 811 F.2d at 28.

39. *Campbell*, 510 U.S. at 583 (“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.”). Similarly, a parody does not have to label itself as such in order to receive First Amendment protection. *Id.* at 583 n.17.

money.”<sup>40</sup>

Because of the wide protection given to speech which is both nondeceptive and noncommercial, PETA may conduct a parody on its site of the famous Ronald McDonald character as shown below and claim full First Amendment protection.



PETA's speech is arguably legitimate commentary about McDonald's, and the speech is noncommercial in nature. PETA does not mislead or misdirect McDonald's customers by use of a deceptive domain name. As a result, McDonald's may be able to do little under the trademark law because there is no likelihood of confusion. Likewise, it has little redress under the anti-dilution statute because commercial use is an essential element of any dilution claim. Indeed, if you visit the current PETA site<sup>41</sup> you will see that PETA claims its campaign has been successful.

The PETA example can be contrasted with a television commercial in which a competitor of John Deere Company used the famous John Deere logo. The John Deere logo was made to "leap" off the John Deere tractor and run away in apparent fear from the

40. *Va. State Bd. of Pharmacy*, 425 U.S. at 761.

41. <http://www.meatstinks.com/mcd/index.html>.

competitor's tractor.<sup>42</sup> Because this use of the John Deere logo was clearly in connection with commercial speech, the court had little difficulty in enjoining this activity.

The precise boundaries of a parody protected by the First Amendment and one that runs afoul of another's intellectual property rights are sometimes difficult to draw. The decisions in this area turn on subtle distinctions between trademark, copyright and right of publicity law and the role of intellectual property in our lives.<sup>43</sup> The assertion of "parody" is not a simple answer to a complex question that is beyond the scope of this article.

### E. *Prior Restraints*

The First Amendment's prohibition against prior restraint of speech is also alive and well on the Internet. Accordingly, if a company's trade secrets are being disseminated over the Internet it may be impossible to halt that activity.<sup>44</sup> The Supreme Court has long stated that "prior restraints may be issued only in rare and extraordinary circumstances, such as when necessary to prevent the publication of troop movements during time of war, to prevent the publication of obscene material and to prevent the overthrow of the government."<sup>45</sup> One judge, in an attempt by Ford to restrain an Internet user from disseminating Ford's trade secrets, bluntly stated, "private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint."<sup>46</sup> Web sites established to criticize businesses are also protected.<sup>47</sup> "Just because speech is critical of a corporation and its business practices is not a sufficient reason to enjoin the speech."<sup>48</sup>

## IV. CONCLUSION

The First Amendment is alive and well on the Internet. That does not mean, however, that there are no disputes or that free

42. *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 41 (2d Cir. 1994).

43. *White v. Samsung Elec. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, Circuit Judge, dissenting). Judge Kozinski describes a broad list of attempts to stifle creative works through the assertion of intellectual property rights. *Id.*

44. *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 745 (E.D. Mich. 1999).

45. *Near v. Minn. ex. rel. Olson*, 283 U.S. 697, 716 (1931).

46. *Ford Motor Co.*, 67 F. Supp. 2d at 752.

47. *CPC Int'l, Inc. v. Skippy, Inc.*, 214 F.3d 456, 462 (4th Cir. 2000).

48. *Id.*

speech is being universally protected. Litigants with greater financial resources will always be able to use the heavy cudgel of the legal system to stifle some expression and cause others to impose self-censorship. The *Noerr-Pennington*<sup>49</sup> doctrine largely undercuts the ability of a defendant to successfully counter-claim that intellectual property rights are being asserted in bad faith for the improper purpose of suppressing speech. UDRP proceedings are being resolved dramatically in favor of the established intellectual property owners and against the domain name holders.<sup>50</sup> Justice Frankfurter observed "freedom of expression is the well-spring of our civilization."<sup>51</sup> The avenues to speech on the Internet are virtually unlimited and efforts to suppress freedom of expression will inevitably fail in a society founded on that ideal.

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49. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 659 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129 (1961). Although *Noerr-Pennington* originated in the antitrust context, it has been held to apply to other types of cases, and may be applicable to intellectual property misuse claims. There is an exception to the *Noerr-Pennington* doctrine known as the "sham" lawsuit exception, but it is a narrow exception. In *Real Estate Prof'l Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57 (1993), the Supreme Court said that in order for the litigation to be a "sham," it must be shown to be objectively meritless.

50. World Intellectual Property Organization (WIPO) case results, available at <http://arbiter.wipo.int/domains/statistics/results.html>. As of the end of August 2000, of the 492 completed cases, only fifteen percent were decided in favor of the domain name holder. *Id.*

51. *Dennis v. United States*, 341 U.S. 494, 550 (1951).