

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ALITALIA-LINEE AEREE ITALIANE S.P.A.)
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Plaintiff,)
)
)
v.) 00 civ. 9731 (Judge Berman)
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WILLIAM PORTA,)
)
)
Defendant.)

MEMORANDUM IN OPPOSITION TO PRELIMINARY INJUNCTION

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This is a free speech case. Defendant established a web site at www.alitaliasucks.com to express his displeasure at the way the plaintiff treated his claim for lost baggage and to warn other consumers against using Alitalia. Plaintiff has sued under various federal and state trademark theories, primarily the new “cybersquatting” statute, as a basis for suppressing this criticism., and now seeks a preliminary injunction. Alitalia seems to think that the law prohibits its dissatisfied customers from complaining about it by its trademarked name. However, defendant’s criticism is protected by the First Amendment, and in any event the trademark laws do not apply because the criticism is completely non-commercial. Moreover, the domain name is not “confusingly similar” to Alitalia, defendant’s use of the name is not a trademark use at all, but is, rather, a fair use to make the plaintiff a target for his criticism, and there was no “bad faith” as required for application of the cybersquatting law. Accordingly, the preliminary injunction should be denied.

STATEMENT

This case arises out of a dispute between plaintiff Alitalia and defendant William Porta, one of its former customers. As recounted in detail in his affidavit, ¶¶ 2-8. Porta flew on Alitalia to India this past fall to be the best man at a friend’s multi-day wedding. His trip was less happy than it might otherwise have been because his luggage, containing formal clothing that Porta need for the wedding, was lost in transit. Porta was repeatedly promised that he would receive recompense, in various forms, and these promises were not kept; in addition, because he was initially told that his baggage had been found and would be sent to him promptly, he postponed buying new formal clothing and hence had to attend wedding ceremonies in the inappropriate attire in which he had traveled. Porta ultimately wrote a letter to Alitalia, dated October 26, 2000, detailing his concerns.

When Alitalia continued to procrastinate, Porta registered the name <http://www.alitaliasucks.com> on December 10, 2000, and used it to publish his October 26 letter. *Id.* ¶ 9. The web site is completely non-commercial – it carries no advertising, it sells no goods, and it does not link to any

commercial sites. *Id.* ¶ 14. Its sole function is to set forth Porta’s criticisms of Alitalia’s treatment of Porta, *id.* ¶ 13, as well as documents portraying Alitalia’s attacks on his free speech rights.

Alitalia learned of the site on December 12. One week later, Alitalia proposed to pay Porta a small portion of what he thought he had been promised, with payment to be sent in another month. *Id.* ¶¶ 10-11. Alitalia explained its small payment by invoking the Warsaw Convention, but it made no excuse for failing to honor its prior promises of higher and immediate payment. And when Porta refused to remove his web site in gratitude for this new promise of smaller payment at a later date, plaintiff filed this suit seeking to enjoin Porta from continuing to publish his criticisms on the Internet.

Plaintiff’s theory is that, because “alitaliasucks” contains “alitalia,” consumers will be misled into visiting and staying at his web site because they may believe that it was sponsored by Alitalia. Apart from the facial absurdity of this allegation, Porta’s affidavit demonstrates that this assumption is false. To be sure, consumers sometimes try to find a company’s site on the Internet by typing the sequence “www.companyname.com” into their web browsers. Porta Affidavit ¶ 17. But nobody looks for a company by going to “www.companynamessucks.com..” *Id.* ¶ 22. Although the use of the word “Alitalia” on his web page and as **part** of the domain name might draw consumers through a search engine, *id.* ¶ 19, that is because consumers use search engines to look for a variety of information about companies, and not simply in order to do business with them. *Id.* ¶ 21. Any consumer finding Porta’s web site in a search engine’s list of relevant sites would see a description sufficient to inform them that his was a critical site, and not one sponsored by Alitalia. *Id.* ¶ 20.

The complaint alleges that the domain name “www.alitaliasucks.com” was registered in bad faith because it was adopted only after Alitalia invoked the Warsaw Convention to limit its payments for Porta’s lost baggage, for the purpose of exacting additional payment. In fact, the name was

registered before the company took this position, at a time when plaintiff had dishonored both its repeated promises to provide any compensation to Porta, and the timetables it set for itself to respond to his complaints. *Id.* ¶ 9. And the purpose for registering the site was not to force the airline to make any particular payment, but to call the public's attention to Alitalia's conduct.

This case was filed on December 22, 2000, but no effort was made to obtain emergency relief until undersigned counsel, Mr. Levy, contacted plaintiff's counsel on January 4 and asked for a brief extension of time to file a motion to dismiss. During that conversation, plaintiff's counsel stated that he **might** move for a preliminary injunction. The very next day, plaintiff moved for a preliminary injunction and restraining order. In seeking a TRO, plaintiff argued that it should not have to notify defendant before filing its motion because continued operation of the web site could cause it irreparable injury. In recounting Mr. Levy's call, plaintiff's counsel does not mention Mr. Levy's offered to discuss the possibility of refraining from registering with search engines (which might be deemed a change in the status quo) pending a motion to dismiss. And, while the TRO motion was pending (unbeknownst to defendant), plaintiff's counsel deliberately did not return telephone calls from Mr. Levy, who had hoped to discuss the schedule for the case. *See* January 12 letter from Paul Levy to Nicholas Pantelopoulos. Only because of the happenstance that defendant requested a pre-motion conference for a motion to dismiss did the Court have any inkling of his arguments.

The Court denied the TRO, but set a hearing on the motion for a preliminary injunction; the first time defendant learned of the pendency of these proceedings was when plaintiff served the order to show cause with motion papers attached. We now explain why that motion should be denied.

I. ENFORCEMENT OF PLAINTIFFS' CLAIMS WOULD VIOLATE THE FIRST AMENDMENT.

Enforcement of Alitalia's claims would violate the First Amendment. In trademark cases,

unlike copyright cases where fair use is co-extensive with the First Amendment, *e.g., Harper & Row v. Nation Enterprises*, 471 U.S. 539, 560 (1985), First Amendment considerations routinely receive separate discussion, although they also inform statutory interpretation. Where, as is true here, the defendant is engaged in non-commercial speech, the mere application of trademark law may violate the First Amendment, *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 32-33 (1st Cir. 1987). Even if a trademark has been used in a commercial context, courts are required to construe the trademark laws narrowly to avoid impingement on First Amendment rights, *e.g., Cliffs Notes v. Bantam Doubleday*, 886 F.2d 490, 494 (2d Cir. 1989); First Amendment interests are weighed as a factor in deciding whether a trademark violation should be found, *e.g., Anheuser-Busch v. Balducci Publications*, 28 F.3d 769, 776 (8th Cir. 1994); and injunctions must be narrowly crafted to comply with the general and virtually absolute rule against prior restraints of speech. *Id.* at 778; *Better Business Bureau v. Medical Directors*, 681 F.2d 397, 404-405 (5th Cir. 1982). The new cybersquatting law contained a savings clause that expressly preserves all defenses under the First Amendment. Public Law 106-113, Section 3008, 113 STAT. 1501A-551. Thus, despite the general principle that requires a court to consider statutory issues first, thus avoiding the need to decide constitutional issues, in this case we begin with the First Amendment.

A. Porta's Non-Commercial Speech Enjoys Full First Amendment Protection.

Plaintiff's action to enforce its trademark implicates the First Amendment even though plaintiff is not a government actor. An injunction sought by private parties is still government action by a court, which is therefore subject to scrutiny under the First Amendment.¹

Nor can it be disputed that Porta's web site is protected by the First Amendment. Numerous

¹*Shelley v. Kraemer*, 334 U.S. 1, 14-15 (1948); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); see also *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224-225 (6th Cir. 1996).

cases hold that consumer commentary is core speech protected by the First Amendment. In *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), the Supreme Court applied the *New York Times* standard to a libel action brought by a manufacturer claiming that a consumer group had maligned its product. Many other cases have similarly treated criticisms of a company's products or business practices as speech protected by the First Amendment.²

Porta's use of the domain name "alitaliasucks" is just the sort of consumer commentary that courts fastidiously protect. Porta's criticisms would be wholly mysterious — indeed, they would be pointless — if he had to omit the name of the company he is criticizing. This is core speech that is fully protected by the First Amendment.

Furthermore, it is not just the web site generally, but Porta's use of plaintiff's trademark in his domain name, that constitute protected speech. The courts have repeatedly held that the use of trademarks constitutes speech within the protection of the First Amendment.³ Use of a trademark in the domain name is analogous to the use of a trademark in the title of a creative work, to which the courts give First Amendment protection because it is part of the author's expression, calling attention to the fact that the work in question contains content that may interest them.⁴ By the same token, Porta's use of Alitalia's name in his domain name, when coupled with the word "sucks," serves to communicate to web users that his site that contains negative information about that

² E.g., *Semco v. Amcast*, 52 F.3d 108, 111-114 (6th Cir. 1995); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1119-1121 (8th Cir. 1999); *U.S. Healthcare v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 927-939 (3d Cir. 1990); *Mattel v. MCA Records*, 28 F. Supp. 2d 1120, 1144-1145 (C.D. Cal. 1998).

³E.g., *Bad Frog Brewery v. New York State Liquor Authority*, 134 F.3d 87, 94-97 (2d Cir. 1998); *ACLU of Georgia v. Miller*, 977 F. Supp. 1228, 1233 (N.D. Ga. 1997).

⁴E.g., *Twin Peaks Production v. Publications Int'l*, 996 F.2d 1366, 1379 (2d Cir. 1993); *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).

company.⁵

Even if the only purpose of a domain name was to show the **sponsor**, and not the topic, of a web page, the proposition that the use of particular words is not speech if their only purpose is to denote the source of the speech is fallacious. There are numerous cases in which courts have held, for example, that signs or billboards indicating the presence of a particular vendor are speech protected by the First Amendment.⁶ Similarly, there are many cases where the desire of a professional or other business person to use a particular name for its operation has been treated as a First Amendment issue, although in some such cases the First Amendment rights have been overcome by other government interests. *E.g., Friedman v. Rogers*, 440 U.S. 1 (1979).

In many cases, the courts have struggled with the question of whether a particular use of trademarks constituted commercial or non-commercial speech. This question is significant not only because Congress limited the application of section 43 of the Lanham Act to cases of commercial speech, see sections 43(a)(1)(B) and 43(c)(4)(B), 15 U.S.C. §§ 1125(a)(1)(B), 1125(c)(4)(B), but also because commercial speech, although protected by the First Amendment, has a lesser status than non-commercial speech, and thus does not benefit from all of the doctrines developed to protect non-commercial speech. *Dun & Bradstreet v. Greenmoss Bldrs.*, 472 U.S. 749, 762-763 (1985). Indeed,

⁵*Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1165 (C.D. Cal. 1998) (upholding use of Bally trademark in both web site and site's internet address); *see also Playboy Enterprises v. Netscape Communications*, 55 F. Supp. 2d 1070, 1083 (C.D. Cal. 1999) (citing "First Amendment interests at stake" where defendants used plaintiffs' trademarks in machine-readable code to decide which advertisements to show users of search engine who included word "playboy" in a search for sites), *aff'd* 202 F.3d 278 (9th Cir. 1999); *Playboy Enterprises v. Welles*, 7 F. Supp. 2d 1098, 1103 (S.D. Cal. 1998) (upholding right of former "Playmate" to use Playboy trademarks in meta tags for her self-promotional commercial web site, with no mention of First Amendment).

⁶*E.g., Metromedia v. San Diego*, 453 U.S. 490 (1981); *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987). *See also Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328 (C.D. Cal. 1989) (striking down ordinance regulating signs identifying businesses in foreign language).

recognition that the First Amendment would bar claims for false statements in non-commercial speech underlay Congress' establishment of the "commercial" requirement in section 43. *Semco v. Amcast*, 52 F.3d 108, 111-112 (6th Cir. 1995) (quoting extensively from the legislative history).

Thus, when one company has, in the course of an advertising campaign, made statements about another company's products, the courts in cases like *Semco* have hammered out a multi-factor test to determine when the statements are non-commercial, and thus entitled to full First Amendment protection, or commercial, and thus entitled only to have their First Amendment interests weighed as part of a fair use or fair commentary defense. Similarly, when a seller of T-shirts or some other commercial product spoofs a trademark or uses a trademark to denounce a political position, the courts have had to decide whether the alleged infringer or diluter is predominantly engaged in commentary, thus obtaining greater protection under the First Amendment, or mainly making use of a trademark to sell its own product.⁷ However, when an action is brought against a plainly non-commercial use of a trademark for either political or consumer commentary, the courts have not hesitated to afford full First Amendment protection against the trademark holder's claim, either by holding that First Amendment principles bar application of the federal statute, or by holding that the state law in question is unconstitutional on its face or as applied to the particular case.⁸

A review of Porta's web site, and of the record in this case, plainly shows his site's non-

⁷E.g., *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968-970 (10th Cir. 1996); *Rogers v. Grimaldi*, 875 F.2d 994, 997-999 (2d Cir. 1989); *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 402-403 (8th Cir. 1987).

⁸*L.L. Bean v. Drake Publishers*, 811 F.2d 26, 33 (1st Cir. 1987); *ACLU of Georgia v. Miller*, 977 F. Supp. 1228, 1233 (N.D. Ga. 1997); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 1161, 1167 (C.D. Cal. 1998); *Lighthawk v. Robertson*, 812 F. Supp. 1095, 1097-1101 (W.D. Wash. 1993); *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp. 1112, 1124-1125 (S.D.N.Y. 1980); see also *Lucasfilm v. High Frontier*, 622 F. Supp. 931 (D.D.C. 1985) (ruling on nonconstitutional grounds).

commercial character. The web site is dedicated to the expression of opinions about Alitalia. The web site contains no advertisements (which is the way many web sites produce revenues for their operators), and is not directed to selling or promoting any goods or services. In short, because it is plainly non-commercial, the speech on the web site is entitled to full constitutional protection.

In addition, as Porta's affidavit shows, he derives no financial benefit from the web site, and he has no financial connection either to Alitalia or to any competitor of that company. Porta Affidavit ¶ 15. Accordingly, whatever rule might apply in another case to a commercial entity (such as a competitor of plaintiff) that published a web site criticizing Alitalia and using its name in the domain name for that web site, this is plainly a case of non-commercial speech, and defendant is entitled to the full measure of protection under the First Amendment.

B. The First Amendment Requires Denial of the Preliminary Injunction.

Given the non-commercial character of Porta's web site, the motion for a preliminary injunction must be denied because it seeks a prior restraint. The Supreme Court has repeatedly held that injunctions which bar defendants from speaking, printing, or broadcasting statements about topics of public concern are prior restraints that require the most extraordinary justifications before they may be approved. *New York Times v. United States*, 403 U.S. 713(1971); *Near v. Minnesota*, 283 U.S. 697 (1931). When an injunction is entered based on a mere finding of likelihood of success in establishing illegal speech, instead of a final adjudication, it is a prior restraint subject to strict First Amendment scrutiny. *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993); *Dataphase Systems v. CL Systems*, 1980 U.S. App. LEXIS 14978, 6 Media L. Rep. 2163 (8th Cir. 1980). See also *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175 (1968). The law is clear and unequivocal – prior restraints are not permitted except in the most exceptional of circumstances, involving “such a grave threat to a critical government interest or to a constitutional right.” *Procter*

& Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996). No such circumstance is present here, and thus the motion for a preliminary injunction should be denied.

II. ALITALIA HAS NO LIKELIHOOD OF SUCCESS ON THE MERITS.

Wholly apart from First Amendment limitations, the motion for a preliminary injunction should be denied because the evidence does not support any finding of likelihood of success on the merits.

Plaintiff contends that Porta has violated its rights under a 1999 amendment to the trademark law, which provides a cause of action against “cybersquatting.” However, this law was directed at a specific problem that has no application here, and plaintiff has failed to meet the basic requirements of this statute. In order to see why this is so, it is necessary to review the reasons why the amendment was enacted, to describe the evil at which the law was addressed, and to identify both the very specific elements of which a cybersquatting claim consists, and the trademark defenses that Congress expressly preserved under the amendment.

A. Background of the Cybersquatting Statute.

The cybersquatting law was passed to meet problems that grew out of the sudden emergence of alphanumeric domain names as a means of locating content on the Internet. Originally, each site on the Internet was identified only by a series of four numbers, such as 156.121.20.201. In the late 1980's, the concept of the alphanumeric domain name was invented, allowing the operator of a web site to use an address that expressed something about the site. *PG Media v. Network Solutions*, 51 F. Supp.2d 389, 391-392 (S.D.N.Y. 1999), *aff'd*, 202 F.3d 573 (2d Cir. 2000) As explained by defendant Porta, who operates a small business that advertises extensively on the Internet and thus has some familiarity with the subject, Porta Affidavit ¶ 16, domain names may either denote the topic of the web page, or it may identify the person who sponsors the web page. *Id.* ¶ 18 and Exhibit

D.

Some people had the foresight to reserve domain names that they, themselves, did not intend to use, recognizing that, in coming years, others might find those names particularly valuable and worth considerable sums of money. The system for assigning domain names is that the first person to register a name can keep it, to the exclusion of anybody else, so long as he pays annual renewal fees for each such name. Consequently, there was a veritable land rush as individuals and companies snapped up as many domain names as they could, intending to market names to those who might want them.. As a result, by the time that it occurred to many companies that it would be in their interest to advertise their goods and services on the Internet, they found that others had beaten them to the domain name registrar's door. Such companies found themselves having to pay others who had “squatted” on their cybernames. *See House Report 106-412, 106th Cong. 1st Sess (1999), at 5-6.*

The Committee Reports identify a series of ways in which cybersquatters unfairly used the trademarks of others. *See Senate Report 106-140, 106th Cong. 1st Sess. (1999), at 5-7.* Some actually registered the trademark itself as the domain name (for example, www.porsche.com); others would register the trademark name with minor spelling errors, intending to catch a careless consumer who mistyped the trademark as part of the domain name (to continue with the same example, www.porcshe.com or www.prosche.com). Still others would register a domain name combining the domain name with some other word that made it appear to be part of the company (an example given in the committee reports is “911porsche.com”). But there is not the slightest hint in the reports, or anywhere else in the legislative history, that Congress intended to prevent the registration of domain names that plainly implied hostility to the trademark holder, such as the “alitaliasucks” name that is at issue in this case. To the contrary, both the Senate and the House Committees repeatedly insisted that companies would not be able to bring lawsuits against people who established web sites

using trade names for the purpose of commenting upon or criticizing companies to which those trademarks belonged. House Report at 10, 11; Senate Report at 14.

Even before the amendment, companies brought lawsuits based on their trademark rights. But some courts refused to grant relief against cybersquatters who did no more than register domain names, reasoning that mere registration of a domain name is not “commercial use” as required for trademark liability. *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 879-880 (9th Cir. 1999); Senate Report 106-140, at 7. The cybersquatting law made it possible to sue based solely on the registration of a cybersquatting name, so long as it was done with intent to profit from another’s good will.

Such a plaintiff must make two showings. First, the plaintiff must also show that the domain name violates the trademark of another in that the name is “identical or confusingly similar” to the mark of the senior user. Section 1125(d)(1)(A)(ii).⁹ Second, the plaintiff must show that the defendant registered the name for the bad faith purpose of profiting from the good will that another had built up in its trademark. Section 1125(d)(1)(A)(i).

As we explain below, neither element of a cybersquatting claim has been shown in this case. First, the domain name “alitaliasucks” is not in the least bit “identical or confusingly similar” to the trademark Alitalia. Moreover, there is no evidence of “bad faith intent to profit from the goodwill associated with the mark” as required by the cybersquatting act. Finally, two defenses that are expressly preserved by the Act are present in this case – Porta’s speech is noncommercial, and he has made a fair use of the mark. For each of these reasons, any one of which would be sufficient to defeat plaintiff’s claim, there is no likelihood of success on the merits.

⁹Another possible claim is that the person has registered a domain name that “dilutes” the old mark. However, plaintiff only mentions a possible dilution claim in passing, and makes no attempt to justify a finding of dilution. Accordingly, we do not discuss that possible aspect of a cybersquatting claim in this memorandum.

B. There Is No Trademark Infringement or Cybersquatting Because “alitaliasucks” Is Neither Identical nor Confusingly Similar to “Alitalia,” and There Is No Likelihood of Confusion About Who Sponsors Porta’s Web Site.

Plaintiff’s cybersquatting claim cannot succeed because “alitaliasucks” is neither “identical nor confusingly similar” to “Alitalia.” Because “alitaliasucks” is plainly not “identical” to Alitalia, plaintiff must show that it is “confusingly similar” to its mark. To the extent there are differences between the infringement rule that the plaintiff must show “likelihood of confusion” and the cybersquatting rule that the plaintiff must show “confusing[] similar[ity],” the legislative history cited above shows that Congress did not intend to expand the rights of trademark holders vis-a-vis persons registering domain names, but only wanted to provide a remedy where the name had not been “used” in the manner required by existing trademark law. It follows that the cybersquatting law cannot give **more** rights to the trademark plaintiff than the rule against infringement. In this regard, it is quite apparent that the word “confusing” is not modified by the term “likely” or “likelihood,” as it is in the statutory cause of action for infringement under section 32 of the Lanham Act, 15 U.S.C. § 1114. Consequently, it is not sufficient that the plaintiff show only that confusion is “likely” – rather, there must be real confusion that follows from the similarity between the domain name and the trademark.

For example, if a domain name consists of a trademark with a few transposed or changed letters, in the case of a single word trademark, or transposed words in the case of a multi-word trademark, the domain name would be “confusingly similar” to the trademark. In this regard, it is notable that, with two exceptions, every cybersquatting case cited by plaintiff involves either a domain name that was identical to the plaintiff’s trademark, or was confusingly similar in the sense

that the letters or words of the trademark were rearranged.¹⁰ The same is true of most of the other cases decided under the new cybersquatting act. *See Shields v. Zuccarini*, 89 F. Supp.2d 634, 639 (E.D. Pa. 2000) (apparently equating “confusingly similar” with “for all practical purposes identical”).

Plaintiff does cite two exceptions to this rule, where the domain names at issue coupled the exact trademark with a word identifying a related product or indication of source which, the court thought, implied that the trademark holder was the sponsor of the web sites posted under those domain names.¹¹ In this regard, there is some support for the proposition that Congress intended such domain names to be within the scope of the Act – the Senate Judiciary Committee gave this as an example of the cybersquatting abuses that the statute was needed to address. Senate Report 106-140, 106th Cong. 1st Sess. (1999), at 5-7.

But even cases of this sort are a far cry from what is before the Court here. It is not believable that a person who saw the domain name “alitaliasucks.com” would believe that it was sponsored or approved by Alitalia. Nor, for that matter, is there any possibility that someone who was looking for Alitalia’s official website would mistakenly type “alitaliasucks” into their browser. As Porta’s affidavit makes clear, ¶ 23, there are numerous sites on the Internet that use domain

¹⁰ *Sporty's Farm LLC v. Sportsman's Market*, 202 F.3d 489 (2th Cir. 2000) (sporty's and sportys); *OBH v. Spotlight Magazine*, 86 F. Supp.2d 176 (W.D.N.Y. 2000) (The Buffalo News and thebuffalonews); *Morrison & Foerster v. Wick*, 94 F. Supp.2d 1125 (D.Colo. 2000) (misspellings and rearrangements of law firm's names); *Wella Corp. v. Wella Graphics*, 874 F. Supp. 54, 56 (E.D.N.Y. 1994) (wella and wello); *Spear, Leeds & Kellogg v. Rosado*, 2000 U.S. Dist. LEXIS 3732 (S.D.N.Y.), aff'd mem., No. 00-7670 (2d Cir. Dec. 7, 2000) (owner of marks REDI, REDIBOOK, and ECN sued defendant registering names redi, redibook, and redi-ecn).

¹¹ *Mattel v. Internet Dimensions*, 2000 U.S. Dist. LEXIS 9747 (S.D.N.Y.) (owner of trademark “Barbie” sued owner of pornography site registered as “barbiesplaypen”); *Porsche Cars North America v. Spencer*, 2000 U.S. Dist. LEXIS 7060 (E.D. Cal.) (owner of “Porsche” sued domain name reseller who registered name “porschesource.com”).

names in the “companynamewants” or “trademarksucks” format; only people who are looking for critical sites will feed such an address into their browser in looking for sites relevant to their needs. And, any consumers who found their way to Porta’s web site would immediately recognize that it is a critical site, not a sponsored site. Consequently, plaintiff cannot establish the “confusingly similar” prong of the two-part test for cybersquatting liability.

Not only has defendant not cited a single case finding cybersquatting by the owner of a “sucks” site, but every case of which we are aware that has considered domain names including the word “sucks” has ruled that there was no confusion. The leading case, decided under a “likelihood of confusion” standard even before the cybersquatting act was passed, is *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998). The defendant operated a web site that prominently displayed the plaintiff’s name and logo for the purpose of criticizing Bally for alleged abuse of consumers. The court found no likelihood of confusion because of the plain statement that the page was “unauthorized” and the superimposition of the word “sucks” over Bally’s mark. As a result, “The Court finds that the reasonably prudent user would not mistake Faber’s site for Bally’s official site,” *id.* at 1164, and “no reasonably prudent Internet user would believe that ‘Ballysucks.com’ is the official Bally site or is sponsored by Bally.” *Id.* at 1165 n.2.

Similarly, in *Lucent Technologies v. Lucentsucks.com*, 95 F. Supp.2d 528 (E.D. Va 2000), the principal issue was whether the court had in rem jurisdiction under the Cybersquatting Act. After ruling against the plaintiff on that ground, the court addressed whether the domain name was confusingly similar to the plaintiff’s mark. The court embraced the reasoning in *Bally* and found no chance of confusion, because the word “sucks” plainly signaled that the site was critical of the trademark holder, and not complimentary: “[S]ucks has entered the vernacular as a word loaded with criticism . . . A successful showing that lucentsucks.com is an effective parody and/or a site for

critical commentary would seriously undermine the requisite elements for the causes of action at issue in this case.” *Id.* at 535-536 (citation to *Bally* omitted).

The only cases involving critical sites where courts have found any chance of confusion were cases where the critical site used the trademark itself as the domain name. *E.g., People for the Ethical Treatment of Animals v. Doughney*, 113 F. Supp.2d 915 (E.D. Va. 2000) (group calling itself People Eating Tasty Animals cybersquatted on “peta.org”). Even in such cases, however, the plaintiff has not always prevailed on its “likelihood of confusion” claim. *See Northland Ins. Cos. v. Blaylock*, 115 F. Supp.2d 1108, 1117-1122 (D. Minn. 2000) (defendant used “northlandinsurance.com” to publicize grievances against Northland Insurance Company).

Moreover, even if a mere “likelihood of confusion” were sufficient under the cybersquatting statute, the plaintiff still has no chance of success. The following eight factors are to be examined and weighed in determining whether a likelihood of confusion exists: (1) strength of the plaintiff’s mark; (2) relatedness of the services [or goods]; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant’s intent in selecting the mark; and (8) likelihood of expansion of the product lines. *Morningside Group v. Morningside Capital Group*, 182 F.3d 133, 138 (2d Cir. 1999); *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F. 2d 492, 495 (2d Cir. 1961).

These factors are simply a guide to help determine whether confusion would be likely to result from simultaneous use of the two contested marks. They imply no mathematical precision, and a plaintiff need not show that all, or even most, of the factors listed are present in any particular case to be successful. As we said in *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983), “[T]he general concept underlying likelihood of confusion is that the public believe that ‘the mark’s owner sponsored or otherwise approved of the use of the trademark.’”

Wynn Oil Co. v. Thomas, 839 F.2d 1183, 1186 (6th Cir. 1988).

Accord, Nabisco v. Warner-Lambert Co., 220 F.3d 43, 46 (2d Cir. 2000).

Assessing the eight likelihood of confusion factors, it is clear that, in the context of this action, there is no likelihood of confusion whatsoever. This case does not involve the traditional trademark infringement claim that the defendant is passing off his goods and services as those of the plaintiff. Rather, plaintiff claims that potential customers are likely to be confused when they use the Internet to find information about plaintiff. Such a claim is absurd in light of the content of Porta's web site.

First, as noted above, all of plaintiff's cases were brought by businesses against either commercial operations or domain name wholesalers who registered names that were either identical to the trademark, rearrangements or misspellings of the trademarks, or plainly linked the trademark with a word indicating one of the trademark holder's products or otherwise strongly suggesting that the trademark holder sponsored the site. And every case considering the issue of whether a "sucks" site was confusing has ruled for the defendant.

There is also an analogous case from this district that involved, not domain names, but another form of HTML code that is used to draw Internet users to a particular web site. In *Bihari v. Gross*, 119 F. Supp.2d 309 (S.D.N.Y. 2000), Judge Sheindlin rejected the claim that the use of a trademark in the "meta tags" of a web site – the machine-readable code that many search engines use in order to identify sites that are responsive to a search related to a particular subject – creates actionable likelihood of confusion when used for a consumer-criticism web site. In that case, the consumer site used the trademarked name without juxtaposing the word "sucks", and the result was that persons who did no more than type the name "Bihari" into a search engine were encouraged to visit the defendant's web site where they would see the defendant's expression of dissatisfaction with the plaintiff's Bihari Interiors business. The Court found no likelihood of confusion – "Because the purpose of the websites is to injure Bihari Interiors commercially, no reasonable viewer would

believe that the disparaging comments regarding Bihari's business ethics – comments which appear on the first page of the websites – are endorsed by Bihari. Moreover, . . . there is no 'lengthy delay between attempting to access plaintiff's home page and learning that one has failed to do so.'" *Id.* at 319 (citation omitted).

As for the other likelihood of confusion factors, even assuming that plaintiff's mark is strong, this does not end the inquiry. Regarding the relatedness of the parties' products or services, even if Porta's web site is deemed a form of "services" under trademark law (the service of providing information), such services are not related to plaintiff's service, which is providing air transportation. On the issue of evidence of actual confusion, plaintiff has submitted none. With respect to marketing channels used, by contrast to plaintiff's professed extensive marketing and advertising campaigns, Porta does no marketing for his site. And the factor of the likely degree of purchaser care favors Porta as well, inasmuch as he offers nothing for purchasers to acquire, and anyone who conducts a search engine query will see immediately from the search engine list, even before visiting his site, that his site is not affiliated with plaintiff in any way. Even careless Internet surfers would see immediately that Porta's site is not affiliated with plaintiff.

Turning next to Porta's intent in selecting plaintiff's mark for inclusion in his domain name, his aim was simply to provide a fair description of the topic of his site and to enable persons looking for information regarding plaintiff to be able to find his site, not to divert traffic from the plaintiffs' sites. Porta Affidavit ¶ 23. The final likelihood of confusion factor, the likelihood of expansion of the product lines, does not apply, because Porta has no product lines.

The discussion above illustrates the extremely poor fit between trademark law and plaintiff's grievances, which have everything to do with the content of Porta's web site speech and nothing to do with trademark law. Indeed, Porta has not used plaintiff's marks in a trademark sense at all; they

are simply used as the title for his web page, much like the title of a book, to describe a particular site that is devoted to information regarding plaintiff. Porta Affidavit ¶¶ 18, 23.

Moreover, the fundamental flaw in Alitalia's argument is its arrogant assumption that all Internet users are potential customers and that the Internet's only purpose is to serve as its own proprietary marketing and advertising medium. *See* P. Mem. at 8-9. But this is not so; it is just as plausible (if not more so) that consumers use the Internet to learn information about plaintiff, not only self-serving advertising and promotional data, but also information that reflects less positively on Alitalia. The crux of plaintiff's argument is a false premise: that search engine users only want information about plaintiff that is published by plaintiff. Any novice Internet user knows the convention for web site and domain names: "www.", plus the company's name, plus ".com." *See* Porta Affidavit ¶ 17 . Using this common convention, the mark that plaintiff is defending will take the user directly to the plaintiff's web site. Only those users who use search engines to find **all** relevant web sites – because merely finding Alitalia's web site is not sufficient to serve their purposes – may find defendant's Alitaliasucks page in addition to the plaintiff's page. *Id.* ¶¶ 20-21.

C. Defendant Did Not Register His Domain Name in Bad Faith.

The second, independent reason why there is no likelihood of success on the merits of plaintiff's cybersquatting claim is that Porta did not register the domain name "alitaliasucks" with a "bad faith intent to profit from [the Alitalia] mark." The only evidence purporting to aid plaintiff's position on this issue is the Gardini Affidavit, ¶ 6, averring that Porta "explicitly stated that he would maintain this web site and also register it with 350 search engines, unless satisfactory compensation was paid by Alitalia to him." Porta disputes this characterization of his discussion with Gardini, and we explain below why Gardini's account should not be credited. However, the Court need not resolve this dispute to decide whether to issue an injunction, because plaintiff's evidence is

insufficient as a matter of law to support the claim of bad faith intent to profit from the Alitalia trademark.

The purpose of this prong of the cybersquatting statute undercuts this claim. Both the House and Senate Committees explained this purpose in almost identical language, which was repeated in the Conference Report reconciling the House and Senate Bills:

The bill is carefully and narrowly tailored, however, to extend only to cases where the plaintiff can demonstrate that the defendant registered, trafficked in, or used the offending domain name with bad-faith intent to profit from the goodwill of a mark belonging to someone else. Thus, the bill does not extend to . . . someone who is aware of the trademark status of the name but registers a domain name containing the mark for any reason other than with bad faith intent to profit from the goodwill associated with that mark.

. . . The [nine enumerated] factors are designed to balance the property interests of trademark owners with the legitimate interests of Internet users and others who seek to make lawful uses of others' marks, including for purposes such as comparative advertising, comment, criticism, parody, news reporting, fair use, etc.

House Report 106-412, at 10; Senate Report No. 106-140, at 12-13; House Conf. Report 106-464, at 109.

Plaintiff submits its evidence concerning Porta's telephone conversation with Gardini in order to invoke the sixth of the nine factors enumerated by Congress for courts to consider in deciding whether the owner of the challenged domain name acted in bad faith: in the words of the statute, "the person's offer to transfer, sell or otherwise assign the domain name to the mark owner of any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct." 15 U.S.C. § 1125(d)(1)(B)(i)(VI). Gardini's affidavit does not accuse Porta of saying anything about selling the domain name – it says that he threatened to continue to maintain the web site, and to advertise it to a large number of search engines, unless he received "satisfactory compensation." However, the cybersquatting statute does not regulate what webmasters may place

on their web sites; if all that Porta has done is threaten to maintain a web site attacking Alitalia unless he is paid, he is not in violation of this new law. Accordingly, plaintiff's own proof does not satisfy the language or purpose of the statute, and the injunction should be denied for that reason alone.

Moreover, not every demand for payment by a trademark holder in return for a domain name represents the “bad faith intent to profit” proscribed by the statute. *Cello Holdings v. Lawrence-Dahl Companies*, 89 F. Supp.2d 464 (S.D.N.Y. 2000). In that case, a seller of audio equipment under the trademark “cello” sued a domain name wholesaler who registered “www.cello.com,” and then tried to sell it to the plaintiff. The court noted that defendant had tried to register domain names for twenty different musical instruments, and that he had offered the domain name to several different persons that might have an interest in a domain name reflecting that a site was about cellos; it concluded that, if defendant’s motive in registering the name was to take advantage of the marketability of the word “cello” as a product rather than as a trademark, then his motive might have been to profit, but not to profit in the requisite “bad faith.” 89 F. Supp.2d at 473-474. Similarly, here, Porta registered a name that described the subject of his site, and that is a permissible purpose under the law.

The only case whose facts on the issue of “bad faith intent to profit” approach this case is *Northland Ins. Cos. v. Blaylock*, 115 F. Supp.2d 1108 (D. Minn. 2000), where a consumer, whose insurance company paid him less than he thought he deserved, registered “northlandinsurance.com” as the domain name for a web site describing his grievances against the company. Plaintiff claimed that the defendant’s purpose was “to use the Internet domain name as leverage to extract a sum of money that will help compensate him for his perceived losses from the underlying insurance settlement.” The court found that the evidence “did not sufficiently reflect a bad intent to **profit**.”

115 F. Supp.2d at 1124 (emphasis in original). “While the evidence indicates that defendant has perhaps exhibited bad intent in setting up this web site to criticize plaintiff’s business practices, his ‘intent to profit’ is not sufficiently discernible at this stage . . .” *Id.* at 1125.

This holding is supported by the legislative history of the statute. In discussing the “intent to profit” factor of the test for bad faith, the House Conference Report stated that this factor

does not suggest that a court should consider the mere offer to sell a domain name to a mark owner . . . as **sufficient** to indicate bad faith. . . . In practice, the offer to sell domain names **for exorbitant amounts** to the rightful mark owner has been one of the most common threads in abusive domain name registrations.

House Conf. Report 106-464, at 111-112 (emphasis added).

Here, the only basis given by plaintiff for a finding of bad faith is the alleged offer to dismantle the web site for money, and even under the plaintiff’s version of the facts, the reason for establishing the web site and threatening to maintain it was to bring leverage to bear on the plaintiff to honor Porta’s view of what he thought he was owed in a separate dispute. Had Porta purchased a full page ad in the New York Times Travel Section stating, in large letters, the “Alitalia Sucks,” or bought billboards ringing Kennedy Airport bearing the same legend in huge letters, this would be a perfectly permissible use of the mark to criticize Alitalia, and there would be no cause of action even if the reason for these acts was to apply leverage on the airline to pay him more for his lost luggage. By the same token, a similar use of the airline’s mark in his domain name cannot constitute bad faith under the statute.

Finally, Porta avers in his own affidavit that he registered the domain name because he knew of many other anti-company web sites that used domain names in the “companynamessucks” format. Porta Affidavit ¶ 23. And, 15 U.S.C. § 1125(d)(B)(ii) 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.” Given the extensive use of domain names in the same format as Porta’s, and give the prior case law on the subject, the Court should find an absence of bad faith under this provision without resolving the credibility dispute between the parties about what happened during Porta’s conversation with Gardini.

If the Court does decide that it needs to reach this question, however, Porta’s version of the conversations should be accepted. Porta’s affidavit shows that he registered the domain name on December 10, 2000, and established the web site immediately thereafter, before he knew that Alitalia was going to offer to pay him less than he thought he was owed. His purpose in establishing the web site was to express his anger at the way in which he had been treated, and he had no intention – and still has no intention – of removing the web site no matter what Alitalia does with his claim. On December 12, he called Alitalia to complain that it still had not responded to his complaint about lost luggage, and he was told that it would take still another month to decide what to do. He then told Alitalia’s representative that he had established his web site; it was Alitalia that raised the question of his taking down the site, warning that he would get paid more quickly if he removed the site. When he persisted in his refusal, Alitalia called back a few days later with an offer to pay him immediately, but in a limited amount, if he removed the site. Again Porta refused. And after Alitalia faxed Porta a letter on December 19, telling him that it would pay the same limited amount, but only a month later, with a sweetener of two \$150 travel vouchers, Porta called back and threatened to register his site with a large number of search engines, thus publicizing the dispute further.

Alitalia’s versions of the conversations, however, are inconsistent with undisputed facts. The complaint alleges that, on December 19, Porta said that he would register the domain name “alitaliasucks.com”, Complaint ¶ 13, and, “thereafter, in furtherance to his statement, PORTA did

indeed set up and register a web site called <www.altialaliasucks.com>.” *Id.* ¶ 14. But the public WHOIS records maintained on the Internet, and commonly relied on by all knowledgeable persons to establish the date when domain names were registered, plainly show that the name was registered on December 10. Alitalia’s version of the facts, claiming that the name was registered and the site established after the December 19 conversation, is inconsistent with undisputable facts, and the unreliability of this claim undermines the credibility of the remainder of Alitalia’s supporting affidavit.

In addition, Alitalia’s complaint strongly suggests that the first time it learned of the existence of the web site was after December 19, following the issuance of its letter promising modest payment for the lost luggage. However, Porta’s affidavit shows that there were two prior conversations, during which Alitalia displayed its awareness of, and unhappiness about, the domain name and the web site. Moreover, Porta’s affidavit includes a server record showing that Alitalia representatives repeatedly visited his web site on December 12 and 13 and the morning of December 19.

In sum, whether by resolving this credibility dispute, or by finding that the dispute is irrelevant because there is no likelihood of success on the bad faith prong of the cybersquatting statute even under the plaintiff’s version of the facts, the Court should deny the preliminary injunction.

D. Because Porta’s Use of Plaintiff’s Mark Is Noncommercial, Plaintiff Has No Claims Under the Trademark Laws.

There can be no trademark liability where the use is non-commercial. Section 43(c)(4) of the Lanham Act, 15 U.S.C. § 1125(c)(4), provides that “The following shall not be actionable **under this section . . .** (B) Noncommercial use of a mark. (C) All forms of news reporting and news

commentary.” (emphasis added). The House Judiciary Committee explained the purpose of this exclusion, which was originally adopted in order to ensure that the dilution cause of action in section 43, that was federalized in 1989, would not apply to non-commercial speech:

[T]he proposed change in Section 43(a) should not be read in any way to limit political speech, **consumer** or editorial **comment**, parodies, satires, or other constitutionally protected material. . . . The section is narrowly drafted to encompass only clearly false and misleading commercial speech.

135 Cong. Rec. H1207, H1217 (daily ed., April 13, 1989) (emphasis added).

The purpose of the statute’s noncommercial use exception was to protect ““parody, satire, editorial and other forms of expression that are not part of a commercial transaction.”” *Dr. Seuss Enterprises v. Penguin Books USA*, 924 F. Supp. 1559, 1574 (S.D. Cal. 1996), *aff’d*, 109 F.3d 1394 (9th Cir. 1997), quoting statement of Senator Hatch from the Congressional Record. Because the new cybersquatting law was enacted as Lanham Act subsection 43(d), 15 U.S.C. § 1125(d), it is plainly covered by the exclusion of noncommercial and consumer commentary which applies to everything in “this section.” Indeed, Congress included a savings clause that explicitly disclaimed any intent that the cybersquatting law override either the First Amendment or section 43(c)(4) of the Lanham Act. Public Law 106-113, Section 3008, 113 STAT. 1501A-551. The sponsors of the cybersquatting law specifically disclaimed any intention to provide a cause of action against persons who registered domain names for the purpose of delivering comment or criticisms of trademark owners by identifying the owners with their marks. See House Report 106-412, 106th Cong. 1st Sess. (1999), at 10.

Despite these legal requirements, the complaint does not allege that Porta’s speech is commercial. Inspection of the web site reveals the wholly non-commercial character of the website. And Porta’s affidavit confirms what is apparent from the web site – there is no advertising, no sales

of goods or services, and no solicitations of donations or other payments. In sum, this is a non-commercial expression of views about Alitalia, and plaintiff's claim cannot succeed on the merits.

E. Porta's Use of Plaintiff's Mark Is a Fair Use.

The Lanham Act codifies a "fair use" defense at Section 33(b)(4): "the use of the name, term or device charged to be an infringement is a use, otherwise than as a mark, of . . . a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party...." 15 U.S.C. § 1115(b)(4). Numerous courts have recognized the applicability of this defense in the Internet context,¹² and the cybersquatting statute expressly recognizes fair use as a possible defense. 16 U.S.C. § 1125(d)(1)(B)(i)(IV). Porta does nothing more than this – the subject matter of his web site is the plaintiff, and he uses its name (which is trademarked) to identify Alitalia as the subject of criticism. This in no way constitutes use of the mark in a trademark sense. Rather, Porta has used plaintiff's mark in a "non-trademark sense," that is, simply to identify **its** goods, services or business, and not his own. *See Restatement (Third) of Unfair Competition* § 28, comment c (1995).

As Judge Patterson stated recently,

Simply put, the use of search engines to navigate the World Wide Web multiplies the possible associations between words and goods or services that consumers might take advantage of when they go about locating particular sources . . .

Granting too much credit to the associative possibilities of the Internet would present an intractable problem for trademark law, however. Notwithstanding the fact

¹²*Bally Total Fitness Holdings Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998); *Playboy Enterprises v. Welles*, 7 F. Supp. 2d 1098 (S.D. Cal. 1998), *aff'd*, 162 F.3d 1169 (9th Cir. 1999); *Patmont Motor Werks v. Gateway Marine*, 1997 US Dist. LEXIS 10877 (N.D. Cal. 1997). *See also Brookfield Communications v. West Coast Video*, 174 F.3d 1036, 1065-66 (9th Cir. 1999) (fair use doctrine allows for the nominative and good faith use of another's mark to attempt to index the content of a web site); *McCarthy on Trademarks* (4th ed. 1999) § 23.11 (discussing non-confusing "nominative use" where trademark is used to name a commercial entity that is under discussion).

that any word can be keyed into a search engine to locate a web site, the operator of a web site surely should not be held responsible for having used every word on its page in a source-identifying manner. The intent of the alleged infringer, and not the associations actually formed by the consuming public, must remain the touchstone for evaluating whether words have been used in good faith in their descriptive sense.

Radio Channel Networks v. Broadcast.com, 1999 US Dist. LEXIS 2577, 19-20 (S.D.N.Y. March 8, 1999), *aff'd mem.* 201 F.3d 432 (2d Cir.).

Porta's domain name uses plaintiff's mark not to identify plaintiff as the source of Porta's First Amendment-protected consumer speech, but only to categorize his site in accordance with its subject matter (that is, in its descriptive sense, and not its trademark sense). Although plaintiff would prefer to silence Porta, his use of plaintiff's name on his web site and in his domain name clearly falls under the fair use doctrine, in addition to the other defenses discussed above.

CONCLUSION

The motion for a preliminary injunction should be denied.

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January 18, 2001

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