

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

THE TAUBMAN COMPANY	)	
LIMITED PARTNERSHIP,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 01-72987
v.	)	
	)	District Judge Zatkoff
WEBFEATS and HENRY MISHKOFF,	)	Magistrate Judge Komives
	)	
Defendants.	)	

**EXPERT REPORT OF MILTON MUELLER**

**Milton Mueller qualifications**

I am a tenured Associate Professor at the Syracuse University School of Information Studies. The School was ranked the country's number three information school by US News and World Report's college guide. I direct the School's Graduate Program in Telecommunications and Network Management. Research at the school focuses on information retrieval, Internet user behavior, and Internet-related policy. I co-direct a research center there called The Convergence Center.  
(<http://www.digital-convergence.info>)

I have conducted research on domain name trademark conflicts for five years. On this topic I have published several scholarly articles in refereed journals and presented research at refereed conferences, as well as publishing numerous other articles and books on related problems in Internet governance. My most recent scholarly product is the book Ruling the Root: Internet Governance and the Taming of Cyberspace, published by the MIT Press in June 2002. This book traces the history of the domain name system and the formation of ICANN, using property rights economics as the theoretical basis of analysis.

In June 2001 I received a grant from the Markle Foundation to conduct research on ICANN's Uniform Dispute Resolution Policy (UDRP). The main task was to create a database that would track the results of all past UDRP cases and facilitate analysis of the effects of the policy. I was responsible for designing and developing a database containing 3,850 cases of domain name trademark conflict; this included almost all UDRP cases decided between December 1999 and July 2001. The database can be downloaded freely from the Convergence Center website. I also used data derived from the database to prepare a statistical report profiling complainants and respondents in cases, the type of cases brought, and trends in cases. That report is attached to my expert report in this case. I was invited to present this research at the annual meeting of the International Trademark Association (INTA) in September 2002.

In April 2001 I was invited to become a participant in the prestigious National Research Council's study of "Internet Navigation and the Domain Name System." The NRC forms interdisciplinary committees of well-established experts to study important policy problems; the reports are circulated to Congress and federal agencies as well as the general public. This specific project was funded by the National Science Foundation and US Department of Commerce. The Committee's report will be released some time in 2003; of course, it will not reflect my views alone but a consensus of committee members with widely divergent views and areas of expertise.

In addition to my scholarly work I have extensive practical experience in domain name policy and litigation. I am a listed panelist for arbitration of domain name trademark disputes for the World Intellectual Property Organization in Geneva. I have served as a panelist in approximately 20 cases. In 2001 I was an elected representative on an ICANN policy making organ, the Names Council of the Domain Name Supporting Organization. I represented the Noncommercial Domain Name Holders constituency. In that capacity I chaired a Task Force on the divestiture of the .org top-level domain, producing a policy document that guided ICANN's removal of the .org domain from VeriSign and the selection of a new operator. I also co-chaired the Task Force on UDRP reform. I was selected by the ICANN staff to perform part of the evaluation of applicants to take over the .org registry.

## **Understanding what domain names do**

I intend to testify that a proper understanding of the functions and actual uses of domain names makes it clear that they are not source identifiers, and that the possession of a domain name corresponding to a trademark by a party that does not hold the trademark does not by itself cause diversion or confusion. I will also testify that it is important to distinguish between the search and identifier functions of domain names.

Domain names serve two distinct purposes for their users.<sup>1</sup> Domain names can perform **search** functions when they are used to locate web sites (or other online service) for the first time. In the paradigmatic case of using domain names as search aids, an Internet user who wants to find Henry Mishkoff's web site makes some guess about what she thinks the address will be (e.g., <mishkoff.com>) and types that into the URL bar of her web browser. In effect, the second-level domain name is used as a keyword (or what information scientists refer to as a search token), with .com the default value for the top level name.

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<sup>1</sup> A third function, not relevant here, is to provide a *unique identifier* that serves the purely technical function of a globally unique "address" that guides information packets to their proper destination. In this case, it is the *uniqueness* of the particular string of text used that is critical, rather than the meaning. Two domain names that may seem semantically identical – such as amazon.com and amazom.com – are, from a technical point of view, as different as abc.com and xyz.com – just as getting one digit wrong on a telephone number is a completely wrong number. In discussing the functions of domain names in the main text above, I am concerned exclusively with their usage by humans and not with their technical usage by machines on the Internet.

Domain names also serve a distinct, separate function related to their status as names. Domain names are **memorable identifiers**. By that I mean that they perform the same function as a telephone number, but are semantically meaningful because they can use alphanumeric characters as well as numbers. The registrant of a domain name uses them to advertise and communicate their Internet location, and the registrant's communication partners store them or mentally remember them for use when they want to find the registrant's Internet location. As an example, if I see an advertisement for "The Shops at Willowbend Mall" the ad likely has a web URL containing a domain name on it. Once I see the URL I know that if I want to go to the Mall's website, I should use the advertised identifier. This function is distinct from search: it is important even when users already know that a web site exists, have already visited it before, or have already been exposed to advertisements from the web site's owner telling them what the domain name is. The memorable name makes it easier to remember, type, record, and retrieve the information needed to find the site. When performing this function, the domain name need not correspond to, and often does not correspond to, the actual name of the source or a trademark. As memorable identifiers, domain name usage puts a high premium on shortness as well as meaning. *Ceteris paribus*, a short domain name is easier to use because it is easier to remember, takes less work to type in than a long domain name and one is less likely to make errors. Thus, many companies with long or potentially confusing corporate names use very short domain names as their primary identifier; e.g., Merrill Lynch publicity broadcasts the domain name <ml.com>, not the domain <merrilllynch.com>. I note with some amusement that the plaintiff in this case does not rely extensively on the disputed <theshopsatwillowbend.com> name, but uses the more economical <shopwillowbend.com>. That domain name is *not* trademarked. In fact, at the time of this writing the domain name corresponding to the trademarked term "The Shops at Willow Bend" does not work.

This second, more basic, naming function is why domain names really exist. As the developers of the domain name system protocol have asserted repeatedly, the domain name system was not designed to be a directory or search tool.<sup>2</sup> Its usage in that capacity was a historical accident and was largely temporary in nature, although it has had lasting effects due to its mistaken embodiment in some legal opinions.<sup>3</sup>

Many legal debates and discussions of domain names tend to conflate these two distinct functions (searching and memorable identifier). That conflation is at the heart of this case. They assume that registration of a domain name somehow gives the registrant sweeping, almost magical powers to collect or intercept traffic from anyone who might be searching for the named entity. This assumption is false. As we shall see in the next section, domain names are a poor search tool and are no longer commonly used for that purpose. The overemphasis on the search function, and the confusion of search function

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<sup>2</sup> See Paul Vixie's 1995 article, John Klensin's reflections on the domain name system, and Jon Postel's 1994 statement in RFC 1591.

<sup>3</sup> I am referring specifically to the *Brookfield Communications, Inc. v. West Coast Entertainment* decision (174 F.3d 1036), which states that "web users often assume, as a rule of thumb, that the domain name of a particular company will be the company name followed by a .com". No systematic empirical evidence quantifying the validity of this proposition is available.

with the memorable identifier function, tend to trivialize or obscure the reasons why users might want to register domain names for purposes of nominative reference or free expression.

## **Search and guessability**

I will testify that domain names play a minor and declining role in Internet searching, and that this fact refutes plaintiff's argument that Mishkoff's occupation of the <shopsatwillowbend.com> domain harms plaintiff's interests.

The domain name "guessing" process, whereby a user thinks of a company name and appends .com to it, is not common now. There are objective and documentable reasons for this change. What we might call "guessability" was a response to unique and temporary conditions when the World Wide Web (WWW) was new, between the years 1994 and 1997.<sup>4</sup> At that time the WWW was overwhelmingly American and Internet content was overwhelmingly English. The Internet was much smaller. The number of registered domain names was 1% to 5% of the number registered now. Moreover, during the initial rush of WWW growth, domain name registrations were concentrated in the .com top level domain (TLD) to a degree that was excessive and historically unique. This concentration happened because .com was the only commercially oriented top-level domain that accepted registrations from anyone and everyone at a low price. Most of the other TLDs were restricted or much more expensive at that time.<sup>5</sup> At the end of 1996, more than 75 percent of all domain name registrations in the world were under .com. That is, for any given name one cared to "guess," attaching .com to the end of it had a 3 in 4 chance of being the correct TLD (and a much better chance than that if you were searching for an American commercial company). Finally, the state of search engine technology and service was much less developed than it is now. Under these historically unique and irreproducible conditions, the search strategy of "guessing" a domain name was reasonably effective (although as far as I know there are no empirical scientific studies on how often users did this).

Current conditions render domain name guessing and domain name-based searching increasingly irrelevant. The sophistication of users, the search tools available, the number of domain names registered, and the expansion of top-level domains have all changed the situation.

- Instead of the 1 million or so registered domain names in 1997, there are now over 40 million registered domain names. As the number grows, the viability of guessing declines.
- Instead of 75% of all registered domains being concentrated in the .com top level domain, now less than half of them are. There are over 2 million registrations in the new generic top-level domains .info, .biz, and .us. These domains are growing more rapidly than .com. In fact, from October 2001 to August 2002 the .com TLD

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<sup>4</sup> The WWW protocol was developed at a Swiss physics research institute (CERN) in 1990-92. The first free, easy to use Web browsers only appeared in 1993; Netscape appeared in 1994.

<sup>5</sup> A more extensive historical documentation of this sequence is contained in my book [Ruling the Root](#).

shrank from over 32 million registrations to 22 million.<sup>6</sup> The new TLDs .info, .biz and .us, on the other hand, grew by about 5 percent each month.<sup>7</sup> Registrations in country codes also grew apace. Expansion of the number of generic top-level names and distribution of more registrations into the country code TLDs makes “guessing” less rewarding and hence less popular as a navigation strategy. A user has a lower and lower chance of knowing in which of the TLDs a given domain name he wants to find will be. As this happens, a domain name becomes more like a mnemonic telephone number – to use it, one needs to know it or be exposed to it, rather than guess it.

- As the value of domain names as guessable search keys has declined, so has the number of speculative registrations and domain name disputes. My statistical study on domain name – trademark disputes under ICANN’s Uniform Domain Name Dispute Resolution Policy showed that the vast majority of disputed .com names were registered at the height of the speculative domain name boom in the last quarter of 1999 and the first two quarters of 2000. Since then, the number of UDRP disputes has declined steadily, so that now the number of UDRP disputes per annum is half of what it was in year 2000. I have attached this study to the expert report.
- Most important of all, the quality of search engines has improved markedly. Many users now report that search engines such as Google can reliably deliver the web site they want to the top of the search list based on a few keywords. One would, for example, never be able to guess the URL for my personal web page <http://istweb.syr.edu/~mueller/>. But if one types “Milton Mueller” into the Google search interface my web site will show up in the top three or four. Google did not exist five years ago.
- Portals also play an important role in Internet navigation. Portal sites assemble links to commonly used, needed or desirable sites for an audience, and obviate much of the need for guessing domain names as a navigation strategy. For example, Yahoo!, AOL and Msn.com are portals. In a 2000 study of Internet use at Syracuse University, where we could precisely quantify traffic and domains referenced, we found that portal sites were by far the most commonly visited domains.<sup>8</sup> Portals as a category led entertainment and pornography, no small achievement for a college audience. Other user studies indicate that the typical user confines almost 80 percent of their traffic to a small set of domains, to which they return again and again. Users store links to which they want to return in their “favorites” file (for Internet Explorer users) and return to them easily. This aspect of user behavior is rather inconsistent with the vision of a clueless user who scratches his or her head and painstakingly types in guessed domain names to navigate the Internet.
- To my knowledge, there is no empirical research supporting the assertion that Internet users cannot distinguish between a domain name that points to a site they

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<sup>6</sup> Comprehensive statistics on the number of domain name registrations are available at the “State of the Domain” report, <http://www.sotd.info/>.

<sup>7</sup> Ibid.

<sup>8</sup> This study was proprietary research performed for Telcordia Technologies, hence the full report cannot be included in the record.

want and a domain name that refers to the same thing but is not the site they want. Indeed, arriving at the wrong web site because of typos, clicking on the wrong link, or some other mistake is a common experience of users. My impression (but I lack systematic empirical research on this topic) is that most users simply back up and keep searching, unless of course the site is deceptively confusing. To my knowledge, there is no research that refutes that common-sense expectation. The application to the Internet of the concept of “initial interest confusion” is primarily (if not exclusively) a legal construct at this point; it lacks an established corpus of social science research confirming its existence and defining its characteristics (such as how often users are “frustrated” and give up further searching as a result of finding the wrong site, or what counts as confusion). Internet research is a fairly new and dynamic area, so it is possible that relevant research exists somewhere and has escaped my notice, either because it is proprietary or because it is in an obscure journal. But I can say that there are no widely known, widely accepted empirical studies on initial interest confusion on the Internet.

- A user study performed at Syracuse University under my direction surveyed a group of 52 students about their Internet search habits. They were asked what search methods they had ever used with success on the web. 100% reported using search engines successfully; 80% reported successfully using offline advertisements as the source of their URL, 76% reported successfully using hyperlinks or subject indexes on portals; 72% reported word of mouth or print listings.<sup>9</sup> Only 68% reported ever having guessed a domain name successfully – making it 7<sup>th</sup> on a list of a dozen factors. Keep in mind that we were only asking them whether they had *ever* used that method successfully, even just once. When asked what methods were *most likely* to be *unsuccessful*, “Word of Mouth” and “Guessing” topped the list, with 56% of the respondents reporting a lack of success in the use of those methods for searching. Finally, when asked which was their preferred method for finding a web site for the first time, only 2% cited guessing a domain name. Search engines topped the list of preferred methods, being cited as best by 42% of the respondents. Hyperlinks was second. This was merely a pilot study done to test a research proposition for the development of a grant so the sample size is small, but it is one of the few sources of empirical evidence on this topic. That was in 1999; if anything, reliance on guessing has declined since.
- In today’s browsers, once you have correctly typed a domain name into the window in the past, the browser will store that information and automatically display domain names that match whatever you start to type into the URL window in the future. Thus, one no longer has to even finish typing in a domain – one can simply select it from a list in one’s browser window. This obviously eliminates much of the guesswork in recalling domains. Thus, any user who guesses wrong and then goes on to the correct site will have the correct URL stored in their browser and easily accessible. Infrequently used URLs eventually get pushed off the list.

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<sup>9</sup> Respondents were allowed to check more than one option.

## Domain Names as “Source Identifiers”

I will testify against plaintiff’s assertion that “domain names, like brand names, function as source identifiers and are not entitled to the protections of communicative speech.” Domain names are not source identifiers. There is no doubt that some domain names relating to Internet-only businesses *acquire* that function as secondary meaning, such as <amazon.com>. But the fact that becoming a source identifier occasionally happens to a domain name does not prove that domain names are, in and of themselves, source identifiers. “Prince” is a very strong trademark for sports equipment, but there is no guarantee that you will find that business, or even *any* business named “Prince” at the domain <prince.com>. (Try it) Actual facts about registration and usage belie the plaintiff’s contention that domain names have some special status as source identifiers. About 20 percent of generic TLD domains are registered to individuals.<sup>10</sup> There are only about one million live registered trademarks in the United States. Yet there are over 25 million domain names registered to US individuals, organizations, or companies. How can one explain this disjunction if domain names are source identifiers? There are millions of generic words registered as domain names: from *jesuschrist.com* to <[obscene word of your choice].com>. These registrations do not identify sources of goods or services; they have been registered for their ability to attract traffic and for their memorability. Many domain names are statements or expressions, such as <stopworldwar3.com> or <stopcensorship.com>. Technically, domain names are just unique, hierarchically organized character strings, but humans have an incentive to register and use meaningful strings, and one can do with domain names anything one can do with any meaningful, limited set of characters.

There is no technical, legal, or logical linkage between the use of a source identifier and the registration of a domain name. Companies with a strong brand may choose not to register the corresponding domain name at the second level in all available TLDs. Companies with trademarked names may choose to register unrelated domain names and point them toward web content that contains source identifiers. (For example, some time ago Proctor and Gamble registered <badbreath.com> and pointed it to their corporate home page. They have since sold off the name, corroborating my assertion that there is a trend away from use of domain names as search keywords.) Likewise, there is no technical, legal, or logical connection between the registration of a domain name and the possession of a source identifier corresponding to the domain name. Under open generic TLDs such as .com, domain name registration occurs largely on a first come, first served basis. One needn’t show any products, services, or trademark rights to register domains. Someone without any products or services to sell may register a domain name because it catches their fancy, is their own nickname, the name of their child or pet cat, or to make a reference to the named entity for discussion purposes.

Consider the term “digital convergence.” I have registered the names <digital-convergence.org> and <digital-convergence.info> and use them as the address of my university-based research center. Mr. Andy Covell has registered <digital-convergence.com> and uses the corresponding web site to promote his book Digital

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<sup>10</sup> Network Solutions, dotcomstats

Convergence: How the Merging of Computers, Communications and Multimedia is Changing our Lives. A commercial company that produces consulting services relevant to converging information industries has registered digitalconvergence.net. In none of these cases does the domain name function as a source identifier. “Digital-convergence” is not the *name* of my university-based research center, it is the name of the phenomenon our Center investigates. “Digital convergence” is not the *name* of the publisher or the author of the book – it is not even the precise title of the book, which would be too long to make a useful domain name; it is, rather, a reference to the topic of the book. Digital convergence does not identify the source of the consulting services; it is what the company consults *about*. A very large number of domain name registrations follow this pattern. They *refer to* things, they do not necessarily identify the source of things. And it is possible for different registrants to refer to the same thing using slightly different domain names – e.g., by using different TLDs, different permutations of characters, and so on. That is a feature of the domain name system, not a bug.

The database of all registered domain names can be more accurately characterized as a heterogeneous combination of:

- Library catalogue of publications or book titles
- Organization name registry
- Vanity license plates
- Trademark/brand name registry
- Keyword system for searching
- Billboard/bumper sticker for making statements

Any statement that domain names are only one of these things is plainly wrong. There are simple existence proofs that decisively refute such assertions – that is, for each such characterization, one can identify numerous domain names that plainly do not fit the bill. Given these heterogeneous functions of domain names, I see no reason why Henry Mishkoff’s <shopsatwillowbend.com> cannot peacefully co-exist with plaintiff’s official site of the Mall <shopwillowbend.com>, provided of course that the content on the website and the actual use to which the name is put do not constitute trademark or copyright infringement.<sup>11</sup> I can state categorically that our research center has never been bothered by its lack of control of quite similar domain names referring to different organizations or products. This is so even though, unlike Mishkoff’s site which includes a prominent notice identifying the “official” mall website and a hyperlink to that website, those whose websites have domain names similar to ours provide no indication of our existence and no easy way for mistaken visitors to their site to find us. I am aware of one or two cases in which people looking for us have gone to the book site, and yet they had no trouble quickly discerning that it was not the site they were looking for and correcting their search. Most referrals to our web site do not come from blind guesses. They come from people who have a copy of our brochure, from links generated by publicity emails or news articles, or from search engines. I suspect, but of course have not conducted an empirical study, that the same is true of plaintiff’s Mall site. If plaintiff is waiting for people to guess its domain name, it will miss far more customers to bad guesses than it

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<sup>11</sup> If it does violate copyright and trademark norms, the offending conduct can be prevented without necessarily transferring control of the domain.

will to Mishkoff. For it seems likely that more customers would guess <willowbend.com> or <willowbendmall.com> than <theshopsatwillowbend.com>. Of course, the notion that enterprises with multimillion dollar advertising budgets rely significantly on guesswork to locate and direct customers is implausible on its face. And because Mishkoff's "disclaimer" is so high on the home page – the location most web users notice first -- and so distinctly colored, any visitors who really wanted to get to plaintiff's own website will be directed there immediately if they did arrive at Mishkoff's site.

## **Domain names and Freedom of Expression**

I intend to testify that taking away an Internet user's domain of choice constitutes an abridgement of their communication rights under the first amendment, if the domain name in question is used in a manner that does not constitute infringement. In addition, even when a domain corresponds to a trademarked term, nominative reference is a legitimate exercise of free speech rights, as long as deception or deliberate confusion is not involved. The question of user confusion and harm hinges on how the domain is used, not on the mere correspondence between the domain name and a trademark.

It is indisputable that domain names can be used to make short statements: <taubmansucks.com> is an existence proof, and thousands more could be adduced. As noted earlier, the primary function of domain names is to serve as a memorable identifier. As such, domain names forge a critical communicative link between a party who wishes to attract an audience and the prospective audience. Distinctive, short domain names suggestive of the content to be found make it easier to broadcast to the public the existence of the web site and attract those interested in its contents. Prospective web site visitors can more easily remember the address if it is short and conveys meaning related to a message that interests them. For plaintiff to contend that the domain name is an unnecessary part of defendant's anti-plaintiff message is analogous to a claim that a book or movie criticizing President George Bush has no need to put Bush's name in the title.

We think of China as a highly censored society. But just as plaintiff suggests that Mishkoff is free to bury his complaints under third-level domains or deep directories that are difficult to reach intended audiences, so it is perfectly possible to say anything you want in China – as long as it is not said in a way that gets any attention.

As an experiment, contrast the registration and use of <taubmansucks.com> with the use of <webfeats.com/taubmansucks.html>. If defendant runs a short radio or television ad, or proselytizes by word of mouth, imagine the difficulty of trying to speak or display the latter URL in a manner that viewers or listeners will be able to remember, write down, and type in correctly. I recommend that the reader try speaking each of these URLs out loud once, in front of someone who has never heard of this case, and attempt to get them to reproduce each URL. I am confident that attaching a semantically unrelated term to the desired message dramatically diminishes the ability of listeners or viewers to correctly recall and use the address. Thus, in order to fully exercise his right to express his opinion that "Taubman sucks," defendant has a right to select a domain name that best achieves his desired objective, which is to attract people to the message. Taking away the domain

name interferes with the registrant's ability to communicate with potentially willing site visitors.

Please note also that the plaintiff's attack on the "sucks" domains is completely inconsistent with its asserted view that ordinary users think of domains as source identifiers with .com appended to them. Either that, or it must believe that ordinary users equate the phrases "taubmansucks" or "willowbendsucks" with its business name, an interesting possibility.

Mishkoff's use of <shopsatwillowbend.com> is defensible as a nominative reference to a subject that Mishkoff was interested in and wished to develop a website about. Just as <digital-convergence.com> is a reference to the subject area of my research center and not a source identifier, so <shopsatwillowbend.com> is what Mishkoff's web site is about, not a source identifier. As long as the actual content on the site and the nature of the domain's use does not confuse or deceive visitors, there is no need to enforce exclusivity in the use of the term in the domain name space.

### **Mishkoff Does Not Fit the Profile of a Cybersquatter**

I intend to testify that Henry Mishkoff does not conform to the pattern of a cybersquatter. I am, alas, an expert on cybersquatting. In the course of preparing our database for the Markle Foundation-supported UDRP Tracking Project, I was forced to read, analyze and classify literally thousands of domain name trademark disputes. It was not a pleasant experience. My experience as a domain name dispute arbitrator for the World Intellectual Property Organization has also contributed to this experience. I know who the world's top cybersquatters are, which trademarks are most commonly targeted by them, and can identify the three or four basic methods and strategies they use. I know what arguments and tactics they use in cases, and the techniques they use to try to conceal or disguise their intent. I know who makes money at it and who does not, and why.

Henry Mishkoff does not fit a recognizable profile of a cybersquatter. To begin with, your garden-variety cybersquatter does not develop an elaborate web site. In almost all cases, they register the name only and do nothing with it. In a few cases, in a feeble attempt to gain legitimacy *after* being challenged, they may throw up a one-page web site. This approach is the economically rational thing for a pure domain name speculator to do. If your plan is to make money by trading on the domain, it makes no sense whatsoever to waste resources developing and hosting content. The most common pattern is simply to register the name, sit on it, and then either contact the trademark holder or wait for the trademark holder to contact you. This type of cybersquatter usually registers hundreds if not thousands of domain names, many of them corresponding to trademarks. When contact occurs, a negotiation over the price ensues.

Mishkoff deviated from the pattern in a number of ways. He did not register large quantities of domain names. He did develop his own content. When contacted, he did not immediately express an interest in selling the name. Cybersquatters often use false contact information in their WHOIS record of domain name registration, in order to conceal their identity and place of residence from lawyers and law enforcement.

Mishkoff did not do this. Mishkoff registered only a few domains, all of them generic (such as <evenday.com>, <multiweb.com> and <familyonline.com>) and related to his own business ideas. It is an undisputed fact that the <shopsatwillowbend.com> domain is the only trademark-related domain he registered before becoming irate and registering the “sucks” domains. The plaintiff’s portrayal of him as a cybersquatter rests on extremely thin ice.

There are some types of cybersquatters who do develop content. These fall into two categories: 1) those who link trademarked names to porn sites in order to blackmail and extort the trademark owner, and 2) typo-squatters, that is, those who register domain names that are only a few characters different from famous trademarks to catch sloppy Internet typers and subject them to a parade of advertisements. These ads generate revenue for the typosquatter on a click-through basis. Mishkoff does not fit either pattern. While his site contained a link to his own home page and an unpaid ad for his girlfriend’s activities, he was not in the business of selling web-based advertising to third parties. Nor did he get compensated for generating hits to other websites. Moreover, for misdirection to be a profitable business method, the typosquatter must register and use lots of domain names. An isolated domain name simply won’t attract enough traffic, and a purely local brand is not the domain of choice. The famous typosquatter John Zuccarini, for example, registered hundreds of domain names, all of them slight misspellings of globally famous trademarks. Moreover, since the plaintiff itself clearly prefers the much shorter and easier to type <shopwillowbend.com> over the cumbersome and infrequently used (no longer functional?) <theshopsatwillowbend.com>, the alleged similarity between the offending domain and the plaintiff’s domain is not so great.

I am amused by the plaintiff’s suggestion that Mishkoff’s acceptance of the proposed settlement sum of \$1,000 constitutes evidence of domain name speculation and cybersquatting. If all the world’s cybersquatters spent as much time developing and hosting web content as Mishkoff and then relinquished their domains for a mere \$1,000, the world would be a better place – because cybersquatters would lose money and cease their practice. In assessing Mishkoff’s costs, it is patently wrong to look only at the \$70 he spent on registering the name. An active website must be name served (anywhere from \$30/year and much more if he bought and configured his own DNS server and software) and hosted (\$250 a year or so, and again more if he used his own equipment and bandwidth). If Mishkoff spent only eight hours designing, writing, loading and modifying the content, then, at the \$100/hour he commands as a consultant, his costs after only a year of publishing the web site would easily exceed the \$1,000 sum. There is no return on investment here. This in my judgment constitutes strong circumstantial evidence that acceptance of the settlement offer was motivated by a desire to recoup costs and end the dispute. Whatever Mishkoff’s motives, it does not correspond to the typical patterns of commercial cybersquatting.

### **Terms of service as expert in this case**

I normally charge \$250/hour for expert witness or related consulting. In this case I am working for no charge, receiving only reimbursement for direct expenses.

**Other expert service**

I have served as an expert witness in *Worldsport v. ArtInternet S.A.*, *Cedric Loison and Network Solutions, Inc. 99-CV-616 (BWK) (E.D. Pa.)*, and am currently an expert in a Hong Kong case, *Reach Communications v New World Telephone*.

November 8, 2002

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Milton Mueller