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LA RUSSA'S LOOSEN: TRADEMARK INFRINGEMENT LAWSUITS AND SOCIAL NETWORKS

I. INTRODUCTION

The St. Louis Cardinals are no strangers to tragedy and embarrassing media coverage.1 In 2002, the team suffered a terrible loss when Darryl Kile, “a former 20-game winner and one of the most respected players in the St. Louis clubhouse,” was found dead in his hotel room.2 Just five years later, in April 2007, the sudden death of former Cardinals’ relief pitcher Josh Hancock followed.3 Finally, in March 2007, the St. Louis Cardinals faced embarrassment when team manager Tony La Russa was “found sleeping behind the wheel of a sports utility vehicle during spring training with a blood alcohol level of 0.093 percent.”4 These events were rehashed in 2009, when Tony La Russa’s name was “twitterjacked.”5 Thereafter, on May 6, 2009, Tony La Russa filed suit against the social networking site Twitter, claiming various injuries resulting from the “twitterjacking.”6


2. Cannella, supra note 1 (“Cardinals pitcher Darryl Kile died of a heart condition in his Chicago hotel room in 2002.”).

3. See NBC Report, supra note 1 (“Cardinals reliever Josh Hancock died in an auto accident in April 2007, and the medical examiner measured his blood-alcohol level at 0.157 — nearly twice the legal limit.”).

4. Id.


Twitter is a free online social network that allows users to post and read messages, called "tweets." Users may make postings under "any name they wish, real or imagined, so long as they make it clear if they're impersonating someone." In essence, Twitter allows users to answer the simple question, "What are you doing?" in 140 characters or less, and share their answers with others. Created in 2006, "Twitter has grown into a real-time short messaging service that works over multiple networks and devices." Since its release, Twitter has risen in the ranks of popular social networks, rubbing elbows with Facebook and MySpace. Unfortunately for Twitter, this increasing popularity also produced mounting legal claims against it. Although La Russa is the first to file suit against Twitter based on an instance of "twitterjacking," other popular figures including the Dalai Lama and Kanye West, have shared similar experiences.

The complaint contained claims of both tortious actions and intellectual property infringements. See id.

7. See Twitter.com, Twitter Support: Frequently Asked Questions, http://help.twitter.com/forums/10711/entries/13920 (last visited Sept. 29, 2009) ("Twitter is a service for friends, family, and co-workers to communicate and stay connected through the exchange of quick, frequent messages. People write short updates, often called "tweets" of 140 characters or fewer. These messages are posted to your profile or your blog, sent to your followers, and are searchable on Twitter search.").


12. See generally Lori E. Lesser, Social Networks and Blogs, 962 PLI/PAT 23, 23 (2009) ("Despite their success, social networking sites and blogs present new legal issues as they face challenges from legislators, state attorneys general, users and content owners over issues including invasion of privacy, copyright and trademark infringement and defamation.").

13. See MacMillan, supra note 5 (reporting instances of celebrities other than La Russa who have experienced trouble with Twitter and false accounts). Initially, Twitter suspended the false Dalai Lama site but it "later reappeared with the name 'the UNOFFICIAL Twitter page of His Holiness the Dalai Lama.'" Id. Further, the postings set up under the name of Kanye West were removed after Kanye West complained "on his personal blog about an imposter posing as him, and called
The claims addressed in La Russa's suit arose after an anonymous user falsely created a Twitter account page under La Russa's name. The page contained postings making light of the previously mentioned tragedies and embarrassments faced by the St. Louis Cardinals. The complaint emphasizes that:

The Site states in large lettering, 'Tony La Russa is using Twitter,' and encourages users to 'Join today to start receiving Tony La Russa's updates.' It also contains a picture of Plaintiff with his name printed next to it. Beneath the picture, the Site contains written entries that are impliedly written by Plaintiff himself when in fact they are not.

Finally, in the user profile, the false anonymous user noted that, "Bio Parodies are fun for everyone." Twitter 'irresponsible and deceitful' for not doing anything to stop it." Other "twittejacked" celebrities include "Tina Fey, Christopher Walken, Condoleezza Rice, and Bill Gates." Coats et al., supra note 5, at 284; see also Joshua Rhett Miller, "Twitterjacking" — Identity Theft in 140 Characters or Less, FOXNEWS.COM, May 1, 2009, http://www.foxnews.com/story/0,2933,518480,00.html (providing list of several celebrity victims of "twitterjacking"). In the sports world:

Eagles CB Asante Samuel last month Tweeted a Super Bowl guarantee that was reported locally, but Samuel "didn't have a Twitter account." Cowboys DE DeMarcus Ware and Steelers QB Ben Roethlisberger also supposedly made comments via Twitter despite not having an actual account. As of Friday, there were "10,848 people following a fake account under" Colts QB Peyton Manning's name, while "another 17,084 were following a fake account under Giants QB Eli Manning's name.


15. See id. (describing false La Russa Twitter page). The postings were as follows:

Lost 2 out of 3, but we made it out of Chicago without one drunk driving incident or dead pitcher . . . I'd call that a 1-55 series. 8:01 PM Apr. 19th from web; Fortunately, Ian Snell sucks now . . . when Molina and Duncan Jr. go deep of you its time to look yourself in the mirror, have an ice . . . 3:33 PM Apr 8th from web; Drinking a cold Zima and wishing fucking Hancock was alive, I bet he could've gotten Jack Wilson out. 4:13 PM Apr 7th from web.

Complaint, supra note 6.

16. William McGeeveran, Celebrity Impersonation and Section 230, INFO/LAW, June 25, 2009, http://blogs.law.harvard.edu/infolaw/2009/06/25/impersonation-and-230 (explaining purpose of complaint's emphasis was due to Tony LaRussa's likelihood of prevailing on trademark infringement claim depending his ability to prove the phony account was likely to confuse consumers into believing LaRussa endorsed Twitter).

17. Id. There were only four followers to the false account, which could have caused a multitude of problems for La Russa's claims. See id. (detailing underlying facts of La Russa suit).
Upset by the page content, La Russa contacted Twitter and asked that the page be shut down. Allegedly, Twitter ignored La Russa's complaints, and La Russa responded by filing the first ever legal challenge against the site. After the suit was filed, Twitter removed the case to federal court, followed by La Russa's motion to dismiss the suit with prejudice in June 2009.

Despite its dismissal, the La Russa suit is unique in comparison to the legal suits endured by social networks in the past. Most notably, La Russa's suit not only addresses tort-based legal claims, but also addresses claims of trademark infringement against a social network. La Russa filed suit for the following causes of action: (1) trademark infringement; (2) false designation of origin; (3) trademark dilution; (4) cybersquatting; (5) misappropriation of name; (6) misappropriation of likeness; (7) invasion of privacy; and, (8) intentional misrepresentation. Most of La Russa's allegations are well established in intellectual property and tort law. Cybersquatting, however, is a relatively new concept that is gaining attention as Internet popularity grows.

18. See Elinson, supra note 14 (reporting La Russa's actions upon discovery of false Twitter page).
19. See id. (addressing La Russa using filing suit after notifying Twitter of fraud without reply).
20. See Notice of Dismissal, La Russa v. Twitter, Inc., No. 09-2505 (filed June 2009). The Dismissal was filed pursuant to rule 41(a)(1)(A) of the Federal Rules of Civil Procedure. Id.
21. See McGeveran, supra note 16 (marking La Russa's suit against Twitter as novel in certain aspects).
22. See id. (noting that complaint makes trademark claims which are not often used). In general, tort-based claims are a more popular and well established law in conjunction with social network liability, whereas, claims pertaining to trademark infringement are a more rare and less explored area of law when against social networks. See id. (describing popularity of tort-based claims against social networks as opposed to trademark infringement claims).
23. See Complaint, supra note 6 (listing La Russa's claims against Twitter).
24. See id. (listing allegations). Those claims alleged by La Russa that are well established law are the claims of trademark infringement and dilution, misappropriation of name and likeness, invasion of privacy, and intentional misrepresentation. Steven Seidenberg, Names' Sake: Social Media Pose Trademark Threats for Companies, INSIDE COUNCIL, Sept. 1, 2009 at 24, available at http://www.insidecounsel.com/Issues/2009/September%202009/Pages/Names-Sake.aspx.
25. See Seidenberg, supra note 24 ("There are clear rules and legal procedures for resolving cybersquatting and other domain name disputes, but the law hasn't yet caught up to social media."); see also Peter S. Sloane & Laura J. Winston, Trademarks and Copyrights as Growth Opportunities Even in a Recessionary Economy, INT'L PROP. TODAY, May 2009, at 30, available at http://www.leasonellis.com/The_Business_of_Trademarks_and_Copyrights.pdf.pdf ("A record 2,156 complaints alleging cybersquatting were filed with the World Intellectual Property Organization, representing an 18% increase over 2006 and a 48% increase over 2005.").
In the following sections, this Comment provides an overview of the laws governing many popular claims against social networks with a strong focus on the claims raised by La Russa. In Section II, this Comment addresses background issues surrounding La Russa’s claims. The background includes, not only the laws pertaining to his case, but also methods adopted by social networks, dealing with similar issues. In Section III, this Comment analyzes several legal issues affecting La Russa’s case. Finally, Section IV addresses the possible impact claims similar to La Russa’s suit may have on the legal treatment of social networks in the future.

II. BACKGROUND

Typically, in lawsuits against Internet service providers, the general issues that arise include tort claims and intellectual property violations. Congress has addressed many of these legal issues by passing the Communications Decency Act (“CDA”), the Digital Millennium Copyright Act (“DMCA”), and the Anticybersquatting Protection Act (“ACPA”). Courts have carefully interpreted most provisions of the CDA and DMCA. The ACPA, however, has few

26. For a background of LaRussa’s claims, see infra text and accompanying notes 30-142.

27. For discussion of social networks and the law, see infra text and accompanying notes 30-142.

28. For an analysis of the legal issues, see infra text and accompanying notes 143-221.

29. For a conclusion of the comment, see infra text and accompanying notes 222-228.

30. See Lesser, supra note 12, at 34 (discussing Communications Decency Act and Digital Millennium Copyright Act). Most tort claims against social networks have included defamation allegations. See id. at 38 (considering tort claims against social networks).


32. See Lesser, supra note 12, at 29 (discussing court interpretation of CDA and DMCA).
interpretive cases to provide direction in this relatively new area of law. Because ACPA litigation remains unchartered territory, there is room for creative liability arguments, as was the case in La Russa v. Twitter.

A. New Issues Originating With Growing Popularity of Internet

When drafting the CDA and DMCA, Congress was wary about the potential effects of extensive government regulation of the Internet. As a result, the language of this new legislation encourages self-regulation, as opposed to creating an overbearing regulatory presence. However, Congress found it extremely difficult to craft the final bill, because of the extensive differences between the Internet and traditional media forms.

First, the costs of using the Internet are significantly lower than traditional media forms, "such as television, radio, newspapers, and magazines." The Internet's bargain transaction cost of providing an easy "way for a speaker to reach a large audience," makes the Internet an attractive option to network, and advertise. As such, "unlike traditional media, the barriers to entry as a speaker on the Internet do not differ significantly from the barriers to entry as a listener." Second, the Internet's youth leaves legality of many

33. See generally ACPA, supra note 31, at § 1125(d) (enumerating statutory requirements bounding anticybersquatting law and year of effectiveness).

34. For full discussion of this law, see infra text accompanying notes 202-209.

35. See Zeran v. Am. Online, 129 F.3d 327, 330 (4th Cir. 1997) ("Congress recognized the threat that tort-based lawsuits pose to freedom of speech . . . [and] Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."); see CDA, supra note 31, § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."); Zeran, supra at 330-31 ("Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.").

36. See Horton, supra note 31, at 1305 ("The CDA's purpose is to promote self-help on the Internet and prevent the potential chilling effect that regulation may have on Internet speech."); see also Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.C. Cir. 1998) ("Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-policing the Internet for obscenity and other offensive material, even when the self-policing is unsuccessful or not even attempted.").

37. See Blumenthal, supra note 36, at 52 (comparing differences between traditional media, including print, television and radio broadcasts, and the internet).


39. Id.

40. Id.
questionable *e-activities* either unexplored or explored and unavailable to the public. 41 In turn, this causes confusion among web users about the legality of their actions. 42 Third, because domain names are unique to Internet media, they are a more limited resource in contrast to "visual and verbal trademarks." 43 Finally, unlike traditional media that seeks out the population to maintain sales and ratings, an Internet *user* "has to seek out information through a time-consuming process of typing and clicking . . . to enjoy the benefits of cyberspace communication." 44 Congress created both the CDA and DMCA with these factors in mind. 45

B. Communications Decency Act of 1996

Section 230 of the CDA was Congress' reaction to a 1995 case, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.* 46 *Stratton* concerned Prodigy Services Company, an Internet service that allows others to post messages on its site. 47 The court reasoned that because Prodigy voluntarily removed several "offensive" postings from its site, it was liable for any "defamatory messages that it failed to delete." 48


42. See id. (explaining legal ambiguity with respect to Internet conduct, and restricted behavior is attributed to Internet law's infancy).

43. Id.

44. Id. Arguably, however, the time consumption of Internet searches has decreased due to growing user familiarity with and the proficiency of search engines, which do most of the legwork for the user. See, e.g., Internet World State, North America Internet Usage Statistics, Population and Telecommunications Reports, http://www.internetworldstats.com/stats14.htm (last visited Sept. 23, 2009) (reporting 73.9% of Americans uses internet, with 138.7% growth from 2000-2009); see also SearchEngineWatch.com, Survey: Searchers are Confident, Satisfied & Clueless – Search Engine Watch (SEW), http://searchenginewatch.com/3462911 (Last visited Sept. 23, 2009) (providing statistics of American trend in internet searches, including, "87% of online searchers say they have successful search experiences most of the time, including 17% of users who say they always find the time, including 17% of users who say they always find the information for which they are looking").

45. For full discussion of CDA and DMCA, see infra notes 46-83.

46. See Lesser, *supra* note 12, at 34 (discussing history of CDA and cases leading up to its enactment); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 32371 (N.Y. Sup. Ct. May 24, 1995) [hereinafter "Stratton Oakmont"] (providing backdrop of CDA enactment); CDA, *supra* note 31, at § 230(c). Note that Congress chose to title this section that provides broadened protection to Internet network providers, "Protection for 'Good Samaritan' blocking and screening of offensive material." Lesser, *supra* note 11, at 34.


48. Lesser, *supra* note 12, at 34. The court held that Prodigy employed an editorial function when it removed the postings, and was, therefore, treated as a
holding in Stratton did not sit well with lawmakers. Based on the Stratton ruling, companies that are less socially responsible would escape liability. Therefore, Congress enacted Section 230 of the CDA, which applies to all Internet publishers or speakers. It states that, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” In other words, an Internet service provider, like Prodigy, is not liable for tort or state based claims because it employs an editorial function. Although Prodigy would have been free from liability, Section 230 does not afford the original posters of the defamatory material the same luxury of immunity (if the true identity of those posters is discoverable).

Section 230 is not all encompassing, however, and there is a limit to the shelter created. It exempts federal criminal liability, intellectual property law, and any state laws that are “consistent with this section” from coverage under the section. Therefore, this limitation provides a loophole for “celebrities who can recast privacy-like claims under trademark law (and possibly also rights of publicity, if those are interpreted as intellectual property under the language of Section 230(d))."

C. The Digital Millennium Copyright Act (“DMCA”)

Section 512 of the DMCA offers Internet service providers with a “safe harbor” from monetary damages for claims of copyright infringement, an area otherwise left vulnerable under Section 230 of publisher of a newspaper. See id. (describing rationale for holding internet service liable).

49. See id. at 35 (discussing rationale for creating Section 230 of CDA after Stratton).

50. See id. (highlighting problems with Stratton holding).

51. See id. (noting protection provided by CDA to Internet service providers).

52. CDA, supra note 31, at § 230(c)(1).

53. See Anne H. Hocking, Selected Liability Issues – Social Networks and Blogs, 947 PLI/PAT 187, 197 (2008) (discussing immunities provided to internet service providers). This includes editing out material that may technically be constitutionally protected. See id. (detailing immunities provided to internet services providers).

54. See Zeran v. Am. Online, 129 F.3d 327, 330 (4th Cir. 1997) (“None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability.”).

55. See CDA, supra note 31, at § 230(d) (enumerating limits to Section 230 shelter).

56. Id.

57. McGeveran, supra note 16.
the CDA. 58 Section 512 "immunizes [Internet service providers, in general,] from liability for contributory or vicarious copyright liability for infringing third-party content under a defined set of safe harbors." 59 Nevertheless, if social networking sites or blogs actively maintain their networks rather than acting merely as passive networks, the provider "could be found liable for contributory, vicarious, or inducement of copyright infringement committed by users on their websites." 60 Therefore, Section 512 protects Internet service providers from "liability for infringing material appearing on their systems" only under certain circumstances. 61 To qualify for the safe harbor, a service provider must:

(a) [Adopt] and reasonably [implement], and [inform] subscribers and account holders of the service provider's system or network of, a policy that provides for termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and (b) [accommodate] and [ ] not interfere with standard technical measures. 62

The DMCA, however, does not require that Internet service providers follow these guidelines stringently, only that they act reasonably. 63 Although the policy requirements are relatively flexible, the "safe harbor" provided to an Internet service provider does have limitations. 64 Under Section 512(c)(1)(A)(iii), the "safe harbor" may be limited if the network "upon obtaining . . . knowledge or awareness [of infringing activity, does not act] expeditiously to remove, or disable access to the material." 65 Therefore, an Internet service provider may only enjoy the "safe harbor" provided by the

The safe harbor is included in Section 512(c) of the DMCA. Id.
59. Lesser, supra note 12, at 51.
60. Id. at 52 (emphasis added). The active maintenance mentioned can take a variety of forms including editorial functions. Id.
61. Neuburger, supra note 58, at 729.
63. See Iq Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132, 1144 (N.D. Cal. 2008) ("[T]he mere fact that [the repeat infringer] appeared on [the internet service provider site] under a different user name and identity does not, by itself create a legitimate question of fact regarding the procedural implementation of [that internet service provider's] policy" (quoting Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1104 (W.D. Wash. 2004))). For a list of cases analyzing DMCA guidelines, see infra note 73.
64. See 17 U.S.C. § 512(c)(1)(A)-(C) (listing limitations on safe harbor).
65. Id. § 512(c)(1)(A)(iii).
DMCA so long as the provider advertises a policy against copyright infringements and makes a realistic threat of shutting down account access to those who go against the policy.66

D. Federal Court Interpretations of the CDA and DMCA

After the enactment of the CDA and DMCA, courts began interpreting the legislative language in an ever-expanding number of cases.67 In 1997, Zeran v. America Online, tested the immunity provided to a service provider via Section 230 of the CDA.68 The Fourth Circuit concluded that Congress had the following rationale when drafting Section 230;

It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.69

Therefore, the court determined that creating liability upon notice would have “a chilling effect on the freedom of Internet speech.”70

In 1998, the D.C. Circuit expanded on the immunities described in Zeran when deciding Blumenthal v. Drudge.71 Despite America Online’s (AOL) showing that the individual making defamatory posts was on its payroll to make the postings, the court determined that AOL retained its immunity as an Internet service provider.72 In the following years, several cases cited Zeran as au-

66. See Lesser, supra note 12, at 55-56 (discussing DMCA safe harbor).
67. See id. at 56 (listing cases citing CDA and DMCA).
69. Id. at 331.
70. Id. at 333.
72. See Blumenthal, 992 F. Supp. at 52-53 (“While it appears to this Court that AOL in this case has taken advantage of all the benefits conferred by Congress in the [CDA], and then some, without accepting any of the burdens that Congress
tority, thus reaffirming the Zeran court's findings. Finally, in 2001, the Southern District of New York affirmed that the CDA does not provide immunity to Internet service providers from trademark infringement claims in Gucci Am., Inc. v. Hall & Assoc.

The affirmation in Gucci gave rise to several cases triggering the DMCA safe harbors. In 2001, the Central District of California used a textualist interpretation method of the DMCA to determine safe harbor qualifications in Hendrickson v. eBay. In doing so, the court held that a notice of infringement to eBay must "comply substantially" with the direct language of the DMCA to remove the safe harbor protection. The District of Maryland, in Costar
Group v. Loopnet, further expanded on the DMCA interpretations.\(^\text{78}\) An Internet service provider’s “policy must warn users who repeatedly infringe copyrights that there is a ‘realistic threat’ of losing account access.”\(^\text{79}\) Further, the Western District of Washington, in Corbis v. Amazon.com, held that:

(1) a termination policy need not eliminate all infringers in order to be ‘reasonably implemented’; (2) repeated ‘takedown’ notices alone are not sufficient to trigger termination obligation; and (3) implementation details of the termination policy need not be communicated to users.\(^\text{80}\)

Finally, in Doe v. MySpace, the Western District of Texas extended the CDA and DMCA immunities to include social networks.\(^\text{81}\) These cases reflect the changing ways people use and interact with the Internet.\(^\text{82}\) As these types of changes persist, courts will continue to test Congressional legislation.\(^\text{83}\)

E. Cybersquatting

In Tony La Russa’s complaint, he raised a cybersquatting claim; a claim with questionable application to Twitter as a social network.\(^\text{84}\) Cybersquatting is a civil liability borne by “any person who registers a domain name that consists of the name of another living person, or a name substantially and confusingly similar thereto, without the person’s consent, with the specific intent to

\[\text{the facts or circumstances from which infringing activity is apparent}].\) eBay is an Internet forum that acts as a “marketplace” for its users to buy and sell products online. eBay, Who We Are – eBay Inc., http://www.ebayinc.com/who (last visited Oct. 17, 2009). The court determined that the plaintiff did not provide proper notice to eBay because the notice did not substantially comply with the provisions listed in Section 512 of the DMCA. Hendrickson, 165 F. Supp. 2d at 1093. This holding provided that, although there is some flexibility in the proper form of notice, there still must be some conformance with the DMCA’s guidelines. \(\text{Id.}\)

\(^{78}\) See Costar, 164 F. Supp. 2d at 703 (expanding on DMCA requirements).

\(^{79}\) Lesser, supra note 12, at 56 (citing holding in Costar).

\(^{80}\) Id. (citing holding in Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090 (W.D. Wash. 2004)).

\(^{81}\) See Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 847 (W.D. Tex. 2007) (holding that social networks were included in immunities provided by Section 230). The court also noted that Section 230 affords immunities to Internet service providers for claims other than defamation. \(\text{Id.}\) at 849.

\(^{82}\) See Sloane, supra note 25, at 30 (discussing new issues arising with new Internet uses).

\(^{83}\) See id. (discussing existence of many new issues yet to arise due to amount of new litigations pending internationally).

\(^{84}\) See Complaint, supra note 6 (stating that Twitter should be included within scope of cybersquatting liability).
profit from such name by selling the domain name for financial gain."85 These disputes arise not only because there are a finite number of domain names, but also because those domain names are registered on a first come first serve basis.86 Without regulatory protection, the field would be left open not only to those trying to capitalize on opportunity but also those innocently registering for other reasons.87 There are many kinds of cybersquatters, all of whom are liable.88 Therefore, those who feel their rights have been infringed upon can look to either of two different instruments to protect those rights.89 These two instruments, established in late 1999, are "the Anticybersquatting Protection Act (ACPA), enacted by the U.S. Congress... and the Uniform Dispute Resolution Policy (UDRP), adopted by the Internet Corporation for Assigned Names and Numbers (ICANN)."90

1. Anticybersquatting Protection Act

An amendment to the Lanham Act, the ACPA imposes civil liability on those who take part in "act[s] of registering, trafficking

85. Dale M. Cendali & Brendan T. Kehoe, Technology and Entertainment Cover-
main name has two parts, the top-level domain that follows the dot (such as .com or .org) and the second level domain "which is the name that directly precedes the dot in every web address." Id. at 37. "Most legal issues arise regarding the second-
level domain because there cannot be two identical second-level domains under the same top-level domain." Id.

86. See Lichtenberg, supra note 85, at 37 (explaining reasoning for creating domain name protections).

87. See id. (addressing how domain name disputes arise).

88. See Zohar Efroni, The Anticybersquatting Consumer Protection Act and the Uni-

"Classic" cybersquatters register domain names based on trademarks and try to sell them to mark owners for profit. By contrast, a second group, "cyberpirates," incorporate marks in their domain names to attract traffic and divert users from their intended destination, making profits from the inadvertent "hits" on their websites and from advertisements posted on those sites. A third group, "typosquatters," in-
dulge[s] in the activity of registering domain names that incorporate marks in a few variations (sometimes dozens), including misspelling or incomplete names...Finally, there are "pseudo-cybersquatters," passive registrants, who merely hold domain names without operating websites. They conduct no online activity using the domain names and do not offer them for sale.

Id. at 337.

89. See id. at 338 (naming two forums available for cybersquatting claims).

90. Id.
in or using a domain name that is identical or confusingly similar to a mark or dilutive of a famous mark (with bad faith intent to profit)."91 The act specifies a non-exhaustive list of factors a court may use to determine whether there is bad-faith intent to profit.92 Included in that list is (1) "the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;" (2) "the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;" and, (3) "the extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous. . . ."93

The ACPA also grants courts authority to provide remedies.94 These remedies include: "forfeiture, cancellation or transfer of the disputed domain name, as well as either actual damages, or statutory damages of not less than $1,000 and not greater than $100,000 per domain name."95 The ACPA allows a suit to proceed "in rem" "against the domain name itself in the district where the domain name was registered" regardless of the identity or location of the registrant.96

Relatively new to courts, the ACPA has, thus far, been adopted with a narrow examination for ACPA liability.97 Courts have constructed three basic questions to determine liability: "(i) is the mark distinctive or famous; (ii) is the domain name in question identical or confusingly similar to the mark; and (iii) was there a bad faith

91. Id. at 346; see also Jeffrey D. Neuburger, New Media, Technology and the Law: A Summary of Key Legal Developments Affecting Technology and Emerging Business Models, 978 PLI/ PAT 249, 271 (2009) (explaining provisions of ACPA). Under the ACPA, a famous mark can include some personal names. Id. at 271.


94. See Neuburger, supra note 91, at 271 (discussing remedies provided by ACPA).

95. Id. at 271.

96. Efroni, supra note 88, at 347; see also Mattel, Inc. v. Barbie-Club.com, 310 F.3d 293, 294 (2d Cir. Nov. 7, 2002) (holding in rem jurisdiction of ACPA to apply only to district in which domain name is registered); Broadbridge Media LLC v. Hypercd.com, 106 F. Supp. 2d 505, 510-11 (S.D.N.Y. 2000) (applying ACPA's in rem provisions to hold jurisdiction over cybersquatting case). This gives the ACPA a further jurisdictional reach than the Lanham Act. See Efroni, supra note 88, at 347.

97. See Efroni, supra note 88, at 347 (discussing court analysis and application of ACPA).
intent to profit." Finally, trademarks in domain names are used quite often for purposes of criticism and parody. Courts vary in their decisions on this type of use.

2. Uniform Domain Name Dispute Resolution Policy (adopted by Internet Corporation for Assigned Names and Numbers)

The Uniform Domain Name Dispute Resolution Policy (UDRP), adopted by the Internet Corporation for Assigned Names and Numbers (ICANN), is an instrument that provides remedy to cybersquatting victims. The UDRP is composed of arbitrators who have the power to provide limited relief by either transferring the domain name to the complainant, or cancelling the domain name. UDRP’s purpose is to determine:

(1) if the disputed domain name is identical or confusingly similar to a trademark or service mark in which a complainant has rights;
(2) if the registrant has no rights or legitimate interest in the domain name; and,
(3) if the domain name has been registered and is being used in bad faith.

Therefore, a complainant may attempt, and possibly succeed, in recovering multiple names in a single action. Generally, UDRP proceedings resemble civil law proceedings. They also

98. Id. See, e.g., Shields v. Zuccarini, 254 F.3d 476, 482-86 (3d Cir. 2001) (using three part test as to whether (1) mark was distinctive or famous, (2) domain name was identical or confusingly similar to mark, and (3) there was bad faith intent to profit). For further discussion of case interpretation of ACPA, see supra note 91 and accompanying text.

99. See Neuburger, supra note 91, at 279 (noting commonness of use of trademarks in domain names for purpose of criticism or parody). Many times these types of sites are called “griep sites.” Id. “Opinions in disputes over these so-called ‘griep sites’ under trademark law and the ACPA vary in their results, as do rulings under the ICANN UDRP.” Id.

100. See id. (noting varied court decisions on issues of using trademarks in domain names in spirit of parody or criticism).

101. See id. at 269-70 (discussing resolution opportunity through UDRP for victims of cybersquatting).

102. See id. at 269 (noting remedies available in UDRP action).

103. Id. at 270.


105. See Anne H. Hocking, Basic Principles of Trademark Law, 973 PLI/PAT 83, 117 (2009) (“There is no discovery, no personal appearances or telephone conferences with the adjudicator; everything is done on paper.”); see also ICANN, Rules for Uniform Domain Name Dispute Resolution Policy (Oct. 24, 1999), available at http://www.icann.org/en/udrp/udrp-rules-24oct99.htm [hereinafter “Rules for...
move quite quickly, requiring the adjudicator to come to a decision within three weeks.\textsuperscript{106} In cases where the complainant prevails, the remedy will “take place 10 days after the decision is issued unless the panel is informed by the defendant that they are initiating court proceedings [via ACPA] on the matter.”\textsuperscript{107} Conversely, because there is no \textit{res judicata}, in cases where the complainant does not prevail, a plaintiff can re-file repeatedly with any “domain name dispute provider. . . until the desired result is reached.”\textsuperscript{108}

3. ACPA v. UDRP; Which One Should I Use?

Complainants may file suit under either the ACPA or through UDRP.\textsuperscript{109} Thus, a complainant should determine the best forum to fit a case by weighing the pros and cons of each forum.\textsuperscript{110} Once cybersquatting is apparent, both provide helpful remedies.\textsuperscript{111}

The UDRP may prove to be a better forum not only because of its efficiency and timeliness, but also because of its “user-friendly” quality.\textsuperscript{112} Conversely, the “ACPA is not ideal for solving political-cybersquatting problems because: (1) litigation is too costly and slow for most candidates; (2) non-commercial cybersquatters may not have the requisite ‘bad faith intent to profit;’ and (3) jurisdictional issues may prevent American courts from reaching foreign cybersquatters.”\textsuperscript{113} Further, the UDRP has a “user-friendly” procedure that is “both a quick method of resolving disputes quickly and...
also a relatively cheap option." 114 Finally, in cases where a complainant "can easily prove the registrant's bad faith registration of a domain name, then it may be preferable to initiate an ICANN proceeding under the UDRP." 115

Conversely, filing federal suits under the ACPA may prove beneficial in complicated cases. 116 "When an issue of contract, free speech or trademark infringement is involved, in addition to an issue of bad faith registration and use, the better course of action is to file a federal lawsuit under the ACPA." 117 Also, if a complainant desires monetary damages, as well as equitable relief, the best choice is to file a lawsuit under the provisions of the ACPA. 118

F. Social Networks' Metamorphosis With the Law

The top social networks adapted to Congressional legislation to take advantage of liability immunity. 119 The two most popular social networks, Facebook and MySpace, have gone through a series of changes to avoid liability. 120 Nevertheless, both networks have found themselves at the center of several lawsuits questioning whether their policies are enough to remove them from liability. 121 MySpace and Facebook are sites that connect their users by "integrating personal profiles, photos, videos, mobile, messaging, [and] games." 122

115. Lichtenberg, supra note 85, at 42.
116. See id. at 41-42 ("[R]ights holders might want to consider bringing claims under the ACPA when a case requires discovery of complicated facts . . . .").
118. Compare Neuburger, supra note 91, at 271 (discussing remedies allowed under ACPA) with Neuburger, supra note 91, at 270 (discussing remedies allowed under UDRP).
119. For full discussion on social networks that have adapted to the immunity of the CDA and DMCA through the drafting of their terms of service, see infra text and accompanying notes 125-129.
121. For full discussion of lawsuits faced by MySpace and Facebook, see infra text and accompanying notes 123-142.
122. MySpace Press Release, supra note 120 (portraying facts about MySpace); see also Facebook/Factsheet, supra note 120 (portraying facts about Facebook).
1. **The CDA/DMCA and the Social Network**

As previously discussed, the CDA protects social networks from most state action liability, except some of those pertaining to intellectual property.\(^{123}\) Furthermore, the DMCA provides additional protections to social networks qualifying for safe harbor in cases involving intellectual property infringement.\(^{124}\) In an effort to protect themselves under the CDA and DMCA safe harbors, both Facebook and MySpace include language in their terms of service, which avails themselves to the protections offered by both legislations.\(^{125}\) First, both sites reserve the right to remove any materials they see fit for any or no reason.\(^{126}\) Second, both sites reserve the right to terminate users for any or no reason, specifically in instances of repeat offenses.\(^{127}\) Finally, neither site works to “interfere with standard technical measures” and have availed themselves to specified United States courts.\(^{128}\) In this sense, both social networks have attempted to maneuver themselves under the shelter of the law.\(^{129}\)

\(^{123}\) For full discussion on the CDA, see *supra* text and accompanying notes 46-57.

\(^{124}\) For full discussion on the DMCA and safe harbor requirements, see *supra* text and accompanying notes 58-66.


\(^{126}\) Compare Facebook TOS, *supra* note 125 (enumerating terms of service for Facebook users and rights reserved by network providers) with MySpace TOS, *supra* note 125 (addressing terms of service for MySpace users and rights reserved by network provider).

\(^{127}\) Compare Facebook TOS, *supra* note 125 (enumerating terms of service for Facebook users and rights reserved by network providers) with MySpace TOS, *supra* note 125 (addressing terms of service for MySpace users and rights reserved by network provider).

\(^{128}\) DMCA, *supra* note 31, § 517(i)(B); see also MySpace TOS, *supra* note 125 (“The Agreement shall be governed by . . . the laws of the State of New York, without regard to its conflict of law provisions. You and MySpace agree to submit to the exclusive jurisdiction of the courts located within the State of New York to resolve any dispute arising out of the Agreement or the MySpace Services.”); Facebook TOS, *supra* note 125 (“You will resolve any claim, cause of action or dispute (“claim”) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County.”).

\(^{129}\) Compare Facebook TOS, *supra* note 125 (enumerating terms of service for Facebook users and rights reserved by network providers) with MySpace TOS, *supra* note 125 (addressing terms of service for MySpace users and rights reserved by network provider).
2. **Cybersquatting and the Social Network**

Most cybersquatting cases pertain to top-level domains (i.e., ".com," ".gov" or ".edu") preceded by second level domain terms. When Facebook released an option to its users to register usernames, the social network had a brush with cybersquatting-like issues. The issue involving Facebook is unique, because the usernames are contained in the post domain path level (after the ".com" in a URL). Therefore, the mark allegedly used in infringement is not within the "domain name" as defined by courts under the ACPA. Although the username position, after the ".com," de-classifies the trademarks from being within a "domain name" as defined by the courts under the ACPA and UDRP, the issues involved are remarkably similar.

Facebook anticipated a problem of bad faith registration, and created a policy stating "the chosen username should be as close as possible to the user’s true name, and ‘must adhere to Facebook’s Statement of Rights and Responsibilities.’ [Further,] [b]efore launch of the registration, Facebook allowed users who own registered trademarks to register them with Facebook” prior to the remainder of the Facebook user population, “so that their trademarks would not be included in the vanity URLs open for registration.” If a registered trademark owner did not register in time, Facebook

130. See Peter T. Wakiyama & Odia Kagan, *Facebook Vanity URLs May Hurt More Than Just One's Pride*, 21 No. 9 INTELL. PROP. & TECH. L.J. 7, 8 (2009) (citation omitted) (discussing typical cybersquatting cases). Lawsuits for trademark infringement generally arise when the second level domain terms contain a protected mark without the holder’s consent or knowledge, and the use of the mark is in bad-faith. See id. (presenting typical elements of trademark infringement lawsuits).

131. See id. (discussing claims against Facebook after issuing user names). For further discussion on post-domain paths, see *infra* text and accompanying notes 138-142. The user names can only be used once, and come after the ".com" in the Facebook address (i.e. www.facebook.com/jdoe) and have been donned as "vanity URLs". Wakiyama, *supra* note 130, at 7 (“On June 13, 2009, Facebook vanity URLs opened for registration by its users. Instead of www.facebook.com/id=591932074, a user’s page would now be located at www.facebook.com/johndoe, allowing the user to be easily found by entering his or her name into the URL in the browser.”). "Examples of the new pages can be seen at www.facebook.com/cocacola, www.facebook.com/gap, and www.facebook.com/mcdonalds. Within the first three minutes of the availability of the Facebook vanity URLs, 200,000 URLs were registered; within 15 minutes, more than half a million had registered.” *Id.*

132. See id. (discussing position of usernames in post domain path).

133. See id. at 8 (describing court definition of domain names). Note that the ACPA does not actually provide a definition for a domain name within its text. ACPA, *supra* note 31.

134. See Wakiyama, *supra* note 130, at 8 (describing post-domain paths and similarity to other cybersquatting issues).

135. *Id.*
has incorporated a remedy within its terms of service (TOS). To
day, it is unclear as to whether a trademark holder would prevail in
either an ACPA or UDRP action citing cybersquatting as a cause of
action against a social network for a trademark included in a post-
domain path.

Before the boom of social networks, one particular case may
shed some light on a court's outcome today, if followed. In Interactive
Products Corp. v. a2z Mobile Office Solutions, Inc., the Sixth Cir-
cuit determined that a similar or same "post-domain path" of a URL
does not rise to the level of causing a "likelihood of confusion," and
therefore, is not trademark infringement. The court based its
holding on the rationale that the "post-domain path of a URL... does not typically signify source [of goods or services]. The post-
domain path merely shows how the website's data is organized
within the host computer's files." With new developments in the
use of post-domain name paths, especially in cases of social net-
works like Facebook and Twitter, courts may take a different ap-
proach to the situation and find added protections necessary.

136. See id. ("The first stop in an aggrieved trademark owner's road to recov-
ery for the misappropriation of his or her trademark would be the Facebook terms
of service (TOS), which govern users' activities on the Facebook site."). The TOS
states, "[i]f you select a username for your account we reserve the right to remove
or reclaim it if we believe appropriate (such as when a trademark owner complains
about a username that does not closely relate to a user's actual name)." Facebook
TOS, supra note 125.

137. See Wakiyama, supra note 130, at 7 (posing questions about viability of
case for cybersquatting under ACPA or UDRP).

138. See Interactive Pros. Corp. v. a2z Mobile Office Solutions, Inc., 326 F.3d
687, 696-98 (6th Cir. 2003) [hereinafter Interactive] (holding that post-domain
paths do not constitute same thing as domain names as defined by ACPA).

139. See id. at 698 (holding that typically similar post-domain paths will not
rise to level of trademark infringement).

140. Id. at 696-97. Notably, the plaintiff in this case "did not present any evi-
dence that the presence of its trademark in the post-domain path caused actual
confusion or was likely to cause consumer confusion." Enrico Schaefer, The ACPA:
Arguably, presenting this type of evidence may have caused the court to hold dif-
ferently. See id. ("If such evidence existed and was presented, the outcome could
have been different.").

141. See Cendali, supra note 85, at 113 ("[T]he new significance of post-do-
main name paths may cause courts to see the situation differently."). Notably,
a court may determine that the post-domain paths now signify a source when pre-
ceded by a social network second legal domain. See id. (discussing ramifications of
new level of importance placed on post-domain name paths). The username
within a post-domain path could be shown to signal the owner of an accounts
page, therefore leading an Internet user to have a higher likelihood for confusion.
Id.; see also Schaefer, supra note 140 (stating that stronger showing of likelihood of
confusion may have caused court to have different conclusion).
any event, some argue the best protection for a trademark owner is to remain pro-active by checking trademark use on the Internet, and personally registering on social networks to stop the problem before it starts.\footnote{142}

III. Analysis

Despite Tony La Russa dropping his suit, he raised several interesting and creative claims against Twitter.\footnote{143} Although few will argue that La Russa had a strong case, the issues presented have the potential to become a pressing concern in the near future.\footnote{144} Further, Twitter’s attempt to modify its self-regulation policy may help it to dodge a similar lawsuit, or at least give it the upper hand.\footnote{145}

A. Tweet, a Squawk, or a Whiff (La Russa v. Twitter, Inc.)

In the first ever lawsuit against Twitter, La Russa raised a variety of claims.\footnote{146} His claims contained both tortuous and intellectual property claims.\footnote{147} La Russa’s complaint contained eight causes of action, including: (1) Trademark Infringement; (2) False Designation of Origin; (3) Trademark Dilution; (4) Cybersquatting; (5) Misappropriation of Name; (6) Misappropriation of Likeness; (7) Invasion of Privacy; and, (8) Intentional Misrepresentation.\footnote{148}

1. Trick or Tweet (Claims for Misappropriation of Name and Likeness, Invasion of Privacy, and Intentional Misrepresentation)

First, La Russa raised a tortuous claim for misappropriation of name or likeness.\footnote{149} In most states, a plaintiff must establish three
elements to prevail in this cause of action.\textsuperscript{150} The elements are (a) use of a protected attribute, (b) for an exploitive purpose, and (c) without consent.\textsuperscript{151} To establish the use of a protected attribute, a plaintiff may show that the offending party used "an aspect of his or her identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects certain other personal attributes as well."\textsuperscript{152} Next, to establish that the defendant unlawfully used a protected mark, most states require the plaintiff to show that the defendant used the attribute for the defendant's own benefit.\textsuperscript{153} Furthermore, "[c]onsent is a complete defense to a legal claim for misappropriation of name or likeness."\textsuperscript{154} In his case, La Russa claimed that by using his name and image on the false account page, Twitter misappropriated his name and likeness, as well as projected the illusion of his endorsement.\textsuperscript{155}

\begin{itemize}
  \item[150.] See Citizen Media Law Project, Using the Name or Likeness of Another, http://www.citmedialaw.org/legal-guide/using-name-or-likeness-another (last visited Oct. 19, 2009) (discussing three factors necessary for plaintiff to show when raising claim for misappropriation of name or likeness).
  \item[151.] See id. (noting that name used does not need to be complainant's "full or formal name, just something that is sufficient to identify" complainant). Further, "[l]ikeness refers to a visual image of the complainant. \textit{Id.} This may take any of a variety of forms, which do not need to "precisely reproduce the [complainant's] appearance... so long as it is enough to evoke the [complainant's] identity in the eyes of the public." \textit{Id.}
  \item[152.] \textit{Id.}; see, e.g., Carson v. Here's Jonny Portable Toilets, Inc, 698 F.2d 831 (6th Cir. 1983) (holding that use of "Here's Johnny" slogan within brand name was sufficient to suggest Johnny Carson's identity); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (holding defendant liable for using photograph of plaintiff's race car in commercial); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (holding defendant liable for using robot resembling Vanna White in television commercial).
  \item[153.] See Citizen Media Law Project, \textit{supra} note 150 (discussing that individual can be held liable for using plaintiff's name or likeness for own benefit). A defendant may also be found liable "for some non-commercial uses of someone's name or likeness if [the defendant] exploit[s] the plaintiff's identity for [the defendant's] own benefit." \textit{Id.}; see, e.g., Faegre & Benson, LLP v. Purdy, 367 F. Supp. 2d 1298 (D. Minn. 2005) (holding anti-abortionist activists liable for registering domain names containing names or nicknames of rivals because registration was for own benefit); Felscher v. Univ. of Evansville, 755 N.E.2d 589, 600 (Ind. 2001) (holding professor liable when he used colleagues' names in non-commercial websites and email accounts to elicit viewers back to own website and it was therefore misappropriation which "enabled him to pursue a personal vendetta"); McMann v. Doe, 460 F. Supp. 2d 259 (D. Mass. 2006) (holding defendant not liable for posting photograph of real estate on "gripe site"). For a further definition of "gripe sites," see \textit{supra} note 99.
  \item[154.] Citizen Media Law Project, \textit{supra} note 150.
  \item[155.] See Complaint, \textit{supra} note 6 (listing La Russa's allegations against Twitter in misappropriation claim).
\end{itemize}
Second, La Russa raised an invasion of privacy claim. His complaint contained language set out in the California Civil Code generally used at common law for right of publicity claims. Section 3344 of the California Civil Code provides that "anyone who knowingly uses another's name, signature, photograph or likeness, in any manner, for the purpose of advertising or selling or soliciting without such person's prior consent shall be liable for any damages sustained." Accordingly, La Russa argued that Twitter "had made an unauthorized use of his name, signature, photograph and likeness, in a manner to which he has not consented" and as a result, La Russa "had suffered emotional distress, damage to his reputation and general damages in the sum to be shown according to proof."

Third, La Russa claimed intentional misrepresentation. This type of claim is "usually a fact-intensive inquiry and requires that the plaintiff allege reliance upon the misrepresentation." In his complaint, La Russa alleged that, by publishing "Tony La Russa is using Twitter," the representation was false and was made available "to all members of the public over the internet." La Russa, therefore, concluded that he suffered "significant emotional distress and damage to his reputation."

Although a complaint is not complete without raising every element, current law has well established that Internet service providers, especially those in Twitter's position as an intermediary, have

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156. See id. (listing invasion of privacy as one claim against Twitter).

157. See Russell J. Frackman & Tammy C. Bloomfield, The Right of Publicity: Going to the Dogs?, UCLA Online Inst. for Cyberspace Law and Pol'y (Sept. 1996), available at http://www.gseis.ucla.edu/iclp/rfcdb.html ("In California, the right of publicity is protected both by statute for 'name, voice, signature, photograph or likeness' (Civil Code § 3344) and, more generally, at common law.").

158. Complaint, supra note 6; see CAL. CIV. CODE. § 3344 (West 2009). Also, note that in Laws v. Sony Music Entm't, Inc., Section 3344 of the California Civil Code is limited on preemption grounds. 448 F.3d 1134 (9th Cir. 2006). In this case, the court found that the plaintiff's claim was too similar to a copyright claim, covered by federal law. See generally id. Therefore, the court determined that federal law, the Copyright Act, preempted the plaintiff's state claim under Section 3344. See id. at 1141 ("[F]ederal copyright law preempts a claim alleging misappropriation of one's voice when the entirety of the allegedly misappropriated vocal performance is contained within a copyrighted medium.").

159. Complaint, supra note 6.

160. See id. (listing intentional misrepresentation as claim against Twitter).


162. Complaint, supra note 6.

163. Id.
been granted wide latitude to qualify for immunity.164 Twitter’s policies and interaction with the site place it within the safe harbors provided by Section 230 of the CDA.165 La Russa’s claims for invasion of privacy, however, may have been meant to be right of publicity claims under Section 3344 of the California Civil Code.166 If La Russa’s invasion of privacy claim is construed as a right to publicity claim, courts have held that social networks are not afforded Section 230 immunities.167 In a right of publicity claim, the plaintiff must show that the network provider unlawfully used a person’s name or likeness for commercial benefit.168 Therefore, assuming that his claim is construed in this nature by the court, La Russa’s

164. See Venkat Balasubramani, Tony La Russa’s Legal Claims Against Twitter Look Tenuous, CIRCLEID, June 09, 2009, http://www.circleid.com/posts/20090609_tony_la_russas_against_twitter_tenuous (discussing weaknesses and points of interest raised by La Russa’s suit against Twitter).

165. See id. (addressing broad grant of immunity to internet service providers acting as intermediaries). For full discussion on immunity granted to service providers by Congressional legislations, see supra text and accompanying notes 46-57.

166. For full discussion on California common law use of Section 3344, see supra text and accompanying note 157-158. Further, there are sections in the California Civil Code illustrating physical and constructive invasion of privacy provisions, not cited in La Russa’s complaint. See Cal. Civ. Code §§ 1708.8(a)-(b) (Deering 2009). The constructive invasion of privacy provision follows:

A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

Id. § 1708.8(b).

167. See Citizen Media Law Project, supra note 150 (discussing proceedings in Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288 (D.N.H 2008)). In Doe v. Friendfinder Network, Inc., the court “held that CDA [Section] 230, which immunizes website operators from many state law legal claims based on user-generated content, does not apply to right of publicity claims. Therefore, [Plaintiff’s] claim against the social networking site could go forward, despite the fact that a third-party created the profile.” Id. (citation omitted). Further, the “[r]ight of publicity protection may cover the use of any personal element that allows the public to identify the individual.” Coats, supra note 5, at 275. The extent that a court will allow protection to individuals, however, varies from state to state. See id. (discussing varying treatment of publicity claims).

168. See Citizen Media Law Project, supra note 150 (discussing lack of protection to social networks when faced with right of publicity claims). “A plaintiff that sues [another] for interfering with [the right of publicity] generally must show that [the defendant] used [the plaintiff’s] name or likeness for a commercial purpose.” Id. (emphasis omitted). An individual “can be liable even without creating a false sense that the person in question endorses [that individual’s] product or service; the key is that [that individual is] exploiting the plaintiff’s identity to drive traffic or obtain some other commercial benefit.” Id.
case would proceed. Even so, the standard is convoluted and a remedy may remain illusory on these types of claims. Several cases have required that the plaintiff must suffer an economic harm in addition to a showing of the defendant's commercial benefit. Nevertheless, once clear of the immunity hurdle, it is uncertain whether a court will find in La Russa's favor, or if his claim will be caught on the warning track.

2. Can't Tweet This (Claims for Trademark Infringement/Dilution)

Trademark infringement is "the unauthorized use of a trademark – or of a confusingly similar name, word, symbol, or any combination of these – in connection with the same or related goods or services and in a manner that is likely to cause confusion, deception, or mistake about the source of the goods or services." In his complaint, La Russa states his name is the infringed trademark. Further, he claims that the unauthorized use of his name by a Twitter member constitutes an infringement of his mark. The complaint also spells out that Twitter's "use of [La Russa's] mark both in the Site's domain name and on the Site itself is misleading and likely to confuse users by leading them to believe that this Site is endorsed and authored by [ La Russa]."

169. But cf. id. (discussing court holdings preventing social networks from seeking cover under Section 230 immunities).
170. See Coats, supra note 5, at 288-89 (discussing case history that also required economic harm to plaintiff alleging harm under right of publicity claims).
171. See id. (addressing cases assessing right of publicity claims). "[S]ome commentators have argued that the right of publicity restricts cultural expression. Courts deal with this tension by balancing a person’s right to earn a living from his fame against the consequences of restricting another’s freedom of expression.” Id. at 288.; see also, Zacchini v. Scripps – Howard Broad., Co., 433 U.S. 562, 575-76 (1977) (discussing that television station violated Zacchini’s right of publicity by broadcasting Zacchini’s entire human cannonball act, and therefore was not extended First Amendment protections); C.B.C. Distribution and Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1097 (E.D. Mo. 2006) (reasoning that using player plaintiff’s statistics on its fantasy baseball website did not interfere with player plaintiff’s ability to financially benefit from playing baseball, therefore protecting defendant under First Amendment expression freedoms).
172. See McGeveran, supra note 16 (noting weakness of La Russa’s case).
173. BLACK'S LAW DICTIONARY 797 (8th ed. 2004).
174. See Complaint, supra note 6 (listing La Russa’s various claims against Twitter).
175. See id. (stating La Russa’s claims against Twitter). The complaint states that “[Twitter, Inc.] owns the registered domain name twitter.com and pursuant thereto, twitter.com/TonyLaRussa. The Site contains an unauthorized photograph of Plaintiff and written statements impliedly written by [La Russa] himself, when if fact they are not.” Id.
176. Id.
Although "[d]ozens of cases over the last decade or so have addressed the question of whether 'using' a third party trademark on a website constitutes trademark infringement," La Russa's claim against Twitter is one of the few against a social networking site for content posted by a third party.\textsuperscript{177} Remarkably, La Russa attempts to rework tort rights into an area not protected by the CDA and potentially not covered under the safe harbor of the DMCA.\textsuperscript{178} If La Russa had prevailed, this would have created the "possibility of a loophole for celebrities who can recast . . . claims under trademark law . . . [and] . . . [this may create a] double standard: celebrities maligned by anonymous online impostors could plead around Section 230 [of the CDA] by claiming trademark . . . rights in their name, while many ordinary people victimized . . . would have their claims blocked."\textsuperscript{179} This brings the argument full circle as to whether Internet media should belong to the same rules as traditional mediums such as newspapers, and television and radio broadcasts.\textsuperscript{180} Looking back at original defamation in media cases, such as \textit{New York Times Co. v. Sullivan}, the Supreme Court held for the requirement that public officials (and celebrities) prove a higher standard of defamation, libel, and slander than required by a private individual.\textsuperscript{181} The rationale is that public officials are more capable of handling and possibly counteracting this type of harm.\textsuperscript{182} If celebrities, however, continue to hurdle the CDA immunities by claiming trademark infringement, then it is the private individuals who will be left with the higher hurdle: a contradictory consequence from the original rationale of the Supreme Court.\textsuperscript{183}

Some dispute exists, however, as to whether La Russa properly classified his name as a trademark.\textsuperscript{184} First, "surnames (names of

\textsuperscript{177} See Hocking, \textit{supra} note 53, at 197-98 (citing treatment of third party trademark infringement claims in past cases ).

\textsuperscript{178} See id. at 196-98 (discussing scope of CDA protection and DMCA safe harbor).

\textsuperscript{179} McGeveran, \textit{supra} note 16.

\textsuperscript{180} See id. (noting differences between traditional forms of media and Internet media).


\textsuperscript{182} See id. at 283-84 (discussing rationale for higher standard of proof for celebrities and public officials).

\textsuperscript{183} See McGeveran, \textit{supra} note 16 (discussing possible consequence if celebrities prevail when restructuring claims from tort claims to trademark infringement claims).

\textsuperscript{184} See Balasubramani, \textit{supra} note 164 (addressing holes in La Russa's suit against Twitter).
people) typically are not entitled to trademark protection." 185 Second, from the complaint, La Russa does not assert that he has registered his name as an official trademark. 186 Finally, putting aside the issue as to whether La Russa's name is a protected mark, trademark infringement requires not only the mark's use in commerce, but also likelihood of confusion regarding its use. 187 Arguably, it is difficult to speculate that because the site page contained the phrase "Hey There! Tony La Russa is using Twitter," Twitter experienced a commercial benefit. 188 This is particularly so, considering the page only had four followers. 189 Because the page "hinted" that the postings were in the spirit of parody, establishing likelihood of confusion is also difficult. 189 Additionally, a population of four followers may not be a large enough to show substantial harm even if it can be shown that the page had likelihood to cause confusion. 190 Therefore, even if La Russa's attorney could convince the court that the use of Tony La Russa's trademarked name was used in commerce, La Russa still needs to produce a curve ball to strike out Twitter's First Amendment Freedom of Speech rights to parody. 192

Next, La Russa not only alleges trademark infringement, but also trademark dilution. 193 Dilution is "the act or an instance of

185. Id.
186. See id. (noting lack of discovery because La Russa dismissed claim at early stage). The United States Patent and Trademark Office only has one mark for "Tony La Russa Baseball" and this mark has since been marked dead as of March 26, 2005. See Trademark Electronic Search System, http://tess2.uspto.gov (follow "New User Form Search" hyperlink; then search "La Russa") (last visited Mar. 11, 2010) (testing trademark validity). Further, the registering party was not Tony La Russa, but Stormfront Studios, Inc. See id. (confirming source of trademark).
187. See Balasubramani, supra note 164 (addressing necessary showing by La Russa to win suit if continued).
188. See id. (stating difficulties La Russa's complaint contained in making claims of trademark infringement or dilution, and that postings provided Twitter with commercial benefit).
189. See id. (discussing weakness in La Russa's claim); see also Complaint, supra note 6 (listing La Russa's claims against Twitter).
190. See McGeveran, supra note 16 ("[P]roving confusion and harm will be very difficult, since (1) the account only had four followers; (2) it included a notation in the user's profile section, "Bio Parodies are fun for everyone.").
191. See id. (discussing La Russa's potential difficulties establishing likelihood of confusion).
192. See id. ("[I]t's not clear a statement (even a false one) that LaRussa used the service can fairly be called an endorsement of the service."); see also Kevin Fayle, Understanding the Legal Issues for Social Networking Sites and Their Users http://technology.findlaw.com/articles/00006/010966.html ("The First Amendment and state constitutional free-speech provisions often come into play in these types of . . . suits.").
193. See Complaint, supra note 6 (listing La Russa's complaints against Twitter).
diminishing a thing’s strength or lessening its value, and in this case, the thing is a trademark.” 194 La Russa makes this claim because Twitter allegedly used La Russa’s “famous mark” after La Russa had already become famous, which “creates the likelihood of dilution of the mark’s distinctive value by diminishing the capacity of the mark to identify and distinguish [La Russa’s] goods and services.” 195 Although “trademark dilution does not require confusion or monetary harm . . . La Russa pleaded under federal dilution law, which allows only injunctive relief – now moot since the profile is gone – and completely exempts ‘noncommercial use’ of a trademark.” 196 Therefore, the dilution claim inevitably was a swing and a miss. 197

3. Who’s Tweet is it Anyway? (Claim for False Designation of Origin)

False Designation of Origin is protected under Title 15, Section 1125(a) of the Lanham Act, which also covers trademark infringements. 198 Under this provision, La Russa alleges that, “[a] direct and proximate result of [Twitter’s] actions . . . [La Russa] has suffered significant emotional distress, damage to his reputation, and damages to the goodwill of his mark.” 199 Again, La Russa’s case is not strong, and he will run into many of the same issues as were addressed above in his tort claims. 200 Admittedly, La Russa will have a difficult time arguing that his claims trump First Amendment rights to comment on trademarks in the spirit of parody or criticism. 201

195. Complaint, supra note 6 (stating La Russa’s basis for claims against Twitter).
196. McGeveran, supra note 16.
197. See id. (noting that once Twitter removed fake page, claim became moot issue).
198. See ACPA, supra note 31 (addressing claims under false designation of origin). The ACPA further states that:
Any person who, on or in connection with any goods or services, or any container for goods, uses . . . any false designation of origin . . . which – is likely to cause confusion, or to cause mistake, or to deceive . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damages by such act.
Id.
199. Complaint, supra note 6.
200. See Balasubramani, supra note 164 (noting weakness of La Russa’s case against Twitter and improbability of success on his claims of tortuous nature, even when covered under trademark law).
201. See id. ("[T]he account obviously stated that it was a parody account, so La Russa doesn’t look reasonable arguing that people were really fooled into thinking he endorsed it.").
4. *Tweet-napped (Claim of Cybersquatting)*

As noted above, cybersquatting is "the act of reserving a domain name on the Internet . . . and then seeking to profit by selling or licensing the name to the company that has an interest in being identified with it."\(^{202}\) La Russa has alleged in his claim of cybersquatting that Twitter's actions, "constitute a bad faith intent to profit from and injure [La Russa's] mark, [are] intended to increase traffic to [Twitter's] site, or were done with knowledge that injury to [La Russa's] mark was substantially certain to occur."\(^{203}\) Because La Russa brought his suit in the United States court system, he is relying on the ACPA, and not UDRP rules.\(^{204}\) As discussed earlier, few cases have determined whether the "post-domain" term (or mark) used is covered by the ACPA.\(^{205}\) Therefore, based on past case law, predating the social network boom, La Russa has a difficult, though not insurmountable, argument to make.\(^{206}\) Further, even if a court considers the use of a trademark in a post-domain path as possible infringement, La Russa's case to prove likelihood of confusion, as stated above, is still lacking.\(^{207}\) Establishing the necessary elements for La Russa's claims will be difficult because:

1. The account only had four followers;  
2. it included a notation in the user's profile section, 'Bio Parodies are fun for everyone;' [and]  
3. it's not clear a statement (even a false one) that La Russa used the service can fairly be called an endorsement of the service.\(^{208}\)

Perhaps with a different set of facts, a court would be willing to address the issue in a different light.\(^{209}\)

\(^{202}\) BLACK'S LAW DICTIONARY 415 (8th ed. 2004).

\(^{203}\) Complaint, *supra* note 6.

\(^{204}\) See Balasubramani, *supra* note 164 ("La Russa's cybersquatting claims are based in part on a federal statute, commonly known as the ACPA.").

\(^{205}\) For full discussion on known case analysis of post-domain paths, see *supra* notes 138-42 and accompanying text.

\(^{206}\) See generally Cendali & Kehoe, *supra* note 85, at 113 (remarking on how new popularity of "vanity URLs" may lead to case law directly readdressing issues of social networks' use and similar bad faith uses of trademarks as seen in typical ACPA and UDRP cybersquatting cases).

\(^{207}\) See McGeveran, *supra* note 16 ("In this particular case, proving confusion and harm will be very difficult.").

\(^{208}\) *Id.*

\(^{209}\) See Schaefer, *supra* note 140 ("Each ACPA turns on the particular facts presented.").
B. Twitter’s Reply

Like other social networks, Twitter has an in depth trademark policy, and following La Russa’s suit, the site launched an additional protection option for trademark holders.210 First, Twitter offers a general protection to intellectual property holders through its policy.211 The policy not only addresses “name squatting” issues, but also addresses impersonation issues, its copyright policy, and the procedures the site uses to comply with the DMCA “take down notice” requirements.212 Next, the terms of service forbid any use of trademark material for financial gain that may mislead or confuse others.213

Twitter’s policy now reads:

Twitter pledges to immediately suspend accounts with clear intent to mislead others, even if there is no trademark infringement. ** If the owner shows that the infringer had a clear intent to mislead people into believing a user account is affiliated with a particular company, Twitter will permanently suspend the infringer’s account.214

Finally, Twitter promises that after mark owners report trademark violations, through Twitter’s website support page, they will respond to the report within twenty-four hours.215 Despite requir-


211. See Greenwald-Swire, supra note 210, at 716-17 (describing Twitter’s trademark policy).


213. See Twitter Trademark Policy, supra note 8 (“Using accompany or business name, logo, or other trademark protected materials in a manner that may mislead or confuse others or be used for financial gain may be considered trademark infringement.”).

214. Greenwald-Swire, supra note 210, at 717.

215. See id. at 716-17 (discussing Twitter’s trademark policy).
ing more formality, Twitter’s take on copyright infringement follows the same line as its policy with trademark infringement.\footnote{See Twitter Support :: Filing a Copyright Complaint or DMCA Take Down Notice, http://twitter.zendesk.com/forums/26257/entries/15795 (last visited Oct. 4, 2009) (requiring procedures including filing complaint electronically via email as well as physical filing via fax or mail, and requires formal filing procedures including ticket numbers).}

Second, Twitter has added an optional protection measure, still in testing stages, called a “verified account.”\footnote{Brown, supra note 210.} This new system places a “verified account badge” on a site page after Twitter has contacted the registering person or entity and has proven that the account belongs to that person or entity.\footnote{See Twitter.com, Verified Account, http://twitter.com/help/verified (last visited Oct. 4, 2009) [hereinafter Twitter Verified Account] (discussing point of new verified account badges).} The badge will allow Twitter members to “easily see which accounts... are authentic.”\footnote{Id. Twitter maintains, “This... does not mean that accounts without the ‘Verified Account’ badge are fake. The vast majority of accounts on the system are not impersonators, and we don’t have the ability to check 100% of them.” Id.} So far, Twitter is only verifying a select group of celebrities and extremely well known accounts that “have had problems with impersonation or identity confusion” but has not yet branched out the verification to businesses.\footnote{Id. Although Twitter has not begun using this feature for businesses, the site is open to the requests to possibly expanding the ‘Verified Badge’ to those businesses seeking protection. See id. (discussing Verified Badge expansion).} Through both policies, Twitter has followed the leads of other social networks by incorporating protections into its terms of service.\footnote{Compare Twitter.com, Twitter/Terms of Service, http://twitter.com/tos (last visited Oct. 4, 2009) [hereinafter Twitter TOS] (providing all terms of service related to use of Twitter by users), with Facebook TOS, supra note 125 (enumerating all terms of service relating to use of Facebook by users).}

IV. CONCLUSION: LOOKING FORWARD - ARE SOCIAL NETWORKS “TWEETERING” ON THE EDGE?

As shown through judicial history, social networks have been afforded considerable protection on many occasions.\footnote{For a further discussion of social network protections, see supra notes 67-83 and accompanying text.} Interestingly, courts have accepted, and even encouraged, high levels of self-regulation because of these expanded protections.\footnote{See Horton, supra note 31, at 1305 (“[T]he CDA’s purpose is to promote self-help on the Internet and prevent the potential chilling effect that regulation may have on Internet speech.”).} As noted earlier, however, there may still be a loophole to establish liability on social networks when approached with cases of trademark in-
fringement. This loophole has grave implications of counter-acting age-old rationales of law defining cases. Therefore, future court outcomes on these types of cases have great potential to create less ambiguity surrounding legal Internet use and liability.

Finally, courts may take a similar stance on trademarks in post-domain paths as they did when affording protections to social networks. The same courts that decided to relieve social networks from liability, because of the “chilling effect” on First Amendment freedom of speech rights on the Internet, may take the same view when assessing liability under the ACPA and UDRP concerning post-domain paths containing trademarks.

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