To: Domain Name@Leg@OGC
From: S=meyerklipper/C=US/A=INTERNET/DDA=ID/meyerklipper(a)mindspring
Cc:
Subject: The Magazine Publishers of America (MPA)
Attachment: Cybersquatting Comment(MPA SHIP)2.doc,MIME.MSG
Date: 4/14/00 2:55 PM

Attached please find our submission regarding section 3002(b) of the Anticybersquatting Consumer Protection Act. I request a notification of acceptance of this comment. I thank you in advance.

Public Comments
Sabrina McLaughlin
Office of the General Counsel
Department of Commerce
Room 5876
14th & Constitution Avenues, N.W.
Washington, D.C. 20230

Magazine Publishers of America, Inc. ("MPA")[1] welcomes the opportunity to respond to the Commerce Department's request for public comment on "dispute resolution issues relating to Section 3002(b) of the Anti-Cybersquatting Consumer Protection Act ("ACPA")."[2] Section 3002(b) protects against "personal name cybersquatting"—the unauthorized registration of a domain name that consists of the name of another living person. More specifically, section 3002(b) prohibits anyone from registering a domain name after November 29, 1999, consisting of the name of another living person, or one confusingly similar thereto, with the specific intent to profit from the name by selling it to another.[3]

The February 29, 2000 Federal Register Notice was issued pursuant to Section 3006 of the ACPA which requires the Commerce Department, in consultation with the Patent and Trademark Office and the Federal Election Commission, to conduct a study and report to Congress with recommendations, guidelines and procedures to resolve disputes over domain name registrations and related uses of personal names.

MPA is writing these comments to explain briefly its concerns with regard to any attempt to expand the reach of current Section 3002(b). Our comments are greatly influenced by two factors. First, section 3002(b) applies irrespective of whether the personal name is a protected mark under the Lanham Act and thus for the first time confers federal property rights in a personal name outside the confines of the federal trademark law. Second, section 3002(b) was added very late during Congress' consideration of the ACPA and thus received only limited congressional scrutiny.[4]

---

[1] MPA, founded in 1919, is the national trade organization of the consumer magazine publishing industry. It currently represents more than 250 of the largest magazine publishers in the United States, who collectively publish more than 1,200 consumer interest magazines on a weekly, bi-weekly, and monthly basis.

[2] ~~—~~65 Fed. Reg. ~~—~~10,163 (daily ed. Feb. 29, 2000).

[3] Pub. L. No. 106-113, § 3002(b). The primary motivation for the inclusion of this provision seemed to be related to acts of cybersquatting surrounding political candidates. *See* ~~—~~145 Cong. Rec. ~~S15026 (August~~S10,513, S10,516 (daily ed. August 5, 1999) (statement of ~~Senator~~Sen. Leahy) (describing the personal name provision as being intended to address situations where "domain names like bush2000.org and hatch2000.org are being snatched up by cyber poachers intent on reselling these domain names for a tidy profit"). Section 3002(b) also comes subject to an important exception: it does not apply in situations where the personal name is used in, affiliated with, or related to a copyrighted work in which the copyright is owned or licensed by the registrant, and the registrant intends to sell the domain name as part of the lawful exploitation of the work. *See* 59 Cong. Rec. S14,715.

[4] Senators Abraham, Hatch, Torricelli, and McCain introduced the ACPA on 21 June 1999, after which it was referred to the Senate Committee on the Judiciary. On 22 July, the Committee held hearings. Mark-up came one week later. The bill passed the Senate on 5 August, after which it was received in the House on 8 September, and discharged by the House Judiciary Committee on 26 October with an amendment in the nature of a substitute.

As trademark owners, MPA members welcomed the enactment of the main provision of the ACPA, which provides an explicit remedy in trademark law for so-called "trademark cybersquatting"—basically, the registration, trafficking, or use of a domain name with the bad faith intent to profit from the goodwill of the mark of another, including a personal name protected as a mark under Section 43(d) of the Lanham Act. As the Federal Register Notice correctly notes, domain names have taken on great value as Internet location tools, and users "have become accustomed to being able to guess the domain name of a company or entity, with a good degree of success."[5]

Congress wisely recognized that a bad actor who registers a confusingly similar domain name (or names) could do enormous harm both to a trademark's goodwill and to the public. The injured trademark owner whose mark has been usurped by another may find its ability to participate effectively in the Internet environment severely compromised. Because only one person may use a domain name at one time, a cybersquatter can easily prevent the trademark owner from exploiting its long-standing mark. The public may well be confused, or even defrauded or deceived in such a situation.

For these reasons, Congress specifically amended the Lanham Act to address "the deliberate, bad-faith, and abusive registration of Internet domain names in violation of the rights of trademark ~~owners, or cybersquatting."[6]~~owners,"[6] or trademark cybersquatting. The legislative record on trademark cybersquatting abounds with cases in which, for example, a pornography purveyor would use a confusingly similar name to that of a registered mark and thereby attract traffic to its web site.[7] At the same time, however, the deliberative nature of the legislative process exposed both First Amendment and practical weaknesses in the bill draft, and resulted in the improvement of the trademark cybersquatting language.[8]

Unfortunately, Section 3002(b) did not undergo a similar degree of scrutiny. This provision first appeared in the ACPA in the waning days of the 105th Congress, and did not have the benefit of hearings or full Committee consideration in either legislative body. Because Section 3002(b) represents an unprecedented expansion of protection for personal names beyond

---

The personal name provision did not appear in the legislation until its incorporation into the larger appropriation bill that was considered by the House on 26 October.

[5] 65 Fed. Reg. 10763, 10764 (daily ed. Feb. 29, 2000).

~~[6] S. Rep. No. 106-140, at 4 (1999).~~

[6] S. Rep. No. 106-140, 4 (1999).

[7] *See, e.g.,* ~~—~~145 Cong. Rec. ~~at S10515 (August~~S10,513, S10,515 (daily ed. August 5, 1999) (statement of ~~Senator~~Sen. Hatch) (describing how a 12 year old child entered the phrase 'zelda.com' looking for the computer game of the same name, and came across a hard core pornography web site); *id.* (describing how Intel had the 'pentium3.com' domain snatched up and used for a hardcore pornography web site); *see also* S. Rep. No.106-~~106-140 at~~140, 4-7 (1999) (documenting the harm to trademarks and the public).

[8] *See* ~~—~~145 Cong. Rec. ~~at S10515~~S10,513, S10,515 (statement of ~~Senator Leahy) (August~~Sen. Leahy) (daily ed. August 5, 1999) (describing how the bill as introduced "criminalized" dissent and protest sites, and would have stifled the legitimate warehousing of domain names).

that which might subsist in trademark law,[9] we are concerned that the lack of scrutiny given ~~section~~Section 3002(b) may have masked similar defects to those exposed in the original version of ACPA.

Given the lack of congressional deliberation over Section 3002(b), we urge the Department of Commerce to reject any suggestion during this proceeding to expand the reach of Section 3002(b). An extension of Section 3002 would be premature given that the provision has been in place for a very limited period of time and federal courts have not yet had any opportunity to interpret it.[10] Rather than call for any extension of Section 3002(b) in its study and report, the Department of Commerce should urge Congress to view any such expansion with great caution—especially given the core First Amendment issues that would be implicated in any such proposal.[11]

Respectfully submitted,

Christopher A. Mohr

Meyer & Klipper, PLLC
923 Fifteenth Street, N.W.
Washington, D.C. 20005
on behalf of Magazine Publishers of America, Inc.

---

[9] Personal names only gain trademark protection upon a showing that the name has acquired a secondary meaning as an identifier of a particular good or service to the relevant portion of the consuming public. *See generally* J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 13.2

[10] Although federal courts have had opportunities to review the trademark cybersquatting provisions of the ACPA, we are not aware of any reported cases interpreting Section 3002(b).

[11] In fact, as currently drafted, Section 3002(b) may itself suffer from constitutional infirmities. It could well be argued that this provision would impinge upon the first amendment rights of a person who registers a domain name [i.e., ~~SenatorSmithVoteNo.com~~]SenatorSmithVoteNo.com] which itself has communicative value and which points the user to the speaker's website and his or her constitutionally-protected message.