

Cyber-Criticism and the Federal Trademark Dilution Act: *Redefining the Noncommercial Use Exemption*

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ABSTRACT

Cyber-criticism websites (e.g., [trademark]sucks.com) present a problem under the Federal Trademark Dilution Act's ("FTDA") noncommercial use exemption. Though case law is thin in the area of cyber-criticism, indicators suggest that courts and commentators have erred in their analysis of cyber-criticism. Both have subscribed to the conventional belief that there is only one type of cyber-criticism. In so doing, courts have read the noncommercial use exemption too broadly, undermining the FTDA's protections. This paper identifies five types of cyber-criticism and argues that courts should distinguish those cases where cyber-criticism is used merely to criticize a famous trademark (or its holder) from those where the cyber-critic is principally free-riding off the distinctive character of a famous trademark. Ultimately, this Article proposes a model for courts to use when evaluating cyber-criticism website disputes under the FTDA's noncommercial use exemption.

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I. INTRODUCTION

¶1 Cyber-criticism is a widespread practice that allows critics to voice their opinions about a corporation using a website that either includes or approximates the domain name, or trademark, of the target.¹ Generally, [trademark]sucks.com websites are considered cyber-criticism.² On its face, cyber-criticism appears to communicate a view regarding a famous trademark or its holder.³ The problem is that using a famous

1. Philip G. Hampton II, *Understanding Basic Trademark Law 2003: Legal Issues in Cyberspace*, 759 PLI/PAT 537, 557-58 (2003) (offering a definition of cyber-criticism and explaining that it is increasingly popular).

2. In this Article, the terms “cyber-criticism,” “[trademark]sucks.com,” and “critical websites” may be used interchangeably. All of the terms refer to the use of a famous trademark in a critical domain name. Further, the analysis herein is intended to cover all pejorative uses of famous trademarks in critical domain names, ranging from mild criticism, i.e., [trademark]complaints.com, to offensive criticism, i.e., [expletive] [trademark].com.

3. See, e.g., Rebecca S. Sorgen, Note, *Trademark Confronts Free Speech on the Information Superhighway: “Cybergrippers” Face a Constitutional Collision*, 22 LOY. L.A. ENT. L. REV. 115, 139-42

trademark in a domain name may dilute the distinctive character of that trademark.⁴

¶2 Famous trademarks, and their distinctive character, are protected by the Federal Trademark Dilution Act (“FTDA”).⁵ The scope of the FTDA is narrowed by three exceptions, notably an exemption for the noncommercial use of a famous trademark.⁶ Cases analyzing the noncommercial use exemption are few, but a dominant view of the exemption has emerged. This school of thought, consisting of the “overbroad cases,” embraces an expansive interpretation of the exemption.⁷

¶3 Not all of the overbroad cases evaluate cyber-criticism per se; instead, these cases proposed a wide-ranging interpretation of the noncommercial use exemption in other contexts.⁸ Taken to its logical conclusion, the noncommercial use exemption, as articulated in the overbroad cases, under-protects famous trademarks that have been appropriated for use in cyber-criticism.

¶4 To illustrate the dilemma caused by the logic of the overbroad cases, consider the following situations. Imagine that a famous trademark is used in a critical domain name, leading the viewer to a critical website that:

(2001) (arguing that cyber-criticism websites are communicative because they express the registrant’s view of the trademark holder and/or its trademark); Leslie C. Rochat, Comment, “*I See What You’re Saying: Trademarked Terms and Symbols as Protected Consumer Commentary in Consumer Opinion Websites*,” 24 SEATTLE U. L. REV. 599, 603 (2000) (discussing the rising frequency of cyber-criticism, and concluding that cyber-criticism is ultimately good for consumers because those websites provide forums for commentary).

4. See H.R. REP. NO. 104-374, at 3 (1995) (“[D]ilution is an infection, which if allowed to spread, will inevitably destroy the advertising value of [trademarks]” (quoting *Mortellito v. Nina of Cal.*, 335 F. Supp. 1288, 1296 (S.D.N.Y. 1972))); *Hearing on H.R. 1270, the “Madrid Protocol Impementaion Act of 1995,” and “H.R. 1295, the Federal Trademark Dilution Act of 1995,”* 104th Cong. (July 19, 1995) (statement of Rep. Carlos J. Moorhead, Chairman, Subcommittee on Courts and Intellectual Property) (stating that the FTDA was designed to protect famous trademarks from uses that would blur the distinctiveness of the trademark or tarnish or disparage it), available at <http://www.house.gov/judiciary/479.htm> (last visited Oct. 26, 2004).

5. See Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified as amended at 15 U.S.C. § 1125(c) (2004)); Mathias Strasser, *The Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine into Context*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 375, 391, 411 (2000) (stating that the FTDA protects a trademark’s distinctiveness in the absence of consumer confusion); Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 793, 862 (1997) (arguing that the FTDA only protects the identity, distinctiveness, and uniqueness of famous trademarks).

6. See 15 U.S.C. § 1125(c)(4), which exempts from liability: “(A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark. (B) Noncommercial use of a mark. (C) All forms of news reporting and news commentary.”

7. See, e.g., *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906-07 (9th Cir. 2002), cert. denied, 537 U.S. 1171 (2003); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1167 (C.D. Cal. 1998); *Am. Family Ins. Co. v. Hagan*, 266 F. Supp. 2d 682, 696-97 (N.D. Ohio 2002).

8. See, e.g., *Am. Family Ins. Co.*, 266 F. Supp. 2d at 696-97.

- (1) features only a message board allowing users to post their gripes about the trademark holder and/or its goods and services;
- (2) uses a message board, but solicits financial contributions from grippers;
- (3) uses a message board, and also contains banner advertisements to support the website;
- (4) features a message board, but also includes hyperlinks to direct visitors to other websites that market goods or services; or
- (5) provides a forum for merchandising goods or services.

¶5 Using the reasoning of the overbroad cases, all of the instances above may be entitled to protection by the noncommercial use exemption. This Article argues that these examples should be treated differently. While the first two situations should receive the safe harbor, the latter three are commercial uses because they evidence free-riding. As used in this Article, free-riding involves trading off the distinctive character of a famous trademark to merchandise goods or services.⁹ In cyber-criticism disputes under the FTDA, free-riding is the key to distinguishing between commercial and noncommercial uses.

¶6 The purpose of this Article is to evaluate cyber-criticism under the FTDA's noncommercial use exemption, and to suggest a framework that courts may use to resolve cyber-criticism controversies. The Article proceeds in three parts. Part II lays out the FTDA's statutory framework. It further discusses the overbroad cases' version of the noncommercial use exemption and its impact on cyber-criticism. Part III explains that the use of famous trademarks in critical domain names requires special attention under the FTDA. Part II also explores the treatment of cyber-criticism by courts. Finally, Part IV proposes guidelines for courts to follow in cyber-criticism disputes.

II. STATUTORY FRAMEWORK OF THE FTDA

¶7 This Article proposes a reasonable interpretation of the noncommercial use exemption regarding cyber-criticism. To begin, this section provides an overview of the FTDA.

9. See *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 805 (9th Cir. 2002) (explaining that the animating concern in dilution cases is free-riding) (citing *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 50 (1st Cir. 1998)); *Ty, Inc. v. Perryman*, 306 F.3d 509, 510-12 (7th Cir. 2002), *cert. denied*, 538 U.S. 971 (2003) (arguing that anti-dilution laws reduce consumer search costs and deter free-riders); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 30 (1st Cir. 1987), *cert. denied*, 483 U.S. 1013 (1987) ("The overriding purpose of anti-dilution statutes is to prohibit a merchant of noncompetitive goods from selling its product by trading on the goodwill and reputation of another's mark."); William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267, 304-05 (1988) (finding that anti-dilution laws are based on external benefits because famous trademark holders make substantial investments in creating prestigious trademarks, and if a copier appropriates those benefits without compensating the trademark holder, the costs of investing in and developing a prestigious trademark will rise).

A. The FTDA Mandates a Four-Part Test

¶ 8 Protection under the FTDA requires a prima facie showing of four elements. A FTDA plaintiff must prove: (1) ownership of a famous trademark, (2) commercial use in commerce of that trademark, (3) occurring after the trademark became famous, thereby (4) causing dilution of the distinctive quality of the trademark.¹⁰

¶ 9 Given that ownership is often easily verified, the first requirement hinges primarily on whether a trademark is famous. That inquiry is guided by a statutory list of eight factors.¹¹

¶ 10 Next, commercial use in commerce occurs when the junior user capitalizes on the status of the trademark.¹² The commercial use requirement may also be satisfied if a junior user registers a famous trademark as a domain name with the intent to sell the domain name back to the rightful owner.¹³

¶ 11 Third, for a trademark to be protected under the FTDA, the plaintiff must prove that the defendant used the trademark after it became famous. Fame occurs once a mark becomes distinctive, even if that distinctiveness only exists in a niche market.¹⁴

¶ 12 The fourth element—an FTDA plaintiff's burden of proof in showing that the defendant caused the distinctive quality of the trademark to be diluted—had until recently resulted in a circuit split.¹⁵ That split was resolved by *Moseley v. V Secret Catalogue, Inc.*¹⁶ The Supreme Court held that the FTDA requires a plaintiff to prove actual dilution

10. See 15 U.S.C. § 1125(c).

11. To determine whether a mark is distinctive and famous, a court may consider factors such as, but not limited to, the following: (1) the degree of inherent or acquired distinctiveness of the mark; (2) the duration and extent of use of mark in connection with the goods or services with which the mark is used; (3) the duration and extent of advertising and publicity of the mark; (4) the geographical extent of the trading area in which the mark is used; (5) the channels of trade for the goods or services with which the mark is used; (6) the degree of recognition of the mark in the trading areas and channels of trade used by the mark's owner and the person against whom injunction is sought; (7) the nature and extent of use of the same or similar marks by third parties; and (8) whether the mark was registered under the Act of March 4, 1881, or the Act of February 20, 1905, or on the principal register. See 15 U.S.C. § 1125(c)(1).

12. See *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 880 (9th Cir. 1999).

13. See *Intermatic Inc. v. Toeppen*, 947 F. Supp. 1227, 1239 (N.D. Ill. 1996) (finding commercial use where defendant registered famous trademarks as domain names and intended to sell them back to their rightful owner).

14. See *Times Mirror Magazines, Inc. v. Las Vegas Sporting News, LLC*, 212 F.3d 157, 164-68 (3d Cir. 2000) (explaining that trademarks that acquire fame or distinctiveness in their market are protectable under the FTDA).

15. Compare *Ringling Bros.—Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 459-65 (4th Cir. 1999) (holding that an FTDA plaintiff must show “actual dilution,” i.e., actual economic harm to the trademark's value as evidenced by loss of revenues, not circumstantial evidence), with *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 223-25 (2d Cir. 1999) (finding that an FTDA plaintiff need only show “likelihood of dilution,” a lower burden of proof). See also Vadim Vapnyar, Note, *Moseley v. V Secret Catalogue, Inc.: Redefining the Scope of the Federal Trademark Dilution Act*, 77 ST. JOHN'S L. REV. 675, 682-88 (2003) (explaining the circuit split).

16. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

of the distinctive quality of a famous trademark.¹⁷ In other words, proof that a consumer may “mentally associate” the junior user’s usage of a famous trademark with the trademark holder is insufficient by itself to state a cause of action under the FTDA.¹⁸ An FTDA plaintiff need not, however, prove the consequences of such dilution, i.e., actual loss of sales or profits.¹⁹

¶ 13 Though not explicit, the Court’s holding in *Moseley* bears some relationship to cyber-criticism. In fact, at least one commentator has suggested that *Moseley* is over-protective of certain trademark criticisms such as parody.²⁰ According to *Moseley*, it is not a violation of the FTDA for a cyber-critic to use a famous trademark to criticize the trademark holder, which in turn may cause consumers to mentally associate the cyber-critic’s use of that trademark with the holder. *Moseley*, however, does not insulate cyber-critics from FTDA suits. Instead, *Moseley* requires that an FTDA plaintiff allege more than a mere mental association between a cyber-critic’s usage of the famous trademark and the plaintiff trademark holder.

¶ 14 Cyber-criticism that is actually dilutive, i.e., where it diminishes the capacity of the trademark holder to distinguish goods and services, is actionable under the FTDA.²¹ As such, actual dilution likely exists when a cyber-critic creates a mental association with a famous trademark and then takes the additional step of merchandising goods or services. At any rate, plaintiffs satisfying the four-part test are entitled to injunctive relief.²² In some cases, FTDA plaintiffs may be entitled to damages.²³

B. Three Exceptions Are Recognized by the FTDA, Notably the Noncommercial Use Exemption

¶ 15 The FTDA includes three exceptions.²⁴ While the “fair use in comparative commercial advertising” and “news reporting” exemptions are plain and unambiguous,²⁵ the “noncommercial use” exemption is complicated. For starters, this exception says no more than the words “[n]oncommercial use of a mark.”²⁶ Explanatory words or phrases

17. *Id.* at 432-33.

18. *Id.* at 433-34.

19. *Id.* at 433. It is also worthwhile to note that under *Moseley*, an FTDA plaintiff can use circumstantial evidence to prove actual dilution. *Id.* at 433-34.

20. See Jordan M. Blanke, *Victor’s Little Secret: Supreme Court Decision Means More Protection for Trademark Parody*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1053, 1092-93 (2003).

21. See *Moseley*, 537 U.S. at 435-36 (Kennedy, J., concurring).

22. See 15 U.S.C. § 1125 (c)(1)-(2).

23. *Id.* See also Lynda J. Oswald, “Tarnishment” and “Blurring” Under the Federal Trademark Dilution Act of 1995, 36 AM. BUS. L.J. 255, 272 (1999) (explaining that if a defendant acted willfully, an FTDA plaintiff may be entitled to other remedies, such as accounting, actual damages, and attorney’s fees).

24. See 15 U.S.C. § 1125(c)(4).

25. See Robert J. Shaughnessy, Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079, 1105 (1986) (justifying the “fair use in comparative commercial advertising” and “news reporting” exceptions on grounds that courts are loathe to stifle product competition and the free flow of information to the marketplace).

26. See 15 U.S.C. § 1125(c)(4)(B).

cannot be found in the text of the statute. Further, although an FTDA plaintiff must show that the defendant made a “commercial use in commerce” of its trademark,²⁷ it is not entirely clear what the defendant must prove to be eligible for the noncommercial use exemption. Moreover, the statute is silent on the definitions of commercial use and noncommercial use. The legislative history offers some clarity—it provides that the FTDA was not intended to affect criticism or commentary, such as parody or satire.²⁸ Because parody and satire are terms of art, however, the precise contours of the noncommercial use exemption are somewhat ambiguous. The result is that courts have erred on the side of reading the noncommercial use exemption too broadly.²⁹

C. The Overbroad Approach to the Noncommercial Use Exemption

¶16 The overbroad cases interpreted the noncommercial use exemption too expansively and did not create guidelines for its application. The reasoning used by the overbroad cases invites commercial abuse, a troubling fact for trademark holders whose trademarks have been appropriated for use in cyber-criticism.

¶17 For example, in *Mattel, Inc. v. MCA Records, Inc.*, Mattel claimed that MCA Records diluted its BARBIE trademark because MCA Records produced and distributed the song “Barbie Girl.”³⁰ Allegedly, the BARBIE trademark’s distinctiveness was diminished because it no longer brought to mind Mattel’s doll alone.³¹ To resolve the matter, the Ninth Circuit applied the noncommercial use exemption, stating that “‘noncommercial use’ refers to a use that consists *entirely* of noncommercial, or fully constitutionally protected, speech.”³² Then, relying on Ninth Circuit precedent, the court concluded that the noncommercial use exemption should be extended to cover “parodies” whose expressive elements were “inextricably entwined” with its commercial purpose.³³

¶18 The Ninth Circuit may have relied on a faulty assumption. The court presupposed that when a parody combines commercial and noncommercial elements, those elements are automatically “inextricably entwined.”³⁴ Such an assumption has the practical effect

27. See 15 U.S.C. § 1125(c)(1).

28. See, e.g., 141 Cong. Rec. S19,312 (daily ed. Dec. 29, 1995) (Statement of Senator Leahy) (claiming that parody, satire, and other forms of First Amendment-protected expression would be unaffected by the FTDA); H.R. REP. NO. 104-374, at 8 (1995) (stating that the noncommercial use exemption incorporates the concept of commercial speech from the commercial speech doctrine and proscribes dilution actions where famous trademark holders seek to enjoin the noncommercial use of a famous mark).

29. See *supra* Part II.

30. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 898-99 (2002). See also Shaughnessy, *supra* note 25, at 1079 (stating that, because of their richness, well-known trademarks are inviting targets for parody).

31. See *Mattel*, 296 F.3d at 903-04.

32. *Id.* at 905 (emphasis added).

33. *Id.* at 906-07 (citing *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001)).

34. See Steven Y. Reeves, Comment, *Speech-zilla Meets Trademark Kong?: How the Hollywood Circuit Got It Wrong in the Barbie Battle*, *Mattel, Inc. v. MCA Records, Inc.*, 4 MINN. INTELL. PROP. REV. 285, 322-37 (2003) (explaining the flaws of the Ninth Circuit’s reasoning, namely that: (1) the court failed to analyze the commercial and noncommercial aspects of MCA’s use separately instead of as “inextricably

of immunizing from liability nearly all FTDA defendants, even those that free-ride.³⁵

¶ 19 Likewise, in *American Family Life Insurance Co. v. Hagan*, Timothy Hagan, a gubernatorial candidate, “borrowed” the AFLAC duck for use in his campaign against the incumbent, Robert Taft.³⁶ The “Taftquack” campaign featured an internet commercial and website.³⁷ American Family Life Insurance brought suit under the FTDA, claiming that Hagan’s use of the AFLAC trademark diluted the distinctiveness of that trademark.³⁸ Citing *Mattel*, the court found that Hagan’s use was covered by the noncommercial use exemption.³⁹ Even though the court acknowledged that Hagan made commercial use of the AFLAC trademark in his political campaign, the use was ostensibly “inextricably entwined” with expression.⁴⁰

¶ 20 Neither *Mattel* nor *American Family Life Insurance* dealt with cyber-criticism per se. Both cases, however, addressed the noncommercial use exemption, which has spillover effects for cyber-criticism disputes under the FTDA. These courts failed to encode the noncommercial use exemption with any limiting principles, which may ultimately expand the boundaries of the exemption so far that it could swamp the FTDA itself.

¶ 21 *Bally Total Fitness Holding Corp. v. Faber* should also be mentioned here because it concerned a critical website, though not one called something like “ballysucks.com.”⁴¹ Even so, the court entertained the hypothetical and found that the noncommercial use exemption was not relevant because the website only criticized Bally’s business practices.⁴² The court further stated that “the mere use of another’s [trademark] on the Internet . . . is not per se commercial use.”⁴³

¶ 22 The *Bally* court’s decision is correct: the use of a famous trademark alone does not constitute a commercial use violating the FTDA. But, by implication, there must be some limiting standard(s) for using famous trademarks in critical domain names, or else the FTDA would be eviscerated. *Bally*, however, did not establish guidelines for determining when the noncommercial use exemption applies.

¶ 23 The wide-ranging articulation of—and the lack of standards for applying—the

entwined”; (2) the court’s reliance on *Hoffman* was misguided because an FTDA defendant’s intent and motivation is critical to evaluating whether an alleged parody should qualify for the noncommercial use exemption; and (3) the Ninth Circuit’s pronouncement of the “inextricably entwined” test guts the FTDA by effectively denying protection to famous trademarks).

35. See *id.* at 286-87 (arguing that if the *Mattel* court’s “treatment of the FTDA is followed, many FTDA defendants will [seek asylum under] the noncommercial use exception”).

36. *Am. Family Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682, 685 (N.D. Ohio 2002).

37. See *id.* at 686.

38. See *id.* at 685.

39. See *id.* at 696-97.

40. See *id.* at 697-99.

41. See *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1161-62 (C.D. Cal. 1998). The critical website at issue in *Bally* was <http://www.compupix.com/ballysucks>.

42. See *id.* at 1166-68.

43. *Id.* at 1166.

noncommercial use exemption could render the FTDA meaningless. This is bad news for trademark holders who may seek refuge under the FTDA to vindicate their trademark rights.⁴⁴ Intuitively, this outcome may not be the correct legal result. Moreover, early indicators suggest that courts may be headed in the wrong direction.⁴⁵

D. The Underinclusive Approach to the Noncommercial Use Exemption

¶24 Admittedly, the overbroad cases represent the dominant school of thought on the noncommercial use exemption, but there is a minority view. The minority view argues that the use of a famous trademark in a domain name constitutes commercial use, and is therefore undeserving of the safe harbor.⁴⁶

¶25 Commentators have critiqued this approach because it is too absolutist. Such a rule, commentators argue, does not contain sufficient First Amendment protections for commentary and criticism.⁴⁷ While commentators correctly note that the minority view fails to incorporate speech protections, they push back too far in the opposite direction.⁴⁸ That is, cyber-criticism proponents typically assume that the use of a famous trademark in a domain name is motivated only by the good faith intent to criticize or comment on the trademark or its holder. This assumption may not hold true given that cyber-criticism websites often evidence free-riding. Accordingly, this Article seeks to offer an approach that is flexible enough to deal with free-riding while carving out protections for speech.

III. THE FTDA DEMANDS CLOSER SCRUTINY OF CYBER-CRITICISM

A. Cyber-criticism Warrants Special Attention

¶26 By definition, cyber-criticism involves the addition of a critical prefix or suffix to a famous trademark for use in a domain name.⁴⁹ Cyber-criticism would thus be ineffective but for the use of a famous trademark.⁵⁰ Because the FTDA protects famous

44. See Hampton, *supra* note 1, at 557-58 (stating that cyber-criticism is increasing in popularity).

45. See *supra* Part II.B.

46. See, e.g., *Planned Parenthood Fed'n of Am., Inc. v. Bucci*, 1997 U.S. Dist. LEXIS 3338, at *19 (S.D.N.Y. 1997) (construing commercial use broadly and finding that registration of another's famous trademark as a domain name is commercial). Cf. *Panavision Int'l, LP v. Toeppen*, 141 F.3d 1316, 1324-25 (9th Cir. 1998) (stating that registration of a famous trademark in a domain name alone is not commercial).

47. See Daniel T. Janis, *Internet Domain Names and the Lanham Act: Broadening Trademark Definitions and Their Implications for Speech on the Web*, 25 COLUM. J.L. & ARTS 21, 45 (2001) (suggesting that cyber-criticism websites are used to both denote their source and connote a message); Sorgen, *supra* note 3, at 139-42 (explaining that cyber-criticism websites should be protected by the First Amendment because they are communicative).

48. See, e.g., Jonathan Band & Matthew Schruers, *Toward a Bright-line Approach to [Trademark]sucks.com*, 20 COMPUTER & INTERNET LAW. 1, 10 (2003) (proposing a bright-line rule authorizing cyber-criticism in all instances).

49. See Hampton, *supra* note 1, at 557-58. For example, a cyber-critic might transform PEPSI into pepsisucks.com.

50. See *Panavision*, 141 F.3d at 1327 (emphasizing that domain names frequently consist of an organization's trademark, and that is the easiest way to locate an organization on the Internet).

trademarks, the unauthorized use of those trademarks in domain names should draw suspicion.⁵¹ To say that cyber-criticism is suspect under the FTDA, however, does not mean that the FTDA stands for a general prohibition of cyber-criticism. Rather, cyber-criticism requires more careful analysis.

¶ 27 On the Internet, domain names are used to locate an organization.⁵² As a result, an organization is likely to use its trademark in a domain name because that makes it easier for consumers to find the organization.⁵³ Armed with this knowledge, cyber-critics add a critical prefix or suffix to a famous trademark, forming a domain name that leads consumers to a critical website.⁵⁴ Critical websites are thus easy to find.

¶ 28 Using a famous trademark in a critical domain name is different than, say, criticizing that trademark in the text of a webpage.⁵⁵ Famous trademarks are used in domain names to identify the holder, or the holder's goods and services.⁵⁶ Put another way, domain names differ from random criticism appearing in webpages because domain names are a consumer's primary means of finding a trademark holder's virtual residence.⁵⁷ Because of their capacity to locate and identify the trademark holder on the Internet, domain names cannot be used by multiple parties simultaneously, which is to say that domain names do not have a public goods aspect.⁵⁸ For that reason, it may be helpful to conceptualize domain names as the passport to a trademark holder's persona online. That passport is, in effect, a product of the trademark holder and can be diluted if used for free-riding purposes.

¶ 29 Inevitably, famous trademarks will be used in critical domain names. It is difficult, however, to draw lines between: (1) cases where the addition of a critical prefix or suffix to a domain name is only used to provide a forum for criticizing the trademark or its holder; and (2) instances where a critical prefix or suffix is tacked onto a famous trademark to lead the visitor to a website that is no more than a cleverly veiled attempt at capitalizing off the commercial magnetism of a famous trademark.

¶ 30 Thus far, courts and commentators have not made that distinction. If the use of a famous trademark in critical domain names is evaluated in a vacuum, it will likely be

51. See sources cited *supra* note 5.

52. See *Panavision*, 141 F.3d at 1327; *Bird v. Parsons*, 289 F.3d 865, 869 (6th Cir. 2002) (stating that to make the Internet easier to navigate, domain names correspond to an Internet protocol address).

53. See *Panavision*, 141 F.3d at 1327 (discussing that domain names mirror famous trademarks, making it easier for consumers to find an organization on the Internet).

54. See Hampton, *supra* note 1, at 557-58.

55. As discussed here, the technical structure of the Internet does not allow two parties to occupy a domain name using the same famous trademark. The use of famous trademarks in domain names is unlike random mentions of a famous trademark in a Web page, or on T-shirts for that matter, because a domain name is the primary way that consumers find the trademark holder online.

56. See *Panavision*, 141 F.3d at 1327.

57. *Id.* (quoting *Cardservice Int'l v. McGee*, 950 F. Supp. 737, 741 (E.D. Va. 1997) ("A customer who is unsure about a company's domain name will often guess that the domain name is also the company's name.")).

58. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL. STUD. 325, 326 (1989) (explaining the public goods concept in the intellectual property context).

viewed as providing a forum for commentary or criticism.⁵⁹ A closer inspection of the content of cyber-criticism websites, however, reveals that critical domain names are sometimes used to free-ride. Free-riding has a transformative impact on cyber-criticism and should thus render a use ineligible for the safe harbor.

B. Treatment of Cyber-criticism by the Courts

¶ 31 At least three courts have considered whether cyber-criticism websites constitute dilution under the FTDA. In each case, the court dismissed the dilution claim on grounds that the critical website was a noncommercial use. However, these courts failed to establish standards for applying the noncommercial use exemption in future cases. In fact, the logic of these decisions is tilted toward the reasoning of the overbroad cases. The effect of this “tilt” is that it may deny plaintiffs of protections guaranteed by the FTDA.

1. *Bally* Failed to Establish Standards for Applying the Noncommercial Use Exemption

¶ 32 As discussed earlier, *Bally* was a case about a website critical of Bally’s business practices.⁶⁰ The court applied the noncommercial use exemption, asserting that the defendant did not use the BALLY trademark to sell goods or services.⁶¹ The court’s emphasis on whether the defendant used his critical website to sell goods or services is a fine starting point, but more guidelines are necessary. Further, although the court stated that merely using another’s trademark on the Internet is not per se commercial, the court did not establish principles for applying the noncommercial use exemption.⁶²

2. *Lucent* Stated, in Dicta, That Cyber-criticism Websites Are Protectable

¶ 33 The court, in *Lucent Technologies, Inc. v. LucentSucks.com*, dismissed the plaintiff’s complaint, which included a dilution claim, because it did not satisfy certain jurisdictional requirements.⁶³ Notwithstanding, the court stated in dicta that the website at issue may have been protectable parody and/or criticism.⁶⁴

¶ 34 The *Lucent* court broadly asserted that critical websites provide forums for commentary, and should thus be deemed noncommercial.⁶⁵ It is unclear whether this court would apply the same analysis for all five types of cyber-criticism.⁶⁶ What is clear,

59. For that reason, commentators have argued that cyber-criticism is good for consumers and should be protected by the First Amendment. See Sorgen, *supra* note 3, at 150-51.

60. See *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1162 (C.D. Cal. 1998). See also *supra* Part II.C.

61. *Bally* at 1166-67.

62. *Id.*

63. *Lucent Techs., Inc. v. LucentSucks.com*, 95 F. Supp. 2d 528, 529 (E.D. Va. 2000).

64. *Id.* at 535-36.

65. See *id.* at 536 n.9.

66. See *supra* Part II (enumerating five types of cyber-criticism).

though, is that the *Lucent* court, like *Bally*, failed to enumerate standards for applying the noncommercial use exemption.

3. *Ford* Precludes Third Parties from Raising Dilution Claims Against Cyber-critics

¶ 35 In *Ford Motor Co. v. 2600 Enterprises*, Ford alleged three causes of action against a cyber-critic, including trademark dilution.⁶⁷ There, the defendant registered the critical domain name fuckgeneralmotors.com, and hyperlinked to Ford's website, ford.com.⁶⁸ Ford, however, failed to allege sufficient facts to prevail because its trademark was not explicitly criticized—it was only used in the programming code.⁶⁹ Thus, the *Ford* decision appears to foreclose third-party actions for trademark dilution.

¶ 36 Additionally, the court stated that a commercial use should not be defined to include any use that might commercially harm the trademark owner.⁷⁰ That pronouncement, however, does not instruct subsequent courts on how to evaluate cyber-criticism under the FTDA.

IV. GUIDELINES FOR RESOLVING CYBER-CRITICISM CONTROVERSIES

¶ 37 Not all cyber-criticism websites should be treated the same. Critical websites that provide a forum for commentary or criticism should be exempted as noncommercial uses. Conversely, cyber-criticism that combines forums for criticism with free-riding should be construed as commercial. Free-riding, as used in this Article, means trading off the distinctive character of a famous trademark to merchandise goods or services.⁷¹ Phrased differently, free-riding is capitalizing off of the commercial magnetism of a trademark with the intent of selling a product. This section analyzes, in turn, the five types of cyber-criticism websites laid out in the Introduction, and suggests a framework under which courts should evaluate each case.

A. Message Board Allowing Users to Post Articles about the Trademark Holder

¶ 38 A cyber-criticism website featuring only a message board (or chat room) that allows users to post comments about a trademark holder or its goods and services is the purest case for protection under the noncommercial use exemption.⁷² In fact, the First Amendment demands this result.

67. *Ford Motor Co. v. 2600 Enters.*, 177 F. Supp. 2d 661, 661-63 (E.D. Mich. 2001).

68. *Id.* at 664.

69. *Id.*

70. *Id.* at 665.

71. See sources cited *supra* note 9.

72. See, e.g., *Mitsubishi Eclipse of Quality*, at <http://www.mitsubishisucks.com> (last visited Sept. 18, 2004); *The Unofficial American Express and American Express Financial Advisor Consumer Opinion Web Page*, at <http://www.amexsux.com> (last visited Sept. 18, 2004).

¶39 Unlike its predecessor, the Trademark Law Revision Act, the FTDA passed both houses of Congress without much fanfare because it expressly carved out First Amendment protections.⁷³ The First Amendment protection at issue here is the noncommercial use exemption. As discussed earlier, the noncommercial use exemption generally permits commentary about, or criticism of, famous trademarks.⁷⁴ That is because the noncommercial use exemption implicitly incorporates the commercial speech doctrine from First Amendment law.⁷⁵

¶40 Commercial speech, as articulated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, is expression that relates to an economic transaction.⁷⁶ There, the Court recognized that in a free market economy, commercial speech provides people with information so that they can make informed private economic decisions.⁷⁷ Notwithstanding, commercial speech is accorded lesser First Amendment protection than other types of expression.⁷⁸

¶41 In the context of anti-dilution law, commercial speech generally refers to the use of a trademark in the context of merchandising or marketing goods and services.⁷⁹

73. See *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 430-431 (2003) (“In 1988, when Congress adopted amendments to the Lanham Act, it gave consideration to an anti-dilution provision. During the hearings on the 1988 amendments, objections to that provision based on a concern that it might have applied to expression by the First Amendment were voiced and the provision was deleted from the amendments.”) (citing H.R. REP. NO. 100-1028, at 5 (1988)); Kenneth L. Port, *The “Unnatural” Expansion of Trademark Rights: Is a Federal Dilution Statute Necessary?*, 18 SETON HALL LEGIS. J. 433, 434 (1994) (explaining that the anti-dilution provisions were removed from the 1988 Act because of concerns in the House that such provisions would impede on the First Amendment rights of advertisers). After a one-day hearing, the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee endorsed H.R. 1295 and the House passed it unanimously. See *Moseley*, 537 U.S. at 431 (citing H.R. REP. NO. 104-374, at 2 (1995)). Subsequently, in the Senate, an identical bill, S. 1513, was introduced on Dec. 29, 1995 and passed on the same day without any hearings. *Id.* (citing 141 CONG. REC. 38559-61 (daily ed. Jan. 11, 1995)).

74. See *supra* Part II.B. See also *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997) (explaining that the First Amendment allows copyright parodies so long as the parody imitates the style of the original, makes ridiculous the style and expression of the original, and takes no more than is necessary to “conjure up” the object of the parody while simultaneously communicating that it is not the original).

75. See sources cited *supra* note 28.

76. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

77. *Id.* at 765.

78. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562-63 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”). Also note that the Court established a four-part test for determining whether commercial speech is protected by the First Amendment: (1) the speech must concern lawful activity and not be misleading; (2) the government interest in regulating the speech must be substantial; (3) the regulation must directly advance the governmental interest asserted; and (4) the regulation must not be more extensive than necessary to serve that interest. See *id.* at 566.

79. See David Sven Villwock, *Legislative Update: The Federal Trademark Dilution Act of 1995*, 6 DEPAUL-LCA J. ART AND ENT. L. 213, 219 (1996) (explaining that if a mark is used for criticism, it is typically upheld on First Amendment grounds; however, if a trademark is used to merchandise a product with the intent of obtaining a profit, that speech may be characterized as commercial, thus deserving lesser First Amendment protection).

Nevertheless, the unauthorized merchandising of a product with another's trademark is not protected under the noncommercial use exemption.⁸⁰ In other words, anti-dilution law, like the FTDA, may proscribe free-riding even though it might limit a commercial actor's speech.⁸¹ While commentary and criticism are typically noncommercial,⁸² "[p]oetic license is not without limits."⁸³

¶42 That being said, a cyber-criticism website that features only a message board allowing users to post their gripes is neither free-riding nor commercial. Although a famous trademark would be used in the domain name of the critical website, the noncommercial use exemption should apply because the website only provides an outlet for criticism and commentary.

¶43 This approach most closely parallels *Bally*. There, the court found that the critical website was protected under the noncommercial use exemption because it merely served as a forum for criticizing Bally's business practices.⁸⁴ Although *Bally* does not map squarely onto the other types of cyber-criticism, it is well-fitted to those cases where a cyber-critic only uses a message board or chat room to criticize the trademark holder and/or its goods and services.

¶44 On the other hand, pursuant to the logic of the minority view, a cyber-critic who registers another's famous trademark in a domain name would be liable for dilution under the FTDA.⁸⁵ As discussed above, the minority view is too heavy-handed.⁸⁶ It runs the risk of over-protecting famous trademarks while under-protecting speech.⁸⁷

¶45 But when rejecting the minority view, one must be careful not to go too far.⁸⁸ Proponents of cyber-criticism tend to do so, meaning that the proponents' arguments for protection of cyber-criticism are often lodged in an understanding of cyber-criticism as having only one type. This is a faulty assumption. All instances of cyber-criticism do

80. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 32 (1st Cir. 1987) (explaining that anti-dilution laws were intended to proscribe merchandising of goods and/or services, and that the First Amendment tolerates incidental impacts on a commercial actor's freedom of expression). Note that "anti-dilution law" is used because this case dealt with a state anti-dilution statute that pre-dated the FTDA.

81. See sources cited *supra* note 9.

82. See *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1405-06 (9th Cir. 1997).

83. See *Rogers v. Grimaldi*, 875 F.2d 994, 996-97 (2d Cir. 1989) (stating that, under the Lanham Act, the government can pass regulations to protect against trademark infringement).

84. See *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1166 (C.D. Cal. 1998).

85. See *supra* Part II.D.

86. *Id.*

87. See *id.*; sources cited *supra* note 47. See also Andrew Beckerman-Rodau, *Prior Restraints and Intellectual Property: The Clash Between Intellectual Property and the First Amendment From an Economic Perspective*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1, 20-21 (2001) (explaining that restrictions on the dissemination of information and ideas may conflict with the underlying thrust of the First Amendment); Shaughnessy, *supra* note 25, at 1103 ("The trademark owner's interest in preserving the image and selling power of its mark seemingly stands on equal footing with the consumer's interest in receiving information about trademark owners and their products.").

88. See *Band & Schruers*, *supra* note 48, at 1.

not only involve a message board and griping posts.

¶46 In sum, a message board that allows critics to post messages about a trademark holder is not free-riding. The commercial magnetism of the mark is not appropriated to sell goods and services.

B. Solicitation of Contributions from Grippers

¶47 The next example of cyber-criticism is similar to the first in that the website features a message board allowing users to post complaints, but this example is different from the first in that it prompts grippers to donate financially to maintain the website.⁸⁹ However, soliciting financial contributions should not make these websites ineligible for protection under the noncommercial use exemption. Principally, solicitation for financial contributions does not evidence free-riding. The distinctive quality of a trademark is not being used to merchandise goods and services. As such, the noncommercial exemption ought to apply.

C. Banner Advertisement Support

¶48 Even though banner advertisement-supported websites may feature message boards that allow users to post criticism, the forum for commentary may be compromised by the appearance of banner advertisements.⁹⁰ Banner ads are commonly used on the Internet to financially support websites, but they are typically hyperlinked to commercial websites,⁹¹ which should make them impermissible in the context of cyber-criticism.

¶49 Note that there is a difference between soliciting financial support and displaying banner ads, although both may be used to defray the costs of website maintenance. Solicitation is a request for financial assistance. Placing banner ads, however, is more like free-riding. After initially being attracted to the cyber-criticism website as a result of the use of a famous trademark in a domain name, a banner ad is used to market and promote noncompeting goods and/or services.⁹²

¶50 Additionally, because banner ads are typically hyperlinked to commercial websites, there is a concern that cyber-criticism will be used as a conduit to commercial

89. See, e.g., RadioShackSucks.com, at <http://web.archive.org/web/20040209090314/http://radioshacksucks.com/> (last visited on Sept. 18, 2004) (including a PayPal solicitation to help “support” the website. This URL is archival because original site is currently down due to legal issues).

90. See, e.g., BCS-Sucks.com, at <http://www.bcs-sucks.com> (visited on Sept. 18, 2004).

91. See *Playboy Enters., Inc. v. Netscape Communications Corp.*, 55 F. Supp. 2d 1070, 1072 (S.D. Cal. 1999).

92. See Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 824-25 (1927) (arguing that an important purpose of dilution law is to prevent the “gradual whittling away or dispersion of the identity and hold upon the public mind of [a trademark]”); Oswald, *supra* note 23, at 265 (“Though Schechter never used the actual term ‘dilution,’ he put forth the then-novel notion that a trademark holder should receive protection against another’s use of his or her trademark on noncompeting, as well as competing, goods.”).

activity.⁹³ In other words, a cyber-critic would have the perverse incentive to appropriate a famous trademark in a domain name to draw advertisers and revenue. The benefit of a trademark's commercial magnetism would be internalized by the cyber-critic and not the trademark holder. Thus, the cyber-critic would be free-riding on the efforts of the trademark holder. Consequently, the placement of banner ads on a critical website likely pushes it over the brink from criticism to commercial. As such, the noncommercial use exemption should not apply to these cases.

D. Hyperlinking to Other Commercial Websites

¶ 51 One commentator, Martha Kelley, suggested that a critical website's hyperlinks should be established as commercial use when: (1) a junior user tarnishes the famous trademark by associating it with unsavory images such as pornography; or (2) the critical website hyperlinks to the commercial competitor of the trademark holder.⁹⁴ Correspondingly, the noncommercial use exemption should not apply to either case.

1. Tarnishment by Unsavory Association

¶ 52 Tarnishment occurs when a famous trademark is associated with an unsavory image.⁹⁵ That image is often pornography.⁹⁶ Kelley urges that when a critical website features hyperlinks to pornographic websites, that use should be proscribed by the FTDA.⁹⁷ Given that trademark holders sink costs into developing the distinctive character of their trademark, the FTDA should protect those trademarks from affiliation with tarnishing images.⁹⁸

¶ 53 Further, hyperlinks to tarnishing websites are problematic in cases where those websites frequently sell pornographic images and services.⁹⁹ In such cases, famous trademarks are used in domain names to attract visitors to critical websites with the intent of routing those visitors to pornographic websites. This also exceeds the scope of commentary or criticism and looks more like free-riding.

2. Hyperlinking to the Trademark Holder's Commercial Competitor

¶ 54 Kelley's approach also proscribes the use of hyperlinks to route a visitor to the

93. See Martha Kelley, Note, *Is Liability Just A Link Away? Trademark Dilution by Tarnishment under the Federal Trademark Dilution Act of 1995 and Hyperlinks on the World Wide Web*, 9 J. INTELL. PROP. L. 361, 379-82 (2002).

94. *Id.* at 374, 381-85.

95. See *id.* at 371.

96. See, e.g., *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204-05 (2d Cir. 1979) (pornographic depiction of fictional cheerleader in similar uniform to Dallas Cheerleaders enjoined on grounds of trademark infringement and dilution of trademark).

97. Kelley, *supra* note 93, at 374.

98. See sources cited *supra* note 9 (explaining that the FTDA protects the investment that trademark holders make in developing their trademarks). See also Kelley, *supra* note 93, at 371-76.

99. See, e.g., *Lucent Techs., Inc. v. LucentSucks.com*, 95 F. Supp. 2d 528, 529 (E.D. Va. 2000) (alleging that lucentSucks.com contained pornographic photographs and services for sale).

commercial competitor of a trademark holder.¹⁰⁰ Kelley uses a helpful hypothetical: imagine that critics of PepsiCo established pepsisucks.com to gripe about PepsiCo's trademark or its products.¹⁰¹ Further suppose that pepsisucks.com contained a hyperlink to Coca Cola Co.'s website.¹⁰² According to Kelley, a court should find commercial use under the FTDA because the cyber-criticism website's purpose was not to provide a forum for criticizing PepsiCo, but to redirect consumers to a commercial competitor.¹⁰³ That makes the purpose of the website commercial and not expressive.

¶55 The opinion in *Ford* also applies to Kelley's argument. In that case, Ford sued 2600 Enterprises ("2600"), claiming that its trademark was diluted because it was hyperlinked to 2600's criticism website, fuckgeneralmotors.com.¹⁰⁴ Although the court dismissed Ford's claim on grounds that its website was not explicitly criticized, the outcome should be different if the General Motors Corporation ("GMC") sued 2600. If the website fuckgeneralmotors.com only provided a forum for criticizing GMC, then it may be entitled to the safe harbor.¹⁰⁵ But, since that website criticized GMC and hyperlinked to ford.com, the website of GMC's commercial competitor, that crossed the threshold from commentary to commerce.

¶56 Kelley's approach is similar to my own because it proscribes free-riding, albeit not explicitly. Kelley forbids a cyber-critic from trading off the distinctive character of a famous trademark to promote goods and/or services. My approach differs from Kelley's, however, because it would proscribe hyperlinking to competing and noncompeting websites. There is no reason to distinguish between competing and noncompeting uses. In fact, the FTDA does not draw that distinction—it is premised on the rationale that a junior user should not be able to trade off the distinctiveness of a senior user's trademark.¹⁰⁶

E. Providing a Forum for Merchandising Goods and Services

¶57 The final type of cyber-criticism is a website whose primary purpose is to merchandise goods or services. In these cases, a famous trademark is used in a critical domain name only to draw consumers to a website that merchandises noncompeting products.¹⁰⁷ This is the clearest example of free-riding and ought not to receive

100. Kelley, *supra* note 93, at 383, 385.

101. *Id.* at 383.

102. *Id.*

103. *Id.*

104. Ford Motor Co. v. 2600 Enters., 177 F. Supp. 2d 661, 663-65 (E.D. Mich. 2001).

105. See *supra* Part IV.A.

106. 15 U.S.C. § 1127 (2004) ("The term 'dilution' means the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties . . ."). See also sources cited *supra* note 92.

107. See THE AMERICAN HERITAGE COLLEGE DICTIONARY 868-69 (4th ed. 2002) (defining "merchandise" as "1. To buy and sell (goods). 2. To promote the sale of, as by advertising" and "merchandising" as "The promotion of merchandise sales, as by coordinating production and marketing."). See also L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 31 (1st Cir. 1987) (dilution, as opposed to tarnishment, occurs when a user markets or proposes a sale with another's famous trademark).

protection under the noncommercial use exemption.

¶ 58 The website yankees-suck.com is a good example for this instance of cyber-criticism.¹⁰⁸ The front page of the yankees-suck.com website features merchandise for sale, and secondarily, a link to a chat board.¹⁰⁹ The YANKEES trademark was used in the critical domain name to attract visitors to a website that merchandises “sucks” paraphernalia, i.e., noncompeting goods.¹¹⁰ This is the quintessential example of free-riding.

¶ 59 Furthermore, anecdotal evidence proves that using a famous trademark in a critical domain name may help secure higher placement in a search engine, which in turn may increase the number of visitors to a cyber-criticism website. Case in point: a Google search of the YANKEES trademark placed the cyber-criticism website tenth on the “hit” list.¹¹¹ The high placement of yankees-suck.com underscores the problem presented in this Article. That is, whether a famous trademark is tacked onto a critical domain name so that the cyber-critic can appropriate the benefit of the trademark and therefore free-ride.

¶ 60 Merchandising goods is the focal point of this type of cyber-criticism. As such, the noncommercial use exemption should not apply.

V. CONCLUSION

¶ 61 The lack of standards for applying—and the overbroad reading of—the noncommercial use exemption to the FTDA may undermine the purpose of the Act. That is to say, because the FTDA’s noncommercial use exemption currently invites abuse, the FTDA’s ability to prevent free-riding is lessened. Generally, commentators have subscribed to the belief that there is only one type of cyber-criticism. That approach overlooks the complexity of the topic. As such, this Article sets forth a reasonable paradigm for evaluating the different types of cyber-criticism under the noncommercial use exemption. This approach best preserves the delicate balance between the First Amendment and the FTDA.

108. Available at <http://www.yankees-suck.com> (last visited on Sept. 22, 2004).

109. *Id.*

110. See sources cited *supra* note 92.

111. See <http://www.google.com> (last visited on Sept. 22, 2004) (testing whether the searching using the YANKEES trademark alone would also locate criticism websites using the trademark).