IN THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO
369 SOUTH HIGH STREET
COLUMBUS OH 43215

CASE NO: 11 CVC 04-4434

YEAGER, ANN M.
3546 STEUBENVILLE RD SE
AMSTERDAM OH 43903
TEL : NONE
PLAINTIFF, PRO SE

V.

GODADDY.COM ET AL

DEFENDANTS

MOTION TO STRIKE DEFENDANT'S ICANN'S, MOTION TO DISMISS FOR ALLEGED FAILURE TO COMPLY WITH CIV R 12 E & JURISDICTION

Plaintiff respectfully asks the Court to strike the Defendant, ICANN's Motion to Dismiss, for lack of personal jurisdiction and Civ R 12 B 6, failure to state a claim against ICANN, as well as to dismiss any other similar Motion made by any other named Defendant.

Jurisdiction:

Defendant, ICANN, asserts, the following:

a) "...ICANN maintains no offices, facilities, or other presence in Ohio...does not conduct any business in the State, and simply does not have sufficient contacts with Ohio that would render ICANN subject to suit here..." (p 1 of said Motion)

b) ICANN "...operates the accreditation system...with over 900 accredited registrars, including Defendant, Go Daddy Group, Inc...." (p 2 of said Motion)

c) "...the statute cannot be satisfied, because ICANN—has not—undertaken any of the activities enumerated in the Statute (ORC 2307.382 A & C) (p 5 of said Motion)

d) "...Ohio Courts consistently hold that the maintenance of a passive website, such as ICANN's does not constitute transacting business for the purposes of Ohio's long-arm

statute...Cites *Edwards v Erdey*: 'A passive Web site that does little more than make information available to those who are interestd in it—is not grounds for the exercise of personal jurisdiction..." (p 6 of said Motion)

e) "ICANN does not collect fees—directly—from domain name registrants..." (p 9 of said Motion)

f) Cites jurisdiction criteria: "...defendant's contacts with Ohio must involve—SOME ACT—by which the defendant—PURPOSEFULLY AVAILS itself of the privileged of conducting activities within the State; 2)...contacts with State must give rise to the plaintiff's cause of action; 3)...exercise of jurisdiction—must be reasonable..." (p 10 of said Motion)

g) Cites In re Blue Flame Energy Corp..."finding no specific personal jurisdiction because the defendant's passive internet website could not be considered to be purposefully directed to the residents of Ohio...' (p 10 of said Motion)

h) Plaintiff's Petitions should be dismissed because the "Complaint fails to state a claim against ICANN..." (p 11 of said Motion)

The Plaintiff responds:

1. Defendant, ICANN, does conduct business within this State, and meets the threshold for "substantial contacts"—through its established superintending control of all domain names:

> "ICANN...is a not-for-profit—public benefit—corporation—with participants from all over the world—dedicated to—keeping the Internet secure, stable, and interoperable.
>
> It (ICANN) promotes competition—AND DEVELOPS—POLICY ON THE INTERNET'S UNIQUE IDENTIFIERS...through its coordination role of the Internet's naming system, it (ICANN) does have an important—impact—on the expansion and evolution of the Internet." (www.icann.org/en/about)

Confirmed by "ICANN Multi-Stakeholder Model," which clearly shows that the entire Internet—is directed back to ICANN'S governance of domain names. (www.icann.org/en/about)

"ICANN plays a unique role—in the infrastructure of the Internet. THOUGH ITS CONTRACTS—WITH REGISTRIES, SUCH AS DOT-COM OR DOT-INFO, AND REGISTRARS (COMPANIES THAT SELL DOMAIN NAMES TO INDIVIDUALS AND ORGANISATIONS [STET])—ICANN—HELPS DEFINE—HOW THE DOMAIN NAME SYSTEM—FUNCTIONS—and expands. (www.icann.org/en/participate/eff-on-internet.html)

"ICANN—created—the registrar market (together with an accreditation sytem)—in order to introduce greater competition—on the Internet. The result—has been several hundred companies—able to sell domains—which itself—led to a dramatic reduction in the cost of domains—an 80 percent fall...Through its decision-making processes—ICANN has adopted guidelines for the introduction of the internationalized [stet] domain names...that will expand the use—and the influence—of the Internet globally..." (www.icann.org/en/participate/effect-on-internet.html)

ICANN's website is not passive. It clearly shows—its purpose is to influence and enforce the policies, contracts, and agreements it makes with registrars—for all domain name use.

ICANN clearly defines its active controlling role, through its organization, which has made risk assessment groups, including "The Intellectual Property Constituency of ICANN's Generic Names Supporting Organizations" (hereinafter IPC)

"The Intellectual Property Constituency (IPC) is...charged with the responsibility of advising the ICANN Board on policy issues relating to the management...on Policies for Contractual conditions—Existing gTLDS (see http://gnso.icann.org/issues/gtld-policies/tor-pdp-28f3b06.html)... IPC recognizes the value of consistency and even uniformity among the AGREEMENTS—ENTERED INTO BY ICANN—WITH THE VARIOUS GTLD REGISTRIES...it is a fact, that not all gTLD registries are comparably situated...Registry renewal agreement: Examine whether or not—there should be a policy—guiding renewal...if there have been significant problems with the operator's performance (including—non-compliance with the terms of the registry agreement)...Policy for price controls for registry services...There should be a general presumption against price caps in registry agreements...Examine objective measures (cost calculation method, cost elements, reasonable profit margin) for approving—an application—for a price increase—when a price cap exists...ICANN Fees: Examine whether or not—there should be a policy guiding—registry fees—to ICANN...The presumption should be—that registry fees—paid to ICANN (above a modest base amount related to ICANN's costs)—should be proportional to the size of the registry...Use of registry data...The general rule should be that gTLD registry data—may be used for any—lawful—purpose."

Hence, Defendant, ICANN, admits that it created and controlled the rights to renew any domain, and receives a payment for said rights, thus admits that it is selling and capitalizing on ownership rights of a copyrighted word, Aypress—that it does not own, nor has the right to do use—merely because a third party registered said the property of the Plaintiff as a domain name, at its renewal expiration.

ICANN admits that it enters into supervisory agreements with registrars, such as Defendant, Go Daddy Group, governing all domain name registrations.

Defendant, GoDaddy, connects a link from its website to ICANN's, citing "The Uniform Domain Name Dispute Resolution Policy (the 'Policy'):

> "THE UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (THE 'POLICY' HAS BEEN ADOPTED BY THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)—IS INCORPORATED BY REFERENCE—INTO YOUR REGISTRATION AGREEMENT...TO YOUR KNOWLEDGE, THE REGISTRATION OF THE DOMAIN NAME—WILL NOT INFRINGE UPON, OR OTHERWISE VIOLATE—THE RIGHTS OF ANY THIRD PARTY...YOU WILL NOT KNOWINGLY USE THE DOMAIN NAME—IN VIOLATION OF ANY APPLICABLE LAWS OR REGULATIONS...WE MAY ALSO CANCEL, TRANSFER, OR OTHERWISE MAKE CHANGES TO A DOMAIN NAME REGISTRATION...EVIDENCE OF REGISTRATION AND USE IN BAD FAITH...BY USING THE DOMAIN NAME, YOU HAVE INTENTIONALLY ATTEMPTED TO ATTRACT—FOR COMMERCIAL GAIN—INTERNET USERS TO YOUR WEBSITE, OR OTHER ON-LINE LOCATION, BY CREATING A LIKELIHOOD OF CONFUSION—WITH THE COMPLAINANT'S MARK—AS TO THE SOURCE....THE COMPLAINANT SHALL SELECT THE PROVIDER FROM AMONG THOSE APPROVED BY ICANN—BY SUBMITTING THE COMPLAINT TO THAT PROVIDER..."
>
> (www.godaddy.com/agreements/ShowDoc.aspx?paged=uniform_domain)

Hence, Defendants', ICANN, and GoDaddy, have clearly demonstrated that ICANN has superior superintending control, which GoDaddy, submits to.

GoDaddy's creation of warning the general public—has taken the step of involving itself in liability—by said warning. (See attached, landlord/tenant; and business owners' duty)

GoDaddy and ICANN admit that a domain name can be disputed for infringment, and that one or the other have the power to suspend or delete the name.

It is clear that the Plaintiff's word, Aypress, is registered to Defendant Ibrahim Kazanci"—using the consent of GoDaddy, who uses the consent of ICANN.

It is therefore—self-evident—as to both "cause" and complicity of negligence of both GoDaddy and ICANN.

Were it not for their permission, the creation of the platform, or property, both ICANN's registry and GoDaddy's registry of said domain to ICANN—then no person could infringe on the Plaintiff's rightful property.

Substantial Contacts in Ohio:

Because a computer is a means to contact a business—every citizen in Ohio—who:

a) uses the Internet, connects to, or contacts—any domain name;

b) has contacted any domain name—registered through the GoDady Group;

c) has registered any domain name—to any registry

—has substantial contacts with ICANN, as ICANN admits to domain name accreditation, and superintending control of each and every domain name.

A person brings forward—onto the real property of their computer—any business' property—called a website page—even though the business computer, or server, physically exists somewhere other than where that person is. Because a webpage existing on another server, or computer, is transported onto a user's computer—said business, then, exists—

within that State—by transportation of its assets: webpages.

In analogy: It is like having an instant salesman—transport himself to one's location; or, like a telemarketers—telephoning—for the purpose of providing information about a company, even if the sales call, or informational call—is initiated by the potential customer, or client (in this case, the customer contacts the business via his computer); Or, like remitting a sales brochure, etc—even if the information remitted is only informational.

ICANN attempts to assert it is strictly "passive," yet the Plaintiff has established its true intent—it to ultimately control and take fees for said control—all domain names in use on the Internet.

ICANN asserts that its purpose is purely "information," again—already proven that is not so—as there shall exist—a penalty for non-compliance with ICANN's agreements with domain registration use.

A purely informational website—seeks no gain from said information; neither from advertising, nor from indirect third party fees, nor provides said information to give notice that another may not be complying with an agreement, and therefore, may be penalized, or otherwise controlled.

ICANN takes fees for domain name registration. Its ultimate purpose is "superintending control."

Analogy of ICANN's website—is like any other business, which ICANN professes it to be "a....corporation." (www.icann.org/en/about)

An online newspaper is informational—however, it still collects revenue from others—even thought the viewer is not charged a fee for use. In like case, said newspaper website could be called "passive." It is still responsible for ensuring its content complies with the boundaries of law, such as libel; just as ICANN is bound to comply with laws of infringement.

ICANN's role is self-evident, and should not be dropped from the Petition—merely

because it demands to be.

Copyright:

Defendant, ICANN, asserts the following:

a) "...Plaintiff fails to allege—facts—sufficient to establish that the word, aypress, is protected by a valid copyright, or that ICANN infringed on such a copyright" (p 1 of said Motion)

b) Cites *Bird:* "...'taking a single word, or even a phrase, from a copyrighted work—generally—does not violate the rights that copyright law provides to the owner of that work.'

In co junction with Bird, ICANN asserts, "A business name similarly would not be protected under copyright laws..." (p 12 of said Motion)

The Plaintiff responds:

Copyright exists the moment a word is committed to paper. Registration with the US Copyright Office—serves merely to provide official notice—of whom registered what—and on what date—thereby providing credential testimony to ownership rights.

Registration with said Office—does not mean—one automatically has ownership rights to whatever is alleged to be copyrighted. The Office's purpose is to strictly fulfill—official date registration—of copyright—for dispute.

If one shows that copyright was in use prior to another's registration for the Office, the copyright at the Office is overruled by such display.

There are other means to attest copyright, without requiring "credential testimony" of the Office.

One method is what is called "a poor man's copyright": One mails a copy of the

copyrighted material to one's self, which remains sealed, until dispute arises. The postmark date testifies to the earliest rights of said copyright.

The Plaintiff satisfied "copyright" of Aypress, via notice of her books, which was published in the Fall, 2003, and in pre-publication phases in June, 2003.

> "Work is 'original'—to author, and thus—qualifies for copyright protection—if work is independently created—by author—and possesses some minimal degree of creativity." *Feist Publications, Inc v Rural Telephone Services Co, Inc* US Kan 1991; 111 S Ct 1282, 499 US 340, 113 L Ed 2d 358

> "Because Copyright Act protects—original works of authorship—sine qua non of copyright is—originality." *Beal v Paramount Pictures Corp CA* 11 (Ga) 1994 20 F 3d 454,

Plaintiff's Petition states she—coined (created)—the word, Aypress, that it stood for her initials: Ann Yeager Press." It therefore—is protected by copyright—due to originality and creation.

The thing speaks for itself: Defendants—would not have access to said word—if Plaintiff had not used the word as a domain name in 2003.

Defendants—wrongfully converted the Plaintiff's ownership of "Aypress"—to their use and profit—by granting, controlling, supervising, and approving—any person who has registered said word since—and allowing any suffix to be attached to it.

> "While the immediate effect of the copyright law is to secure a fair return for an author's creative labor. The ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." (Am Jur 2d, Copyright and Literary Property; Lisa Zakolski, JD)

"...a prima facie case is made out—by showing the use of one's trademark by another—in a way that is likely to confuse consumers—about the product's source..." (Corpus Juris Secundum, Trademarks, TradeNames, & Unfair Competition; Weight & Sufficiency)

Plaintiff's use of her copyrighted word, Aypress, as a domain name—lasted one year: the Plaintiff's first year of business. (The first five—are crucial to business survival.)

The Plaintiff made note of her exclusive use of said word—on her books—noting "AyPress...is the trademark of AyPress," clearly listing the Plaintiff's business address in association with said word—and supported with—the registration of said trade name to the State of Ohio; did print the website on the books dust jackets; and listed Aypress her business cards and other advertising remitted to her customers and the publishing industry.

There existed an association—that would be confusing and create a wrong impression—to any person—who viewed said website, thereafter.

Plaintiff's Petition states the fact, that Defendant Kazanci, who is currently the registered user of Aypress, with dot-com suffix—IS USING THE EXACT FIRST COINAGE OF SAID WORD.

This clearly— explicitly shows AN INTENTIONAL CAUSE TO CONFUSE.

Mr. Kazanci could not know the original spelling, first published on the Plaintiff's website, Aypress.com—unless he viewed said website at said time, was aware of the expiration of said domain, aypress.com; and further viewed the second spelling of the word, through its closing on the books' copyright page: moving Ay Press to AyPress to Aypress.

Plaintiff has satisfied a showing that Ohio is a proper forum: substantial contacts is sufficed in contacting any domain name under supervision of ICANN, and any under Go

Daddy; or otherwise, when any citizen or business of Ohio, registers a domain name, period, as it is supervised, registered to, and otherwise controlled by agreements, through ICANN. ICANN and GoDaddy, therefore, have "sufficient contacts" through citizens' computers, in said manner.

Plaintiff has satisfied that the word, Aypress, is protected by copyright—through original creation.

Plaintiff has satisfied that GoDaddy and ICANN's cause of action—is self-evident in the word "ownership": its superintending control. Defendants are aware as to how their act contributes to the injury, through their business plan, which includes risk assessment; especially, when both Defendants, ICANN and GoDaddy, acknowledge said risk of copyright and trade name infringement—and give public warning of said infringement. In said foreseeability, in which Defendants heighten others to said risk, Defendants incurred a legal duty to protect the legal interests of others, from willful invasion on the lawful ownership of a name, word, phrase, work, etc.

Plaintiff respectfully asks the Court to Strike the Defendant's Motion, and Stay the Petition, as is; and to not delay the Plaintiff's interest in justice any further.

Plaintiff asks the Court to recognize the Defendants' Motions—seek to further burden the Plaintiff, by raising the cost of litigation.

ANN YEAGER, PLAINTIFF, PRO SE

I certify that a copy of this Motion has been remitted to the Defendants.

ANN YEAGER, PLAINTIFF, PRO SE

cc:

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2003-Ohio-5780, 2003 WL 22439752, Unreported. Social Security And Public Welfare ⇐ 194.16(2)

Service at defendant's residence was not effective, where defendant had been adjudicated to be incompetent and guardian had been appointed, as service had to be made on guardian; moreover, defendant did not waive service by filing answer since as an incompetent he had no such capacity. Newark Orthopedics, Inc. v. Brock (Ohio App. 10 Dist., 01-25-1994) 92 Ohio App.3d 117, 634 N.E.2d 278. Mental Health ⇐ 498.1; Mental Health ⇐ 499

If person is merely suspected to be incompetent, but if he has never been adjudicated incompetent and has never had guardian appointed for him and has not been committed to mental institution or care of another person, then he should be served as any other individual is served and, thus, such service was valid in action for divorce. Butler v. Butler (Ohio Com.Pl. 1984) 19 Ohio Misc.2d 1, 482 N.E.2d 998, 19 O.B.R. 52. Divorce ⇐ 77

Service of process on an insane person in an action in the common pleas court should be made in the same manner required for other parties. (Annotation from RC 5125.13.) Frost v. Frost (Pike 1960) 112 Ohio App. 529, 176 N.E.2d 858, 16 O.O.2d 446. Mental Health ⇐ 498.1

7. —— Unincorporated association, entity served

Service of process on a partnership at an address other than those provided in a contract does not constitute service by certified mail reasonably calculated to provide notice to a partnership. United Fairlawn, Inc. v. HPA Partners (Summit 1990) 68 Ohio App.3d 777, 589 N.E.2d 1344, motion to certify overruled 58 Ohio St.3d 710, 569 N.E.2d 512.

Members of a labor union may sue it, but not its officers, as officers, for libel. Miazga v. International Union of Operating Engineers, AFL–CIO, Local 18 (Cuyahoga 1964) 2 Ohio App.2d 153, 196 N.E.2d 324, 94 Ohio Law Abs. 5, 29 O.O.2d 297, case certified 200 N.E.2d 645, 95 Ohio Law Abs. 254, 32 O.O.2d 353, affirmed 2 Ohio St.2d 49, 205 N.E.2d 884, 31 O.O.2d 27.

For purposes of determining the state citizenship of an unincorporated association in a federal law-suit based upon diversity of citizenship under 28 USC 1441(b), the unincorporated association has no citizenship of its own but is a citizen of every state of which a constituent member is a citizen. Rose v. Giamatti (S.D.Ohio 1989) 721 F.Supp. 906. Federal Courts ⇐ 302

Under RC 1745.01 to RC 1745.04, a member of a labor union that is an unincorporated association can sue the association for the alleged torts of its agents committed against him while acting within the scope of their authority. Miazga v. International Union of Operating Engineers, AFL–CIO (Ohio 1965) 2 Ohio St.2d 49, 205 N.E.2d 884, 31 O.O.2d 27.

At common law a workers' union should be recognzied as a legal entity; RC Ch 1745, in effect, restates this rule of law. Miazga v. International Union of Operating Engineers, AFL–CIO, Local 18 (Cuyahoga 1964) 200 N.E.2d 645, 95 Ohio Law Abs. 254, 32 O.O.2d 353.

8. —— Municipal corporation, entity served

Where in an action against a municipal corporation summons was served only upon the clerk of the city commission with no effort to serve the mayor, an alias summons issued more than sixty days thereafter does not meet the requirements of RC 2305.17, and hence plaintiff did not come within the provisions of RC 2305.17 or RC 2305.19. (Annotation from RC 2305.17 and RC 2305.19.) Oliver v. City of Dayton (Ohio Com.Pl. 1963) 191 N.E.2d 741, 91 Ohio Law Abs. 419, 23 O.O.2d 340.

9. —— County agency, entity served

Service upon county prosecutor was service on former sheriff in official capacity, but not in personal capacity. Scott v. Kreiger (N.D.Ohio 1981) 538 F.Supp. 495.

Pursuant to Civ R 4.2(11), in order to file suit against an agency of a county, the agency must be separately served, and service on the board of county commissioners is insufficient. There is no authority for the proposition that the commissioners represent the county's agencies and agents in all tort actions. Picciuto v Lucas County Bd of Commrs, No. L–89–387 (6th Dist Ct App, Lucas, 10–12–90).

Civ R 4.3 Process: out–of–state service

(A) When service permitted

Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. "Person" includes an individual, an individual's executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's:

(1) Transacting any business in this state;

(2) Contracting to supply services or goods in this state;

(3) Causing tortious injury by an act or omission in this state, including, but not limited to, actions arising out of the ownership, operation, or use of a motor vehicle or aircraft in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when the person to be served might reasonably have expected the person who was injured to use, consume, or be affected by the goods in this state, provided that the person to be served also regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(6) Having an interest in, using, or possessing real property in this state;

(7) Contracting to insure any person, property, or risk located within this state at the time of contracting;

(8) Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for spousal support, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state;

(9) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when the person to be served might reasonably have expected that some person would be injured by the act in this state;

(10) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, that the person to be served commits or in the commission of which the person to be served is guilty of complicity.

(B) Methods of service

(1) Service by certified or express mail.

Evidenced by return receipt signed by any person, service of any process shall be by certified or express mail unless otherwise permitted by these rules. The clerk shall place a copy of the process and complaint or other document to be served in an envelope. The clerk shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk with instructions to forward. The clerk shall affix adequate postage and place the sealed envelope in the United States mail as certified or express mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

The clerk shall forthwith enter the fact of mailing on the appearance docket and make a similar entry when the return receipt is received. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact of notification on the appearance docket. The clerk shall file the return receipt or returned envelope in the records of the action. If the envelope is returned with an endorsement showing failure of delivery, service is complete when the attorney or serving party, after notification by the clerk, files with the clerk an affidavit setting forth facts indicating the reasonable diligence utilized to ascertain the whereabouts of the party to be served.

All postage shall be charged to costs. If the parties to be served by certified or express mail are numerous and the clerk determines there is insufficient security for costs, the clerk may require the party requesting service to advance an amount estimated by the clerk to be sufficient to pay the postage.

(2) Personal service.

When ordered by the court, a "person" as defined in division (A) of this rule may be personally served with a copy of the process and complaint or other document to be served. Service under this division may be made by any person not less than eighteen years of age who is not a party and who has been designated by order of the court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person who will make the service.

Proof of service may be made as prescribed by Civ.R. 4.1(B) or by order of the court.

(Adopted eff. 7–1–70; amended eff. 7–1–71, 7–1–80, 7–1–88, 7–1–91, 7–1–97)

What's the effect of ICANN's role and work on the Internet?

ICANN plays a unique role in the infrastructure of the Internet. Through its contracts with registries (such as dot-com or dot-info) and registrars (companies that sell domains names to individuals and organisations), ICANN helps define how the domain name system functions and expands.

Registrars

ICANN created the registrar market (together with an accreditation system) in order to introduce greater competition on the Internet. The result has been several hundred companies able to sell domains which itself led to a dramatic reduction in the cost of domains - an 80 percent fall. There is now a diverse and vibrant market in the supply of the Internet's basic building block.

That accreditation process is currently undergoing reform in order to keep in up-to-date with a rapidly changing domain name market.

Dispute resolution

ICANN helped design and implement a low-cost system for resolving disputes over domain name ownership. The Uniform Domain Name Dispute Resolution Policy (UDRP) has been used tens of thousands of times to resolve ownership disputes, avoiding the need for costly and complex recourse to the courts.

New top-level domains

ICANN approves the introduction of new "generic top-level domains" to the Internet - a process that expands the online space available. So far, ICANN has introduced 13 new top-level domains to the Internet, ranging from dot-asia to dot-travel, accounting for over six million domains. ICANN has also developed a refined process to introduce further TLDs that is being finalised with applications expected in early 2010.

Internationalized domain names

Through its decision-making processes, ICANN has adopted guidelines for the introduction of internationalised domain names (IDNs), opening the way for domain registrations in hundreds of the world's languages - something that will expand the use and the influence of the Internet globally to new heights.

About

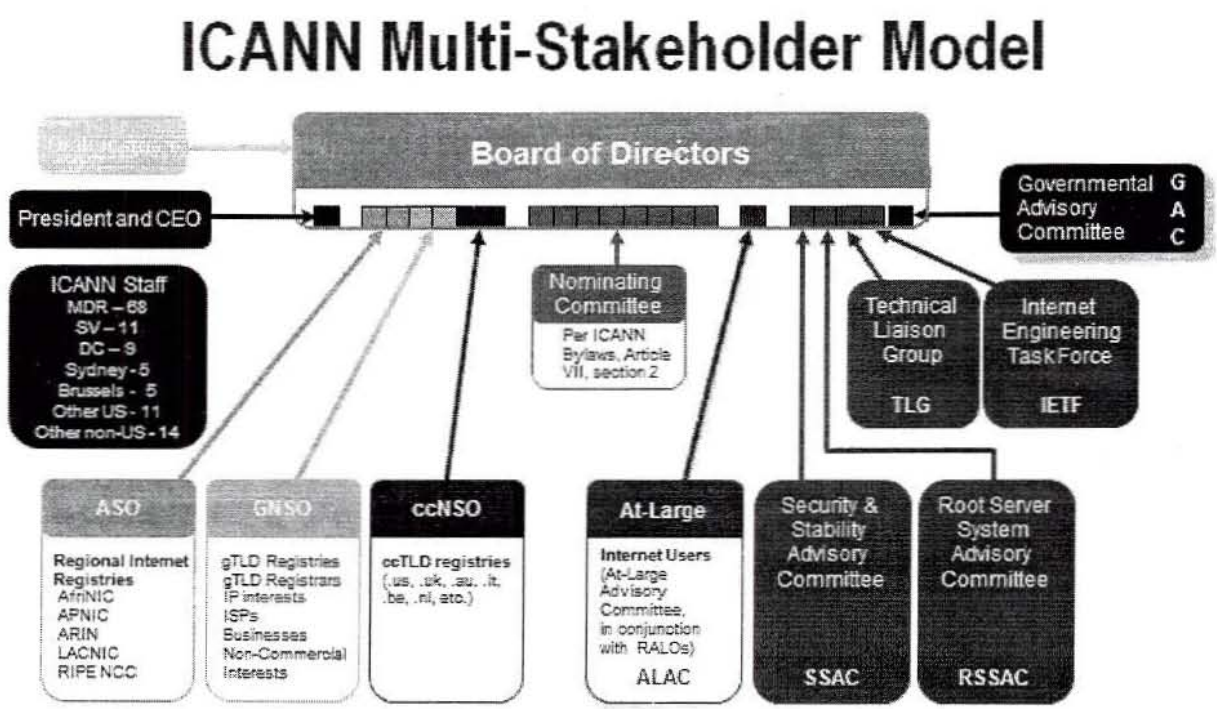
To reach another person on the Internet you have to type an address into your computer - a name or a number. That address has to be unique so computers know where to find each other. ICANN coordinates these unique identifiers across the world. Without that coordination we wouldn't have one global Internet.

What does ICANN do? | What is the effect on the Net? | What is going on now? | How do I participate?

ICANN was formed in 1998. It is a not-for-profit public-benefit corporation with participants from all over the world dedicated to keeping the Internet secure, stable and interoperable. It promotes competition and develops policy on the Internet's unique identifiers.

ICANN doesn't control content on the Internet. It cannot stop spam and it doesn't deal with access to the Internet. But through its coordination role of the Internet's naming system, it does have an important impact on the expansion and evolution of the Internet.

The organizational structure



Board Committees

Audit

Board Governance

Compensation

Executive

Finance

Global Relationships

IANA

Public Participation

Risk

President's Committees and Board Working Groups

2011

Board IDN Variants Working Group

Technical Relations Working Group

2009

Board-GAC Working Group

Past Committees, Task Forces, and Other Groups

2010

Board Data and Consumer Protection Working Group (2010)

Working Group on Equivalent Strings Support (2010)

President's IANA Consultation Committee (2005-2008)

President's Strategy Committee (2005 -2009)

President's Standing Committee on Privacy (2003)

IPC

The Intellectual Property Constituency of ICANN's Generic Names Supporting Organizations

The Intellectual Property Constituency (IPC) is one of the six constituencies of the Generic Names Supporti charged with the responsibility of advising the ICANN Board on policy issues relating to the management o Information regarding membership in the IPC or other areas of interest may be obtained by clicking on the

This is the Constituency Statement of the Intellectual Property Interests Constituency (IPC) on the Terms of Reference for the Policy Development Process on **Policies for Contractual Conditions – Existing gTLDs (see** (http://gnso.icann.org/issues/gtld-policies/tor-pdp-28feb06.html). Pursuant to requirements of the GSNO policy development process, outlined by the ICANN bylaws, see Annex A, Sec. 7(d), available at http://www.icann.org/general/archive-bylaws/bylaws-19apr04.htm, the IPC came to the following conclusion.

I. Constituency Statement

IPC General Approach:

(1) IPC presents the following position statement on elements of the Terms of Reference for this PDP as our initial views. We look forward to considering the views of other constituencies and working toward a mutually acceptable recommendation.

(2) IPC recognizes the value of consistency and even uniformity among the agreements entered into by ICANN with the various gTLD registries. However, it is a fact that not all gTLD registries are comparably situated, with regard to size or dominance, and it is not always appropriate to treat them as if they were. Consistency is only one of several factors that should be taken into account in fashioning a policy regarding registry agreements.

1. Registry agreement renewal

1a. Examine whether or not there should be a policy guiding renewal, and if so, what the elements of that policy should be.

There should be a general presumption that a registry operator that performed competently during the initial term of the agreement should have a preferential status in any review that occurs prior to renewal. This will promote continuity and encourage long-term investment. However, the presumption can be overcome if there have been significant problems with the operator's performance (including non-compliance with terms of the registry agreement) or if there have been significant intervening changes in circumstance.

1b. Recognizing that not all existing registry agreements share the same Rights of Renewal, use the findings from above to determine whether or not these conditions should be standardized across all future agreements.

See comment (2) under "General Approach" above regarding standardization.

2. Relationship between registry agreements and consensus policies

ICANN CREATED RIGHT TO RENEW MYPIRS

2a. Examine whether consensus policy limitations in registry agreements are appropriate and how these limitations should be determined.

To the extent feasible, the terms of registry agreements should be aligned with policies adopted by the GNSO Council and approved by the Board for gTLD registries generally. The necessity for any deviations should be explicitly stated and justified in the agreement.

2b. Examine whether the delegation of certain policy making responsibility to sponsored TLD operators is appropriate, and if so, what if any changes are needed.

Such delegation is appropriate only to the extent it does not conflict with ICANN policies (or is explicitly justified, see preceding answer). The gatekeeping /charter enforcement role of sponsored TLD operators should be given paramount importance.

3. Policy for price controls for registry services

3a. Examine whether or not there should be a policy regarding price controls, and if so, what the elements of that policy should be. (note examples of price controls include price caps, and the same pricing for all registrars)

There should be a general presumption against price caps in registry agreements. Exceptions to this presumption should be explicitly justified. There should be a general presumption in favor of "price controls" aimed at preventing discrimination among registrars; exceptions should be explicitly justified. Also favored should be "price controls" aimed at providing transparency and equal access to information about pricing policies.

3b. Examine objective measures (cost calculation method, cost elements, reasonable profit margin) for approving an application for a price increase when a price cap exists.

This should be handled on a case by case basis in situations in which the presumption against price caps is overcome.

4. ICANN fees

4a. Examine whether or not there should be a policy guiding registry fees to ICANN, and if so, what the elements of that policy should be.

The presumption should be that registry fees paid to ICANN (above a modest base amount related to ICANN's costs) should be proportional to the size of the registry; deviations from this presumption should be explicitly justified.

4b. Determine how ICANN's public budgeting process should relate to the negotiation of ICANN fees.

Safeguards should be introduced to minimize the risk that registries contributing disproportionately large fees to ICANN's budget will be able to exercise disproportionate control over budgeting decisions. ICANN's budgeting process should give priority to input from GNSO and its constituencies (at least so long as fees derived from gTLD registrations provide the bulk of ICANN's funding), and particularly to user constituencies as the ultimate source of ICANN's funds (i.e., gTLD registrants).

5. Uses of registry data

Registry data is available to the registry as a consequence of registry operation. Examples of registry data could include information on domain name registrants, information in domain name records, and traffic
data associated with providing the DNS resolution services associated with the registry.

5a Examine whether or not there should be a policy regarding the use of registry data for purposes other than for which it was collected, and if so, what the elements of that policy should be.

The general rule should be that gTLD registry data may be used for any lawful purpose. For registry data that consists of personally identifiable information, a modified rule may be required, which permits its use for purposes not incompatible with the purpose for which it was collected, and which takes into account other public policy interests in use of the data. Use of gTLD registry data by the registry itself for the development or support of new registry services should generally be subject as well to the procedures for new registry services adopted by the GNSO Council and approved by the Board for gTLD registries. Deviations from the above general principles should be explicitly justified.

5b. Determine whether any policy is necessary to ensure non-discriminatory access to registry data that is made available to third parties.

There should be a mechanism for distinguishing between proprietary and non-proprietary registry data, and non-discriminatory access should be guaranteed to the latter but not the former. This mechanism could take the form of a policy spelled out in the agreement; a procedural step in the consideration of proposed new registry services pursuant to ICANN polices; or both. Deviations from this general rule should be explicitly justified.

6. Investments in development and infrastructure

6a. Examine whether or not there should be a policy guiding investments in development and infrastructure, and if so, what the elements of that policy should be.

A general policy on this topic may not be needed. Commitments regarding such investment will generally be an appropriate factor in the selection of registry operators. Contractual commitments to such investment should be considered on a case-by-case basis. Any commitment entered into should be transparently disclosed, and effectively enforced.

II. Methodology for Reaching Agreement

The issues in the Terms of Reference were discussed within the IPC on several occasions, including the meeting of the IPC held in conjunction with the Wellington ICANN meeting on March 27, 2006. A draft constituency statement was circulated to IPC officers and leadership on April 27, 2006, and was discussed on a teleconference of IPC officers and GNSO council representatives on May 2. A revised version, reflecting edits and additions proposed by officers, was circulated to the full IPC membership on May 2. IPC members suggested no additional substantive changes.

III. Impact on Constituency

The impact of the PDP on the IPC depends upon the answers ultimately adopted to the questions posed by the Terms of Reference. In general, however, IPC members, as registrants of domain names in the gTLDs and as entities seeking to protect their intellectual property rights against abusive registration and use of domain names in the gTLDs, will be affected by changes to the registry agreements for existing gTLD registries.

IV. Time Period Necessary to Complete Implementation

This depends upon the outcome of the PDP.

Respectfully submitted,

Steve Metalitz, IPC President
and
Ute Decker, IPC representative to GNSO Council
Primary IPC Contact Person for the PDP (Feb06) on **Policies for Contractual Conditions – Existing gTLDs**

Network Solutions >> Whois
Log In

- Search
- Renew
- Transfer
- Features
- Private Registration
- Forward
- WHOIS

WHOIS *behind that domain?*

Search all WHOIS Records

Enter search term here... Search

Search by either...

- Domain Name e.g. networksolutions.com
- IP Address e.g. 205.178.187.13

Announcing a great feature for WHOIS users

You can now start a WHOIS query directly in your browser!

Use the format: *www.networksolutions.com/whois-search/netsol.com* and you'll come directly to our results page. Stay tuned for more useful features coming soon to WHOIS!

What is WHOIS?

When you register a domain name, the Internet Corporation for Assigned Names and Numbers (ICANN) requires your domain name registrar to submit your personal contact information to the WHOIS database. Once your listing appears in this online directory, it is publicly available to anyone who chooses to check domain names using the WHOIS search tool.

There are a variety of third parties who may check domain names in the WHOIS database, including:

- Individuals check domain names for expiration dates
- Registrars check domain names when transferring ownership
- Authorities check domain names when investigating criminal activity

As an accredited domain names registrar, Network Solutions® must comply with the WHOIS database requirements set forth by ICANN. However, in an effort to ensure that customers feel comfortable with the visibility of their personal information, Network Solutions offers three options for your WHOIS database listing.

Public WHOIS Database Listing
If you're comfortable with having your information available to the public — and don't want the extra fee associated with private domain registration — Network Solutions will submit a public listing to the WHOIS database. This listing will include

GO DADDY
UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY

(As Approved by ICANN on October 24, 1999)

1. PURPOSE

This Uniform Domain Name Dispute Resolution Policy (the "Policy") has been adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN"), is incorporated by reference into your Registration Agreement, and sets forth the terms and conditions in connection with a dispute between you and any party other than us (the registrar) over the registration and use of an Internet domain name registered by you. Proceedings under Paragraph 4 of this Policy will be conducted according to the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules of Procedure"), which are available at dispute policy, and the selected administrative-dispute-resolution service provider's supplemental rules.

2. YOUR REPRESENTATIONS

By applying to register a domain name, or by asking us to maintain or renew a domain name registration, you hereby represent and warrant to us that (a) the statements that you made in your Registration Agreement are complete and accurate; (b) to your knowledge, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party; (c) you are not registering the domain name for an unlawful purpose; and (d) you will not knowingly use the domain name in violation of any applicable laws or regulations. It is your responsibility to determine whether your domain name registration infringes or violates someone else's rights.

3. CANCELLATIONS, TRANSFERS, AND CHANGES

We will cancel, transfer or otherwise make changes to domain name registrations under the following circumstances:

a. subject to the provisions of Paragraph 8, our receipt of written or appropriate electronic instructions from you or your authorized agent to take such action;
b. our receipt of an order from a court or arbitral tribunal, in each case of competent jurisdiction, requiring such action; and/or
c. our receipt of a decision of an Administrative Panel requiring such action in any administrative proceeding to which you were a party and which was conducted under this Policy or a later version of this Policy adopted by ICANN. (See Paragraph 4(i) and (k) below.)

We may also cancel, transfer or otherwise make changes to a domain name registration in accordance with the terms of your Registration Agreement or other legal requirements.

4. MANDATORY ADMINISTRATIVE PROCEEDING

This Paragraph sets forth the type of disputes for which you are required to submit to a mandatory administrative proceeding. These proceedings will be conducted before one of the administrative-dispute-resolution service providers listed at http://www.icann.org/udrp/approved-providers.htm (each, a "Provider").

a. Applicable Disputes. You are required to submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure, that

i. your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and

ii. you have no rights or legitimate interests in respect of the domain name; and

iii. your domain name has been registered and is being used in bad faith.

In the administrative proceeding, the complainant must prove that each of these three (3) elements are present.

b. Evidence of Registration and Use in Bad Faith. For the purposes of Paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

i. circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or

ii. you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or

iii. you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or

iv. by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.

c. How to Demonstrate Your Rights to and Legitimate Interests in the Domain Name in Responding to a Complaint. When you receive a complaint, you should refer to Paragraph 5 of the Rules of Procedure in determining how your response should be prepared. Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate your rights or legitimate interests to the domain name for purposes of Paragraph 4(a)(ii):

i. before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or

ii. you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or

iii. you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

d. Selection of Provider. The complainant shall select the Provider from among those approved by ICANN by submitting the complaint to that Provider. The selected Provider will administer the proceeding, except in cases of consolidation as described in Paragraph 4(f).

GO DADDY
UNIVERSAL TERMS OF SERVICE AGREEMENT

Last Revised: April 1, 2011

PLEASE READ THIS UNIVERSAL TERMS OF SERVICE AGREEMENT CAREFULLY, AS IT CONTAINS IMPORTANT INFORMATION REGARDING YOUR LEGAL RIGHTS AND REMEDIES.

1. OVERVIEW

This Universal Terms of Service Agreement (this "Agreement") is entered into by and between GoDaddy.com, Inc., a/an Arizona corporation ("Go Daddy") and you, and is made effective as of the date of electronic acceptance. This Agreement sets forth the general terms and conditions of your use of Go Daddy products and services (individually and collectively, the "Services") purchased or accessed through Go Daddy or the Go Daddy website (this "Site"), and is in addition to (not in lieu of) any specific terms and conditions that apply to the particular Services you purchase or access through Go Daddy or this Site.

Your electronic acceptance of this Agreement signifies that you have read, understand, acknowledge and agree to be bound by this Agreement, along with the following policies and agreements, which are incorporated herein by reference:

- Privacy Policy
- Anti-Spam Policy
- Civil Subpoena Policy
- Criminal Subpoena Policy
- Dispute On Transfer Away Form
- Uniform Domain Name Dispute Resolution Policy
- ICANN Registrar Transfer Dispute Resolution Policy
- Trademark and/or Copyright Infringement Policy
- Brand Guidelines
- Permissions Policy
- Direct Affiliate Program Service Agreement

The terms "we", "us" or "our" shall refer to Go Daddy. The terms "you", "your", "User" or "customer" shall refer to any individual or entity who accepts this Agreement. Nothing in this Agreement shall be deemed to confer any third-party rights or benefits.

Go Daddy, in its sole and absolute discretion, may change or modify this Agreement, and any policies or agreements which are incorporated herein, at any time, and such changes or modifications shall be effective immediately upon posting to this Site. You acknowledge and agree that (i) Go Daddy may notify you of such changes or modifications by posting them to this Site and (ii) your use of this Site or the Services found at this Site after such changes or modifications have been made (as indicated by the "Last Revised" date at the top of this page) shall constitute your acceptance of this Agreement as last revised. If you do not agree to be bound by this Agreement as last revised, do not use (or continue to use) this Site or the Services found at this Site. In addition, Go Daddy may occasionally notify you of changes or modifications to this Agreement by email. It is therefore very important that you

keep your account ("Account") information, including your email address, current. Go Daddy assumes no liability or responsibility for your failure to receive an email notification if such failure results from an inaccurate or out-of-date email address.

2. ELIGIBILITY; AUTHORITY

This Site and the Services found at this Site are available only to Users who can form legally binding contracts under applicable law. By using this Site or the Services found at this Site, you represent and warrant that you are (i) at least eighteen (18) years of age and/or (ii) otherwise recognized as being able to form legally binding contracts under applicable law.

If you are entering into this Agreement on behalf of a corporate entity, you represent and warrant that you have the legal authority to bind such corporate entity to the terms and conditions contained in this Agreement, in which case the terms "you", "your", "User" or "customer" shall refer to such corporate entity. If, after your electronic acceptance of this Agreement, Go Daddy finds that you do not have the legal authority to bind such corporate entity, you will be personally responsible for the obligations contained in this Agreement, including, but not limited to, the payment obligations. Go Daddy shall not be liable for any loss or damage resulting from Go Daddy's reliance on any instruction, notice, document or communication reasonably believed by Go Daddy to be genuine and originating from an authorized representative of your corporate entity. If there is reasonable doubt about the authenticity of any such instruction, notice, document or communication, Go Daddy reserves the right (but undertakes no duty) to require additional authentication from you.

3. ACCOUNTS; TRANSFER OF DATA ABROAD

Accounts. In order to access some of the features of this Site or use some of the Services found at this Site, you will have to create an Account. You represent and warrant to Go Daddy that all information you submit when you create your Account is accurate, current and complete, and that you will keep your Account information accurate, current and complete. If Go Daddy has reason to believe that your Account information is untrue, inaccurate, out-of-date or incomplete, Go Daddy reserves the right, in its sole and absolute discretion, to suspend or terminate your Account. You are solely responsible for the activity that occurs on your Account, whether authorized by you or not, and you must keep your Account information secure, including without limitation your customer number/login, password, Payment Method(s) (as defined below), and shopper PIN. For security purposes, Go Daddy recommends that you change your password and shopper PIN at least once every six (6) months for each Account you have with Go Daddy. You must notify Go Daddy immediately of any breach of security or unauthorized use of your Account. Go Daddy will not be liable for any loss you incur due to any unauthorized use of your Account. You, however, may be liable for any loss Go Daddy or others incur caused by your Account, whether caused by you, or by an authorized person, or by an unauthorized person.

Transfer of Data Abroad. If you are visiting this Site from a country other than the country in which our servers are located, your communications with us may result in the transfer of information (including your Account information) across international boundaries. By visiting this Site and communicating electronically with us, you consent to such transfers.

4. GENERAL RULES OF CONDUCT

You acknowledge and agree that:

i. Your use of this Site and the Services found at this Site, including any content you submit, will comply with this Agreement and all applicable local, state, national and international laws, rules and regulations.

ii. You will not impersonate another User or any other person or entity, or submit content on behalf of another User or any other person or entity, without their express prior written consent.

iii. You will not collect or harvest (or permit anyone else to collect or harvest) any User Content (as defined below) or any non-public or personally identifiable information about another User or any other person or entity without their express prior written consent.

iv. You will not use this Site or the Services found at this Site in a manner (as determined by Go Daddy in its sole and absolute discretion) that:

- Is illegal, or promotes or encourages illegal activity;
- Promotes, encourages or engages in defamatory, harassing, abusive or otherwise objectionable behavior;
- Promotes, encourages or engages in child pornography or the exploitation of children;
- Promotes, encourages or engages in hate speech, hate crime, terrorism, violence against people, animals, or property, or intolerance of or against any protected class;
- Promotes, encourages or engages in any spam or other unsolicited bulk email, or computer or network hacking or cracking;
- Violates the Ryan Haight Online Pharmacy Consumer Protection Act of 2008 or similar legislation, or promotes, encourages or engages in the sale or distribution of prescription medication without a valid prescription;
- Infringes on the intellectual property rights of another User or any other person or entity;
- Violates the privacy or publicity rights of another User or any other person or entity, or breaches any duty of confidentiality that you owe to another User or any other person or entity;
- Interferes with the operation of this Site or the Services found at this Site;
- Contains or installs any viruses, worms, bugs, Trojan horses or other code, files or programs designed to, or capable of, disrupting, damaging or limiting the functionality of any software or hardware; or
- Contains false or deceptive language, or unsubstantiated or comparative claims, regarding Go Daddy or Go Daddy's Services.

v. You will not copy or distribute in any medium any part of this Site or the Services found at this Site, except where expressly authorized by Go Daddy.

vi. You will not modify or alter any part of this Site or the Services found at this Site or any of its related technologies.

vii. You will not access Go Daddy Content (as defined below) or User Content through any technology or means other than through this Site itself, or as Go Daddy may designate.

viii. You agree to back-up all of your User Content so that you can access and use it when needed. Go Daddy does not warrant that it backs-up any Account or User Content, and you agree to accept as a risk the loss of any and all of your User Content.

Risk Committee of the Board

Steve Crocker
Chair [biography]

Mike Silber
Member
[biography]

Bruce Tonkin
Member
[biography]

Rajasekhar Ramaraj
Member
[biography]

Suzanne Woolf
Non-Voting Member
[biography]

Minutes

- 2011 Minutes
- 2010 Minutes
- 2009 Minutes

Background

The Risk Committee was established by the Board at its 7 November 2008 meeting.

Charter

The Committee's charter was adopted and approved by the Board on 6 March 2009.

Members of the Committee

Steve Crocker (Chair), Mike Silber (Member), Bruce Tonkin (Member), Rajasekhar Ramaraj (Member), and Suzanne Woolf (Non -Voting Member)

Presentations at ICANN Public Meetings

- March 2011 – Silicon Valley/SF
- December 2010 - Cartagena
- June 2010 - Brussels
- March 2010 - Nairobi
- October 2009 - Seoul
- June 2009 - Sydney
- March 2009 - Mexico City

Risk Committee Charter

As approved by the ICANN Board of Directors 6 March 2009

I. Purpose

The Process and Systems Risk Committee of the ICANN Board is responsible for the assessment and oversight of policies implemented by ICANN designed to manage ICANN's risk profile, including the establishment and implementation of standards, controls, limits and guidelines related to risk assessment and risk management, including but not limited to financial, legal and operational risks and other risks concerning ICANN's reputation and ethical standards.

II. Scope of Responsibilities

The following responsibilities are set forth as a guide for fulfilling the Committee's purposes. The Committee is authorized to carry out these activities and other actions reasonably related to the Committee's purposes as may be assigned by the Board from time to time:

A. Oversight of risk management for ICANN as an organization, including the following activities:

1. Reviewing and advising on ICANN policies, plans and programs relating to risk management;
2. Monitoring the effectiveness of risk management programs, including operational risk management and controls;
3. Oversight of the significant non-financial risk exposure for ICANN and steps taken to monitor and control such exposure;
4. Staying informed on ICANN conditions and gaining familiarity with ICANN processes in order to identify potential future risks and advise on plans for addressing these risks as appropriate; and
5. Reviewing other areas of risk concentration as appropriate.

B. Oversight of operational activities including reviewing information and monitoring the effectiveness of the management of operational activities such as:

1. The effectiveness of the technology utilized by ICANN;
2. The adequacy of ICANN's business continuity policies; and
3. Addressing changes in the business environment that may be material to ICANN operations; and

III. Composition

The Committee shall be comprised of at least three, but not more than five voting Board Directors and not more than [ ] Liaison Directors, as determined and appointed annually by the Board, each of whom shall comply with the Conflicts of Interest Policy (see http://www.icann.org/en/committees/coi/coi-policy-30jul09-en.htm.) The voting Directors shall be the voting members of the Committee. The voting Directors shall be the voting members of the Committee. The members of the Committee shall serve at the discretion of the Board.

Unless a Committee Chair is appointed by the full Board, the members of the Committee may designate its Chair from among the voting members of the Committee by majority vote of the full Committee membership.

The Committee may choose to organize itself into subcommittees to facilitate the accomplishment of its work. The Committee may seek approval and budget from the Board for the appointment of consultants and advisers to assist in its work as deemed necessary, and such appointees may attend the relevant parts of the Committee meetings.

IV. Meetings

The Risk Committee shall meet at least three times per year, or more frequently as it deems necessary to carry out its responsibilities. The Committee's meetings may be held by telephone and/or other remote meeting technologies. Meetings may be called upon no less than forty-eight (48) hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together, provided that regularly scheduled meetings generally shall be noticed at least one week in advance.

V. Voting and Quorum

A majority of the voting members shall constitute a quorum. Voting on Committee matters shall be on a one vote per member basis. When a quorum is present, the vote of a majority of the voting Committee members present shall constitute the action or decision of the Committee.

VI. Recording of Proceedings

A preliminary report with respect to actions taken at each meeting (telephonic or in-person) of the Committee shall be recorded and distributed to committee members within two working days, and meeting minutes shall be posted promptly following approval by the Committee.

VII. **Review**

The performance of the Committee shall be reviewed annually and informally by the Board Governance Committee. The Board Governance Committee shall recommend to the full Board changes in membership, procedures, or responsibilities and authorities of the Committee if and when deemed appropriate. Performance of the Committee shall also be formally reviewed as part of the periodic independent review of the Board and its Committees.

Conflicts of Interest Policy

30 July 2009

ARTICLE I -- PURPOSE AND ADMINISTRATION

Section 1.1 The purpose of the Conflicts of Interest Policy (the "COI Policy") is to ensure that the deliberations and decisions of ICANN are made in the interests of the global Internet community as a whole and to protect the interests of ICANN when ICANN is contemplating entering into a transaction, contract, or arrangement that might benefit the private interest of a Covered Person.

Section 1.2 A Covered Person (see Section VII below for definitions of all defined terms that can be identified throughout this Policy with initial capital letters) may not use his or her position with respect to ICANN, or confidential corporate information obtained by him or her relating to ICANN, in order to achieve a financial benefit for himself or herself or for a third person, including another nonprofit or charitable organization.

Section 1.3 This COI Policy is intended to supplement but not to replace any applicable laws governing conflicts of interest in nonprofit and charitable corporations.

Section 1.4 ICANN will encourage ICANN Supporting Organization and Advisory Committees and other ICANN bodies, as appropriate, to consider implementing the principles and practices of this COI Policy as relevant.

Section 1.5 The Board Governance Committee shall administer and monitor compliance with the COI Policy.

Section 1.6 Certain Capitalized Terms used in this COI Policy shall have the meanings set forth in Article VII of this COI Policy.

ARTICLE II -- PROCEDURES REGARDING CONFLICTS OF INTEREST

Section 2.1 **Duty to Disclose.**

(a) In connection with any proposed transaction, contract, or arrangement being considered by ICANN, a Covered Person shall promptly disclose to the Board Governance Committee the existence of any Potential Conflicts that may give rise to a Conflict of Interest with respect to the proposed transaction, contract, or arrangement.

(b) The disclosure to the Board Governance Committee of a Potential Conflict shall be made pursuant to such procedures as the Board Governance Committee may establish from time to time. The Covered Person making such disclosure is referred to herein as an Interested Person.

Section 2.2 **Determining Whether a Conflict of Interest Exists.**

(a) After disclosure of a Potential Conflict by an Interested Person, the Board Governance Committee shall have a discussion with the Interested Person regarding the material facts with respect to the Potential Conflict.

(b) Thereafter, in the absence of the Interested Person, Disinterested members of the Board Governance Committee shall determine whether or not the circumstances disclosed by the Interested Person regarding the Potential Conflict constitute a Conflict of Interest, and, subject to a contrary finding by the Disinterested Board members, the determination by the Disinterested members in this regard is conclusive and may not be challenged by the Interested Person. If the Interested Person is a Director, such determination shall be reported to the Disinterested Board members at the next Board meeting and shall be subject to Board ratification.

Section 2.3 **Procedures for Addressing a Conflict of Interest.**

(a) If the Board Governance Committee determines that a Conflict of Interest exists, the Conflicted Person may make a presentation to the Board Governance Committee regarding the transaction, contract, or arrangement. After any such presentation, the Conflicted Person shall leave the meeting and shall not be present during any discussion of the Conflict of Interest.

(b) The Chair of the Board Governance Committee shall, if appropriate, appoint a Disinterested person or committee to investigate alternatives to the proposed transaction, contract, or arrangement. If the Conflicted Person is a Board member, the findings shall be reported to the Board.

(c) After exercising due diligence, the Board Governance Committee shall determine whether ICANN can obtain with reasonable efforts a more advantageous transaction, contract, or arrangement in a manner that would not give rise to a Conflict of Interest. If the Conflicted person is a Board member, such determination shall be reported to the Board.

(d) If a more advantageous transaction, contract, or arrangement is not reasonably possible under circumstances not producing a Conflict of Interest, the Board Governance Committee, and where the Conflicted Person is a Board member, the Board, shall determine by a majority vote of the Disinterested members whether the transaction, contract, or arrangement is in ICANN's best interest, for its own benefit, and whether it is fair and reasonable to ICANN. In conformity with those determinations, the Board Governance Committee or the Board, as applicable, shall make its decision as to whether ICANN should enter into the transaction, contract or arrangement.

Section 2.4. **Duty to Abstain**

(a) No Director shall vote on any matter in which he or she has a material Financial Interest that will be affected by the outcome of the vote.

(b) In the event of such an abstention, the abstaining Director shall state the reason for the abstention, which shall be noted in the notes of the meeting in which the abstention occurred.

(c) No Director shall participate in Committee or Board deliberations on any matter in which he or she has a material Financial Interest without first disclosing the conflict and until a majority of Disinterested Committee or Board members present agree on whether and in what manner the Board member may participate.

Section 2.5 **Violations of the Conflicts of Interest Policy.**

(a) If the Board Governance Committee has reasonable cause to believe a Covered Person has failed to disclose an actual or Potential Conflict of Interest, the Board Governance Committee shall inform the Covered Person, and initiate the procedures described in Section 2.2 and 2.3.

ARTICLE III-- RECORDS OF PROCEEDINGS

Section 3.1 The written or electronic records of the Board and the Board Governance Committee relating to Conflicts of Interest shall contain:

(a) The names of Covered Persons who disclosed or otherwise were found to have a Potential Conflict in connection with a proposed transaction, contract, or arrangement;

(b) The nature of the Potential Conflict;

(c) Any action taken to determine whether a Conflict of Interest was present;

(d) The Board's or Board Governance Committee's, as applicable, decision as to whether a Conflict of Interest in fact existed;

(e) The names of the persons who were present for discussions and votes relating to the transaction, contract, or arrangement;

(f) The content of the discussion, including any alternatives to the proposed transaction, contract, or arrangement; and

(g) A record of any votes taken in connection therewith.

ARTICLE IV -- COMPENSATION

Section 4.1 A Covered Person who receives compensation, directly or indirectly, from ICANN for services may not vote on matters pertaining to the Covered Person's compensation.

Section 4.2 A Covered Person may not vote on matters pertaining to compensation received, directly or indirectly from ICANN by a member of the Covered Person's Family or by an individual with whom a Covered Person has a close personal relationship, including, but not limited to, any relationship other than kinship, spousal or spousal equivalent that establishes a significant personal bond between the Covered Person and such other individual that in the judgment of the Board Governance Committee could impair the Covered Person's ability to act fairly and independently and in a manner that furthers, or is not opposed to, the best interests of ICANN.

Section 4.3 No Covered Person who receives compensation, directly or indirectly, from ICANN, either individually or collectively, is prohibited from providing information to the Board or to any Committee regarding the Covered Person's compensation.

ARTICLE V -- ANNUAL STATEMENTS

Section 5.1 Each Covered Person shall annually sign a statement which affirms such Covered Person: (i) has received a copy of the COI Policy; (ii) has read and understands the COI Policy; (iii) has agreed to comply with the COI Policy; and (iv) understands ICANN is a tax-exempt organization described in § 501(c)(3) of the Internal Revenue Code and that in order to maintain its federal tax exemption, ICANN must engage primarily in activities which accomplish one or more of ICANN's tax-exempt purposes.

ARTICLE VI -- PERIODIC REVIEWS

Section 6.1 To ensure ICANN operates in a manner consistent with its tax-exempt purposes and does not engage in activities that could jeopardize its tax-exempt status, ICANN's Office of the General Counsel and Finance Department shall conduct periodic reviews of its purposes and activities.

Section 6.2 These periodic reviews shall, at a minimum, include the following subjects:

(a) Whether activities carried on by ICANN are consistent with and in furtherance of one or more of ICANN's tax-exempt purposes;

(b) Whether ICANN follows policies and procedures reasonably calculated to prevent private Inurement more than incidental private benefit, excess benefit transactions, substantial lobbying, and participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office; and

(c) Whether compensation arrangements and benefits are reasonable, are based on appropriate data as to comparability, and are the result of arm's length bargaining.

(d) Whether partnerships, joint ventures, and arrangements with organizations that provide management personnel or management services conform to ICANN's written policies, are properly recorded, reflect reasonable investment or payments for goods and services, further tax-exempt purposes, and do not result in private Inurement more than incidental private benefit, or in an excess benefit transaction.

Section 6.3 When conducting the periodic reviews, ICANN may, but need not, use outside experts and/or advisors. If outside experts and/or advisors are used, their use shall not relieve the Board of ICANN of its responsibility for ensuring periodic reviews are conducted in the manner prescribed in this Article.

ARTICLE VII -- DEFINITIONS

Section 7.1 As used in this COI Policy, the following terms shall have the meanings set forth below.

(a) "Board Liaison" shall mean those liaisons to the ICANN Board of Directors appointed in accordance with ICANN's Bylaws.

(b) "Compensation" includes direct and indirect remuneration as well as gifts or favors that are substantial in nature.

(c) "COI Policy" means this Conflict of Interest Policy as adopted by the Board of ICANN on 30 July 2009.

(d) A "Conflict of Interest" arises when the Board or Board Governance Committee, as applicable, following the procedures set forth in Articles II and III of this COI Policy, determines that a Covered Person has disclosed a Potential Conflict that may in the judgment of a majority of the Disinterested members of the Board or Board Governance Committee, as applicable, adversely impact the Covered Person's ability to act fairly and independently and in a manner that furthers, or is not opposed to, the best interests of ICANN.

(e) "Conflicted Person" means a Person that has been determined by the Board Governance Committee to have a Conflict of Interest.

(f) "Covered Person" shall mean an Officer, Director, Board Liaison, or Key Employee of ICANN.

(g) A "Director" is any voting member of the Board of ICANN.

(h) "Disinterested" means not having a Potential Conflict with respect to a transaction, contract, or arrangement being considered by ICANN.

(i) "Domestic Partner" shall mean an individual who resides at the same residence as the Covered Person as his or her spousal equivalent.

(j) A "Duality of Interest" arises when with respect to a transaction, contract, or arrangement, a Covered Person or a member of a Covered Person's Family has a fiduciary relationship with another party to a proposed transaction, contract, or arrangement which gives rise to a circumstance in which the fiduciary duties of the Covered Person to ICANN and the fiduciary duties of the Covered Person, or the fiduciary duties of the Family Member of the Covered Person, to the other party may be in conflict. A Duality of Interest does not constitute a Conflict of Interest if ICANN and all other parties to the transaction, contract, or arrangement, being in possession of all material facts, waive the conflict in writing.

(k) The "Family" of any Covered Person shall include the Covered Person's spouse; Domestic Partner; siblings and their spouses or Domestic Partners; ancestors and their spouses or Domestic Partners; and descendants and their spouses or Domestic Partners.

(l) A "Financial Interest" exists whenever a Covered Person has, directly or indirectly, through business, investment, or Family: (i) an ownership or investment interest in any entity with which ICANN has a transaction, contract, or other arrangement; (ii) a compensation arrangement with any entity or individual with which ICANN has a transaction, contract, or other arrangement; and (iii) a potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which ICANN is negotiating a transaction, contract, or other arrangement. Compensation includes direct and indirect remuneration as well as gifts or favors that are not insubstantial. Transactions, contracts, and arrangements include grants or other donations as well as business arrangements. A Financial Interest is a Potential Conflict but is not necessarily a Conflict of Interest. A Financial Interest does not become a Conflict of Interest until the Board Governance Committee, following the procedures

set forth in Articles II and III of this COI Policy, determines that the Financial Interest constitutes a Conflict of Interest.

(m) An "Interested Person" is a Covered Person who has a Potential Conflict of Interest with respect to a particular transaction, contract, or arrangement under consideration by the Board or Board Governance Committee, as applicable.

(n) "Internal Revenue Code" shall mean the United States Internal Revenue Code of 1986, as amended, or any future revenue statute replacing the 1986 Code.

(o) "Inurement," as used in this COI Policy, shall mean: (i) a transaction in which ICANN provides an economic benefit, directly or indirectly, to or for the use of any Covered Person where the value of that economic benefit exceeds the value of the consideration (including the performance of services) that ICANN receives in exchange; or (ii) any transaction or arrangement by or through which a Covered Person receives a direct or indirect distribution of ICANN's net earnings (other than payment of fair market value for property or the right to use property and reasonable compensation for services).

(p) A "Key Employee" is an employee of ICANN designated as a member of the Executive Management team of ICANN, but who is not an Officer or Director.

(q) An "Officer" is an individual holding a position designated as an Officer by ICANN's Bylaws or by resolution of the Board and includes, without limitation, the President of ICANN.

(r) A "Person" includes an individual, corporation, limited liability company, partnership, trust, unincorporated association, or other entity.

(s) A "Potential Conflict" means any one or more of the following: (i) a direct or indirect Financial Interest in a transaction, contract or arrangement being considered by ICANN by a Covered Person or a member of a Covered Person's Family; (ii) a Duality of Interest by a Covered Person or a member of a Covered Person's Family with respect to another party to a transaction, contract, or arrangement being considered by ICANN that has not been waived in writing by all parties to the transaction, contract, or arrangement; or (iii) a close personal relationship between the Covered Person, or a member of a Covered Person's Family, with an individual who is, directly or indirectly through business, investment, or Family, a party to a transaction, contract, or arrangement being considered by ICANN.

Section 7.2 Where terms used in this COI Policy have a particular meaning under the Internal Revenue Code, this COI Policy shall be construed to incorporate that meaning.

Section 7.3 All other terms used in this COI Policy shall be given their ordinary, everyday meaning.

212, 215 U.S.P.Q. 516, affirmed 714 F.2d 113. Copyrights And Intellectual Property ⇦ 6

30. —— Video games, expression of ideas

Audio component and concrete details of visual presentation constituted copyrightable expression of audiovisual game "idea." Atari, Inc. v. North American Philips Consumer Electronics Corp., C.A.7 (Ill.) 1982, 672 F.2d 607, 214 U.S.P.Q. 33, certiorari denied 103 S.Ct. 176, 459 U.S. 880, 74 L.Ed.2d 145. Copyrights And Intellectual Property ⇦ 10.1

Copyrights on coin-operated electronic video games were not invalid as embodying merely an idea as copyrights covered holder's audiovisual expression of various game ideas, which expressions included distinctive color and design of spaceships and other players as well as sounds accompanying playing of the games and such expressions of game ideas are an appropriate subject of copyright protection. Midway Mfg. Co. v. Dirkschneider, D.C.Neb.1981, 543 F.Supp. 466, 214 U.S.P.Q. 417. Copyrights And Intellectual Property ⇦ 10.1

31. —— Words and phrases, expression of ideas

Employment phraseology in radio promotional contest, in which listeners could call in, "get on the clock," and win money until next listener successfully called in, which claimed creator of program allegedly added to contest, was not protected by copyright, as phraseology consisted merely of cliched language typically used to convey idea of employment, and language was functional in that it instructed listeners how to participate in contest. CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc., C.A.1 (Me.) 1996, 97 F.3d 1504, 41 U.S.P.Q.2d 1065. Copyrights And Intellectual Property ⇦ 10.4

Cliched language, phrases and expressions conveying an idea that is typically expressed in a limited number of stereotypic fashions are not subject to copyright protection. Perma Greetings, Inc. v. Russ Berrie & Co., Inc., E.D.Mo.1984, 598 F.Supp. 445, 223 U.S.P.Q. 670. Copyrights And Intellectual Property ⇦ 5

Translator of English words into Arabic counterparts could not claim copyright in list of Arabic words transliterated into Roman letters and phonetic spellings since transliterations were not expression of idea but application of idea of combining Roman letters to obtain various sounds of Arabic words. Signo Trading Intern. Ltd. v. Gordon, N.D.Cal.1981, 535 F.Supp. 362, 214 U.S.P.Q. 793. Copyrights And Intellectual Property ⇦ 12(3)

32. Communications with aid of machine or device

Audiovisual works and computer programs are not to be denied copyrightability as "process" or "system" precluded from registration; purpose of computer programs is to express, and that method of expression is by way of computer "device" or "machine" is immaterial in view of revised language in Copyright Act expressly bringing within standard of copyrightability communications made "with the aid of a machine." M. Kramer Mfg. Co., Inc. v. Andrews, C.A.4 (S.C.) 1986, 783 F.2d 421, 228 U.S.P.Q. 705. Copyrights And Intellectual Property ⇦ 10.1; Copyrights And Intellectual Property ⇦ 10.4

Plaintiff had right to protect its artistic expression in original works which met statutory fixation requirement through their embodiment in electronic devices though there could be no copyright protection for the electronic devices themselves. Williams Electronics, Inc. v. Artic Intern., Inc., C.A.3 (N.J.) 1982, 685 F.2d 870, 215 U.S.P.Q. 405. Copyrights And Intellectual Property ⇦ 6

Imprinting of a computer program on a silicon chip, which then allows computer to read program and act upon its instructions, falls within statutory provision that works of authorship can be fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated. Tandy Corp. v. Personal Micro Computers, Inc., N.D.Cal.1981, 524 F.Supp. 171, 214 U.S.P.Q. 178. Copyrights And Intellectual Property ⇦ 10.4

33. Originality requirement—Generally

Work is "original" to author and thus qualifies for copyright protection if work is independently created by author and possesses some minimal degree of creativity. Feist Publications, Inc. v. Rural Telephone Service Co., Inc., U.S.Kan. 1991, 111 S.Ct. 1282, 499 U.S. 340, 113 L.Ed.2d 358, 18 U.S.P.Q.2d 1275. Copyrights And Intellectual Property ⇦ 12(1)

Because Copyright Act protec
works of authorship, "sine qu
copyright is originality. Beal
mount Pictures Corp., C.A.11 (
20 F.3d 454, 30 U.S.P.Q.2d 17
rari denied 115 S.Ct. 675, 513 U
130 L.Ed.2d 607. Copyrights
lectual Property ⇦ 12(1)

Only unmistakable dash of
need be demonstrated in law
right; high standards of uniq
creativity are dispensed with.
damone, Circuit Judge, with on
Judge concurring in part and c
in the judgment in part.). Weis
Freeman, C.A.2 (N.Y.) 1989,
1313, 101 A.L.R. Fed. 91, 10 U.
1014, certiorari denied 110 S.
493 U.S. 883, 107 L.Ed.2d 172
rights And Intellectual Property

In order for work to be copyr
it must show certain minimal
creativity and originality. John
Co., Inc. v. New York Arrows
Team, Inc., C.A.8 (Mo.) 1986,
989, 231 U.S.P.Q. 319. Copyrig
Intellectual Property ⇦ 12(1)

Standard for sufficient origi
whether a work contains some
tial, not merely trivial, originality
standard for copyright infringe
whether the defendant's work is
tially similar to plaintiff's work
Toys, Inc. v. Florelee Undergarm
Inc., C.A.2 (N.Y.) 1982, 697 F.2d
U.S.P.Q. 201, on remand. Co
And Intellectual Property ⇦ 12(1)
rights And Intellectual Property

Cleaning product manufa
"kitchen appearance checklist"
copyrightable; checklist did not
any information, and was neither
nor creative. Portionpac Chemica
v. Sanitech Systems, Inc., M.D.Fl
217 F.Supp.2d 1238. Copyrights
tellectual Property ⇦ 12(1)

Work of authorship is considered
inal" under Copyright Act if worl
its origin to author or authors, ar
possesses at least some minimal de
creativity. Cabrera v. Teatro Del
ta, Inc., D.Puerto Rico 1995, 914 F
743.

Sine qua non of copyright is origi
to qualify for copyright protection,
must be original to author. FASA
v. Playmates Toys, Inc., N.D.Ill.199
F.Supp. 1124, vacated in part 108

Because Copyright Act protects original works of authorship, "sine qua non" of copyright is originality. Beal v. Paramount Pictures Corp., C.A.11 (Ga.) 1994, 20 F.3d 454, 30 U.S.P.Q.2d 1762, certiorari denied 115 S.Ct. 675, 513 U.S. 1062, 130 L.Ed.2d 607. Copyrights And Intellectual Property ⇐ 12(1)

Only unmistakable dash of originality need be demonstrated in law of copyright; high standards of uniqueness in creativity are dispensed with. (Per Cardamone, Circuit Judge, with one Circuit Judge concurring in part and concurring in the judgment in part.). Weissmann v. Freeman, C.A.2 (N.Y.) 1989, 868 F.2d 1313, 101 A.L.R. Fed. 91, 10 U.S.P.Q.2d 1014, certiorari denied 110 S.Ct. 219, 493 U.S. 883, 107 L.Ed.2d 172. Copyrights And Intellectual Property ⇐ 12(1)

In order for work to be copyrightable, it must show certain minimal levels of creativity and originality. John Muller & Co., Inc. v. New York Arrows Soccer Team, Inc., C.A.8 (Mo.) 1986, 802 F.2d 989, 231 U.S.P.Q. 319. Copyrights And Intellectual Property ⇐ 12(1)

Standard for sufficient originality is whether a work contains some substantial, not merely trivial, originality, but the standard for copyright infringement is whether the defendant's work is substantially similar to plaintiff's work. Eden Toys, Inc. v. Florelee Undergarment Co., Inc., C.A.2 (N.Y.) 1982, 697 F.2d 27, 217 U.S.P.Q. 201, on remand. Copyrights And Intellectual Property ⇐ 12(1); Copyrights And Intellectual Property ⇐ 53(1)

Cleaning product manufacturer's "kitchen appearance checklist" was not copyrightable; checklist did not convey any information, and was neither original nor creative. Portionpac Chemical Corp. v. Sanitech Systems, Inc., M.D.Fla.2002, 217 F.Supp.2d 1238. Copyrights And Intellectual Property ⇐ 12(1)

Work of authorship is considered "original" under Copyright Act if work owes its origin to author or authors, and if it possesses at least some minimal decree of creativity. Cabrera v. Teatro Del Sesenta, Inc., D.Puerto Rico 1995, 914 F.Supp. 743.

Sine qua non of copyright is originality; to qualify for copyright protection, work must be original to author. FASA Corp. v. Playmates Toys, Inc., N.D.Ill.1996, 912 F.Supp. 1124, vacated in part 108 F.3d 140, 41 U.S.P.Q.2d 2015, on remand 1 F.Supp.2d 859, 47 U.S.P.Q.2d 1034. Copyrights And Intellectual Property ⇐ 12(1)

Overall presentation of automotive advertising promoting "test market pricing" was sufficiently original to be copyrightable; phrase "test market pricing" was printed in large block letters at top of page, immediately below, stars bracketed "THREE DAYS ONLY," promotional material indicated that day, month, date and hours of the three days were to follow, advertisement also included specific text, and phrase "price sells cars" was graphically represented. Johnson v. Automotive Ventures, Inc., W.D.Va.1995, 890 F.Supp. 507, 36 U.S.P.Q.2d 1385. Copyrights And Intellectual Property ⇐ 10.4

Relatively modest amount of originality suffices for copyright protection. Modern Pub., a Div. of Unisystems, Inc. v. Landoll, Inc., S.D.N.Y.1994, 841 F.Supp. 129, on reargument 849 F.Supp. 22. Copyrights And Intellectual Property ⇐ 12(1)

Plaintiffs in copyright infringement action showed originality in authorship, compliance with formalities to secure copyright, and their ownership of copyrights by filing copies of copyright registrations for their works involved. Chi-Boy Music v. Towne Tavern, Inc., N.D.Ala.1991, 779 F.Supp. 527, 21 U.S.P.Q.2d 1227. Copyrights And Intellectual Property ⇐ 83(3.1); Copyrights And Intellectual Property ⇐ 83(5)

Standard of "originality" required for copyrightability is minimal, requiring neither novelty nor uniqueness; work need only be independently created by author and embody very modest amount of intellectual labor. Apple Computer, Inc. v. Microsoft Corp., N.D.Cal.1991, 759 F.Supp. 1444, 18 U.S.P.Q.2d 1097, on reconsideration 779 F.Supp. 133, 20 U.S.P.Q.2d 1236, affirmed 35 F.3d 1435, 32 U.S.P.Q.2d 1086, certiorari denied 115 S.Ct. 1176, 513 U.S. 1184, 130 L.Ed.2d 1129. Copyrights And Intellectual Property ⇐ 12(1)

For copyright purposes, test of originality is one of low threshold. Moore v. Lighthouse Pub. Co., Inc., S.D.Ga.1977, 429 F.Supp. 1304. Copyrights And Intellectual Property ⇐ 12(1)

American Jurisprudence, Second Edition
Database updated May 2011

Copyright and Literary Property
Lisa A. Zakolski, J.D.

I. In General
A. Scope of Copyright Protection; Administration

Topic Summary Correlation Table References

§ 2. Aim and effect of copyright law

West's Key Number Digest

West's Key Number Digest, Copyright and Intellectual Property ⚷2

While the immediate effect of the copyright law is to secure a fair return for an author's creative labor,[1] The ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.[2] Thus, copyright policy is meant to balance protection, which seeks to ensure a fair return to authors and inventors and thereby to establish incentives for development, with dissemination, which seeks to foster learning, progress, and development.[3]

The monopoly privileges that Congress may authorize under the Copyright Clause of the Constitution are neither unlimited nor primarily designed to provide a special private benefit; rather, the limited grant is a means by which an important public purpose may be achieved.[4] The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.[5] In other words, copyright benefits the public by providing an incentive to stimulate artistic creativity through the grant of a temporary monopoly to a copyright owner.[6] The copyright law is intended to motivate the creative activity of authors by provision of a special reward and to allow the public access to the product of their genius after the limited period of exclusive control has expired;[7] the reward to the owner is a secondary consideration that serves the primary public purpose of inducing release to the public of the products of the author's or artist's creative genius.[8]

Observation:

The protection of privacy is not a function of the copyright law; to the contrary, the copyright law offers a limited monopoly to encourage ultimate public access to the creative work of the author.[9]

CUMULATIVE SUPPLEMENT

Cases:

Intellectual property clause of Constitution is intended to motivate creative activity of authors and inventors by provision of special reward, and to allow public access to products of their genius after limited period of ex-

Corpus Juris Secundum
Database updated March 2011

Trade-Marks, Trade-names, and Unfair Competition
John Bourdeau, J.D., James Buchwalter, J.D., John J. Dvorske, J.D., M.A., Rebecca Hatch, J.D., Stephen Lease, J.D., Lucas Martin, J.D., Jeffrey J. Shampo, J.D.

IX. Remedies and Procedure
A. Civil Actions or Proceedings
4. Evidence
d. Weight and Sufficiency of Evidence
(1) In General

Topic Summary References Correlation Table

§ 321. Confusion or deception

West's Key Number Digest

West's Key Number Digest, Trademarks ⚷1629(1)

On either a claim of a trademark infringement or a claim of unfair competition, a prima facie case is made out by showing the use of one's trademark by another in a way that is likely to confuse consumers about the product's source.

On either a claim of a trademark infringement or a claim of unfair competition, a prima facie case is made out by showing use of one's trademark by another in a way that is likely to confuse consumers as to the product's source.[1] Likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party.[2] The court may properly consider the similarity of the parties' products as enhancing confusion caused by partial similarity of marks, and is not required to separately assess potential the confusion arising solely from the marks.[3]

In a trademark infringement and unfair competition case where the plaintiff seeks damages and injunctive relief, the plaintiff must prove the likelihood of confusion by a preponderance of the evidence[4] and more than slight confusion must be shown.[5] To prevail on a claim for common-law trademark infringement under the Lanham Act, a party must demonstrate a likelihood of confusion.[6]

Consumer surveys.

While surveys are not required to prove the likelihood of consumer confusion,[7] in a trademark infringement suit, actual confusion may be proven by market research surveys.[8] Furthermore, the absence of consumer surveys tends to show that actual confusion between the marks cannot be demonstrated.[9]

In an action for a trademark infringement, there are two important factors to be considered in determining the weight to be accorded to the results of a consumer survey: the format of the survey and the methods used to

American Jurisprudence, Second Edition
Database updated March 2011

Trademarks and Tradenames
John Kimpflen, J.D.

VII. Infringement and Unfair Competition
A. In General
2. Elements of Trademark Infringement

Topic Summary Correlation Table References

§ 86. Likelihood of confusion; reverse confusion

West's Key Number Digest

West's Key Number Digest, Trade Regulation ⚿334

A.L.R. Library

"Post-sale Confusion" in Trademark or Trade Dress Infringement Actions under § 43 of the Lanham Trade-Mark Act (15 U.S.C.A. § 1125), 145 A.L.R. Fed. 407.

It is only a likelihood of confusion that must be proved to establish trademark infringement under the Lanham Act,[1] and proof of actual confusion is not required.[2]

The factors that aid in determining whether a likelihood of confusion exists between two marks, for purpose of trademark infringement action, include:

- the degree of similarity between the marks[3]
- the intent of the alleged infringer in adopting its mark[4]
- evidence of actual confusion[5]
- the relation in the use and the manner of marketing between the goods or services marketed by the competing parties[6]
- the degree of care likely to be exercised by purchasers[7]
- the strength or weakness of the marks[8]
- the quality of the defendant's product[9]
- actual confusion of consumers[10]
- the likelihood of expansion of the product lines by the initial user[11]

Although no one factor is decisive, in assessing the likelihood of consumer confusion between two trademarks, the similarity of the marks, the intent of the defendant, and evidence of actual confusion are the most important considerations.[12]

Practice Guide:

brand name licensing program, using " **BUD** ", "BUDWEISER" and " **THIS BUD'S** FOR **YOU** " in promoting the sale of nearly every kind of conceivable product from t-shirts to tote bags. A–B's licensees render royalty reports and payments on a quarterly basis to A–B in accordance with their license agreements. In August of 1984 there were some 290 active licensees whose merchandise included various decorative accessories, giftware, paper goods, clothing, housewares, sporting goods, artworks, novelties, desk accessories, toys, games, jewelry and luggage.

Annual revenues generated at the wholesale level have been in excess of $20,000,000.00 annually since 1982, with retail sales in excess of $40,000,000.00. A–B's licensing royalty revenues for 1983 were in excess of $570,000.00 and are expected to exceed $650,000.00 for 1984.

After viewing hundreds of pictures of various kinds of merchandise, this Court concludes that, although "BUD" and "BUDWEISER" have been used in floral-related promotions, prior to the commencement of this litigation the slogan, "THIS BUD'S FOR YOU", had not been licensed for use in connection with the sale of fresh-cut flowers, [FN3] nor has A–B ever sold fresh-cut flowers. In short, while there can be no doubt about the strength of A–B's slogan with respect to beer, and its licensed use for the promotion of many other kinds of merchandise, there also can be no doubt about its lack of strength with respect to fresh-cut flowers.

FN3. There is a dispute as to whether A–B got the idea for licensing the slogan "THIS BUD'S FOR YOU" in connection with the sale of fresh-cut flowers from the Florists during settlement negotiations in connection with this lawsuit, as alleged in the Florists' counterclaim, or whether such licensing was being negotiated between A–B and other parties prior to that time. It is clear, however, that A–B did not conclude a formal written license agreement with GRO–MAN (for whom CP Products serves as a distributor) until July of 1983.

The goods in question are totally unrelated. The dictionary defines beer as a "malted and hopped somewhat bitter alcoholic beverage," a flower as "a shoot of the sporophyte of a higher plant that is modified for reproduction and consists of a shortened axis bearing modified leaves", and the troublesome word "bud" as "a small lateral or terminal protuberance on the stem of a plant that is an undeveloped shoot." [FN4] It is absurd to believe that any consumer could confuse beer with flowers, even of the underdeveloped variety. Indeed, A–B admits that it suffered no loss of beer sales as a result of the Florists' use of its slogan in connection with "Sweetest Week" in 1982.

FN4. *See Webster's Seventh New Collegiate Dictionary* at 77, 108, 321 (1969).

Although the Florists intended to capitalize on the slogan which had been popularized by A–B, there is no evidence that they ***38** intended to deceive the public into believing that A–B was connected in any way with their product, namely fresh-cut flowers. Nor was there any evidence of actual confusion presented to the Court. No consumer called any florist asking to be delivered a six-pack; nor did any consumer call A–B seeking to purchase two dozen roses. The marketing channels for the products are totally different. The Florists, in selecting "THIS BUD'S FOR YOU," did intend to capitalize on the familiarity of A–B's slogan. But they did not intend to deceive consumers into believing that the fresh-cut flowers were in fact being marketed by A–B, or that they, the Florists, were marketing beer.

A–B relies heavily on a survey, conducted at a local shopping mall. A total of 472 representative members of the general consuming public (adults between 21 and 65) were shown either the Florists' television commercial, or its July, 1984 newspaper advertisement. Each person was asked 1) who they believed sponsored or promoted the advertisement;

Ohio Forms Legal and Business (OH-LF)
Ohio Jurisprudence Pleading and Practice Forms (OH-PP)
Ohio Statutes Annotated (OH-ST-ANN)

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I. CONVERSION

A. IN GENERAL

Research References

West's Key Number Digest
Trover and Conversion ⇐1, 3 to 12, 70

A.L.R. Library
A.L.R. Index, Conversion
West's A.L.R. Digest, Trover and Conversion ⇐1, 3 to 12, 70

Legal Encyclopedias
Am. Jur. 2d, Conversion §§ 1 to 6
C.J.S., Trover and Conversion §§ 1, 3, 4, 8

Forms
Am. Jur. Pleading and Practice Forms, Conversion §§ 4, 5, 7

§ 1 Generally; "conversion" defined

Research References

West's Key Number Digest, Trover and Conversion ⇐1
Am. Jur. Pleading and Practice Forms, Conversion §§ 4, 5 (Instruction to jury—Definition of conversion)

Conversion has been defined as:

- The wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from the owner's possession under a claim inconsistent with his or her rights[1]
- Any exercise of dominion or control wrongfully exerted

[Section 1]

[1]Fenix Enterprises, Inc. v. M & M Mortg. Corp., Inc., 624 F. Supp. 2d 834 (S.D. Ohio 2009) (ap-

over the personal property of another in denial of or under a claim inconsistent with the owner's rights[2]

- A wrongful exercise of dominion or control over the property of another in denial of or under a claim inconsistent with his or her rights[3]
- Any exercise or control wrongfully exerted over the personal property of another in denial of, or under a claim inconsistent with, his or her rights[4]
- The wrongful control of personal property belonging to another in denial of the owner's rights[5]
- The wrongful control or exercise of dominion over property belonging to another inconsistent with or in denial of the rights of the owner[6]
- An exercise of dominion or control wrongfully exerted

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plying Ohio law); Allan Nott Ents, Inc. v. Nicholas Starr Auto, L.L.C., 110 Ohio St. 3d 112, 2006-Ohio-3819, 851 N.E.2d 479 (2006); State ex rel. Toma v. Corrigan, 92 Ohio St. 3d 589, 2001-Ohio-1289, 752 N.E.2d 281 (2001); Jarupan v. Hanna, 173 Ohio App. 3d 284, 2007-Ohio-5081, 878 N.E.2d 66 (10th Dist. Franklin County 2007).

[2]Slough v. Telb, 644 F. Supp. 2d 978 (N.D. Ohio 2009) (applying Ohio law); Superior Piping Contrs., Inc. v. Reilly Industries, Inc., 2008-Ohio-4858, 2008 WL 4356107 (Ohio Ct. App. 8th Dist. Cuyahoga County 2008); Morgan v. Mikhail, 2004-Ohio-5792, 2004 WL 2445219 (Ohio Ct. App. 10th Dist. Franklin County 2004); Tolson v. Triangle Real Estate, 2004-Ohio-2640, 2004 WL 1157473 (Ohio Ct. App. 10th Dist. Franklin County 2004); McCartney v. Universal Electric Power, Corp., 2004-Ohio-959, 2004 WL 384167 (Ohio Ct. App. 9th Dist. Summit County 2004); Landskroner v. Landskroner, 154 Ohio App. 3d 471, 2003-Ohio-4945, 797 N.E.2d 1002 (8th Dist. Cuyahoga County 2003).

[3]Tinter v. Lucik, 172 Ohio App. 3d 692, 2007-Ohio-4437, 876 N.E.2d 1026 (8th Dist. Cuyahoga County 2007).

[4]Bono v. McCutcheon, 159 Ohio App. 3d 571, 2005-Ohio-299, 824 N.E.2d 1013 (2d Dist. Clark County 2005).

[5]Portage Cty. Bd. of Commrs. v. Akron, 156 Ohio App. 3d 657, 2004-Ohio-1665, 808 N.E.2d 444 (11th Dist. Portage County 2004), judgment aff'd in part, rev'd in part on other grounds, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478 (2006).

[6]Congress Lake Club v. Witte, 2008-Ohio-6799, 2008 WL 5340219 (Ohio Ct. App. 5th Dist. Stark County 2008); Barnett-McCurdy v. Hughley, 2008-Ohio-4874, 2008 WL 4358614 (Ohio Ct. App. 8th Dist. Cuyahoga County 2008); Pappas v. Ippolito, 177 Ohio App. 3d 625, 2008-Ohio-3976, 895 N.E.2d 610 (8th Dist. Cuyahoga County 2008); R.T. Builders, Inc. v. Granger, 2005-Ohio-6043, 2005 WL 3036539 (Ohio Ct. App. 7th Dist. Mahoning County 2005); Elias v. Gammel, 2004-Ohio-3464, 2004 WL 1471038 (Ohio Ct. App. 8th Dist. Cuyahoga County 2004); R.G. Engineering &

over property in denial of or under a claim inconsistent with the rights of another[7]

- Any wrongful exercise of dominion or control exerted over personalty of another in exclusion of the rights of the owner or withholding it from his or her possession under a claim inconsistent with his or her rights[8]
- An act of willful interference with a chattel, done without lawful justification, by which any person entitled thereto is deprived of use and possession[9]
- An intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel[10]

Thus, the tort of conversion serves to protect one having an ownership interest or other superior right in property against the derogation of that right by another having an inferior interest in the property.[11]

The fundamental idea underlying the tort of conversion is that of interference with the dominion or control over the chattel incident to some general or special ownership, rather than with the physical condition of the chattel itself. The intent required is not necessarily a matter of conscious wrongdoing. It is rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with the

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Mfg. v. Rance, 2002-Ohio-5218, 2002 WL 31168521 (Ohio Ct. App. 7th Dist. Columbiana County 2002).

[7]Fairbanks Mobile Wash, Inc. v. Hubbell, 2009-Ohio-558, 2009 WL 294936 (Ohio Ct. App. 12th Dist. Warren County 2009); Keybank Natl. Assoc. v. Guarnieri & Secrest, P.L.L., 2008-Ohio-6362, 2008 WL 5124562 (Ohio Ct. App. 7th Dist. Columbiana County 2008); Dice v. White Family Cos., 173 Ohio App. 3d 472, 2007-Ohio-5755, 878 N.E.2d 1105 (2d Dist. Montgomery County 2007); Union Sav. Bank v. White Family Cos., Inc., 167 Ohio App. 3d 51, 2006-Ohio-2629, 853 N.E.2d 1182 (2d Dist. Montgomery County 2006); Busch v. Premier Integrated Med. Assoc., Ltd., 2003-Ohio-4709, 2003 WL 22060392 (Ohio Ct. App. 2d Dist. Montgomery County 2003).

[8]Staffilino Chevrolet, Inc. v. Balk, 158 Ohio App. 3d 1, 2004-Ohio-3633, 813 N.E.2d 940 (7th Dist. Belmont County 2004).

[9]Moffitt v. Litteral, 2002-Ohio-4973, 2002 WL 31105394 (Ohio Ct. App. 2d Dist. Montgomery County 2002).

[10]Misseldine v. Corporate Investigative Services, Inc., 2003-Ohio-2740, 2003 WL 21234928 (Ohio Ct. App. 8th Dist. Cuyahoga County 2003).

[11]In re Wilson, 383 B.R. 678 (Bankr. N.D. Ohio 2007) (applying Ohio law).

plaintiff's rights.[12] All that is required is that the tortfeasor intend to do the act which interferes or is inconsistent with the ownership rights of the true owner.[13]

◆ **Practice Tip:** The tort of conversion generally occurs where and when the actual injury takes place and not at the place of the economic consequences of the injury.[14]

§ 2 Elements of conversion

Research References

West's Key Number Digest, Trover and Conversion ⇐1, 4 to 12

Typically, the elements of a conversion cause of action are: (1) the plaintiff's ownership or right to possession of the property at the time of the conversion, (2) the defendant's conversion by a wrongful act or disposition of the plaintiff's property rights, and (3) damages.[1] It has similarly been said that conversion consists of the following elements: (1) the plaintiff's ownership or interest in the property,[2] (2) the plaintiff's actual or constructive possession or immediate right to possession of the property, (3) the defendant's wrongful interference with the plaintiff's right to possession, and

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[12]Moffitt v. Litteral, 2002-Ohio-4973, 2002 WL 31105394 (Ohio Ct. App. 2d Dist. Montgomery County 2002).

[13]In re Little, 335 B.R. 376 (Bankr. N.D. Ohio 2005) (applying Ohio law).

[14]State ex rel. Toma v. Corrigan, 92 Ohio St. 3d 589, 2001-Ohio-1289, 752 N.E.2d 281 (2001).

[Section 2]

[1]Fairbanks Mobile Wash, Inc. v. Hubbell, 2009-Ohio-558, 2009 WL 294936 (Ohio Ct. App. 12th Dist. Warren County 2009); Keybank Natl. Assoc. v. Guarnieri & Secrest, P.L.L., 2008-Ohio-6362, 2008 WL 5124562 (Ohio Ct. App. 7th Dist. Columbiana County 2008); Dice v. White Family Cos., 173 Ohio App. 3d 472, 2007-Ohio-5755, 878 N.E.2d 1105 (2d Dist. Montgomery County 2007); Marriott Corp. v. Lerew, 2005-Ohio-5336, 2005 WL 2467055 (Ohio Ct. App. 8th Dist. Cuyahoga County 2005); Conley v. Caudill, 2003-Ohio-2854, 2003 WL 21278885 (Ohio Ct. App. 4th Dist. Pike County 2003).

As to ownership or right to possession as a condition precedent to an action for conversion, see §§ 18, 19.

As to damages for conversion, generally, see §§ 33 to 42.

[2]Allied Erecting & Dismantling Co., Inc. v. Youngstown, 151 Ohio App. 3d 16, 2002-Ohio-5179, 783 N.E.2d 523 (7th Dist. Mahoning County 2002).

I. IN GENERAL

A. INTRODUCTION

Research References

West's Key Number Digest

Equity ⇐10 to 14; Fraud ⇐1 to 7

A.L.R. Library

A.L.R. Index, Constructive Fraud; Fraud and Deceit
West's A.L.R. Digest, Equity ⇐10 to 14; Fraud ⇐1 to 7

Legal Encyclopedias

Am. Jur. 2d, Duress and Undue Influence §§ 2, 36; Fraud and Deceit §§ 1 to 19
C.J.S., Fraud §§ 1 to 11

Trial Strategy

Proof of Nondischargeability of Debt Based on Fraud or Defalcation Committed by Debtor While Acting in a Fiduciary Capacity Under Bankruptcy Code § 523(a)(4) and (c), 102 Am. Jur. Proof of Facts 3d 207

Forms

Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 62
Ohio Jur Pleading and Practice Forms § 54:67

Model Codes and Restatements

Restatement Second, Torts § 525, comment b

1. Definitions

§ 1 Generally

Research References

West's Key Number Digest, Fraud ⇐1

"Fraud" is the intentional perversion of truth for the purpose of inducing another and reliance upon it to part with some valuable thing belonging to him or her or to sur-

render a legal right.[1] Fraud is also said to be a false representation of fact which misleads and is intended to mislead another.[2] Further, "fraud" is a knowing misrepresentation of the truth to induce another to act to his or her detriment.[3] "Fraud" is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth.[4] No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.[5] Deceit or fraud, in business transactions, consists in fraudulent representations or contrivances by which one person deceives another who has a right to rely upon such representations, or has no means of detecting such fraud.[6] The primary concern of the law of deceit is to preserve the ability of parties to make business judgments without being led to make unwise choices that result in financial loss.[7]

Bad faith is a species of fraud[8] and is stated to be the essence of fraudulent transactions.[9]

§ 2 Misrepresentations, concealment, and false pretenses

Research References

West's Key Number Digest, Fraud ⇨4.5

[Section 1]

[1]In re Adoption of Zschach, 75 Ohio St. 3d 648, 665 N.E.2d 1070 (1996).

[2]McClure v. Fischer Attached Homes, 145 Ohio Misc. 2d 38, 2007-Ohio-7259, 882 N.E.2d 61 (C.P. 2007).

[3]Curran v. Vincent, 175 Ohio App. 3d 146, 2007-Ohio-3680, 885 N.E.2d 964 (1st Dist. Hamilton County 2007).

[4]In re Vitanovich, 259 B.R. 873, 2001 FED App. 0002P (B.A.P. 6th Cir. 2001) (applying Ohio law).

[5]In re Vitanovich, 259 B.R. 873, 2001 FED App. 0002P (B.A.P. 6th Cir. 2001) (applying Ohio law).

[6]Spencer v. King, 3 Ohio N.P. 270, 5 Ohio Dec. 113, 1896 WL 686 (C.P. 1896).

[7]In re Immobilaire, IV, Ltd., 314 B.R. 139 (Bankr. S.D. Ohio 2004) (applying Ohio law).

[8]First Discount Corp. v. Daken, 75 Ohio App. 33, 30 Ohio Op. 319, 42 Ohio L. Abs. 528, 60 N.E.2d 711 (1st Dist. Hamilton County 1944).

[9]Eller v. Turvene, 71 Ohio L. Abs. 375, 131 N.E.2d 407 (Ct. App. 2d Dist. Darke County 1955).

the action,[2] given that the action does not require an unlawful taking.[3]

◆ **Illustration:** A puppy buyer stated a claim against the seller for replevin where the buyer alleged that the seller initially had given the buyer possession of the puppy pursuant to a purchase contract, that the seller now had possession of puppy, and that the seller had wrongfully refused to return the puppy to the buyer.[4]

In a replevin action, the plaintiff, the plaintiff's agent, or the plaintiff's attorney must file an affidavit showing that the defendant is wrongfully detaining the property,[5] and a court cannot issue the writ without the affidavit showing unlawful detention.[6]

§ 51 What constitutes wrongful detention

Research References

West's Key Number Digest, Replevin ⚿10

To maintain an action in replevin, the plaintiff must own or have an interest in the wrongfully detained property[1] and a right to its immediate possession.[2] Also, the defendant must have actual or constructive possession of the property.[3]

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121 (8th Dist. Cuyahoga County 1984); Black v. City of Cleveland, 58 Ohio App. 2d 29, 12 Ohio Op. 3d 36, 387 N.E.2d 1388 (8th Dist. Cuyahoga County 1978).

[2]Grever v. Taylor, 53 Ohio St. 621, 42 N.E. 829 (1895); Kellogg-Mackay Co. v. O'Neal, 39 Ohio App. 372, 11 Ohio L. Abs. 3, 177 N.E. 778 (5th Dist. Muskingum County 1931); Lorain County Sav. & Trust Co. v. Haynes, 26 Ohio App. 552, 5 Ohio L. Abs. 723, 160 N.E. 516 (9th Dist. Lorain County 1927); Harrison v. Mack International Motor Truck Corp., 20 Ohio App. 256, 3 Ohio L. Abs. 232, 151 N.E. 797 (6th Dist. Lucas County 1925).

[3]Schneider v. Schneider, 178 Ohio App. 3d 264, 2008-Ohio-4495, 897 N.E.2d 706 (9th Dist. Lorain County 2008), appeal not allowed, 120 Ohio St. 3d 1525, 2009-Ohio-614, 901 N.E.2d 244 (2009).

[4]Bono v. McCutcheon, 159 Ohio App. 3d 571, 2005-Ohio-299, 824 N.E.2d 1013 (2d Dist. Clark County 2005).

[5]§§ 83, 84.

[6]§ 86.

[Section 51]

[1]§§ 53, 54, 61.

[2]§§ 55, 56.

[3]Studer v. Seneca County Humane Society, 2000-Ohio-1823, 2000 WL 566738 (Ohio Ct. App. 3d Dist. Seneca County 2000); Black v. City of Cleveland, 58 Ohio App. 2d 29, 12 Ohio Op. 3d 36, 387 N.E.2d 1388 (8th Dist. Cuyahoga County

However, to wrongfully detain the property, the defendant need not have actual physical possession.[4]

◆ **Illustration:** Where a game warden took possession of animals and immediately delivered them to a third party who would care for them pending a hearing, the game warden had constructive possession of the animals and was a proper party in a replevin action to recover them.[5]

§ 52 Time of wrongful detention

Research References

West's Key Number Digest, Replevin ⇦9

Maintainability of replevin or similar possessory action where defendant, at time action is brought, is no longer in possession of property, 97 A.L.R.2d 896

An action for replevin is strictly a possessory action, and it lies only in behalf of one entitled to possession against one having, at the time the suit is begun, actual or constructive possession and control of the property.[1] Thus, the action lies against a person having actual or constructive possession of the wrongfully detained property at the time the action commences.[2]

However, a transfer of possession of the property in question by the defendant after the commencement of the action will not prevent its maintenance.[3] Indeed, where the defendant has transferred possession of the property, the

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1978).

[4]Collier v. Bickley, 33 Ohio St. 523, 1878 WL 21 (1878); Barnes v. Keller, 94 Ohio App. 107, 51 Ohio Op. 306, 114 N.E.2d 604 (2d Dist. Montgomery County 1952).

[5]Barnes v. Keller, 94 Ohio App. 107, 51 Ohio Op. 306, 114 N.E.2d 604 (2d Dist. Montgomery County 1952).

[Section 52]

[1]Schneider v. Schneider, 178 Ohio App. 3d 264, 2008-Ohio-4495, 897 N.E.2d 706 (9th Dist. Lorain County 2008), appeal not allowed, 120 Ohio St. 3d 1525, 2009-Ohio-614, 901 N.E.2d 244 (2009); Long v. Noah's Lost Ark, Inc., 158 Ohio App. 3d 206, 2004-Ohio-4155, 814 N.E.2d 555 (7th Dist. Mahoning County 2004).

[2]Studer v. Seneca County Humane Society, 2000-Ohio-1823, 2000 WL 566738 (Ohio Ct. App. 3d Dist. Seneca County 2000); Black v. City of Cleveland, 58 Ohio App. 2d 29, 12 Ohio Op. 3d 36, 387 N.E.2d 1388 (8th Dist. Cuyahoga County 1978).

[3]Black v. City of Cleveland, 58 Ohio App. 2d 29, 12 Ohio Op. 3d 36,

In principle, Rule 8(A) is based on Federal Rule 8(a). Rule 8(A), however, does not require a jurisdictional statement in the original pleading (in a federal court it is necessary for the plaintiff to state in his complaint whether he had invoked federal jurisdiction by way of diversity or the raising of a federal question).

Rule 8(A) denominates the action as a "claim for relief" rather than as a "cause of action." In addition, throughout the rules generally, the original pleading is denominated a "complaint" rather than a "petition." The language change (cause of action becomes claim for relief and petition becomes complaint) is purposeful; the language change indicates that "rule" pleading is a departure from hidebound "fact" pleading. The rules seek to free pleading from the interminable battles over the form of the pleadings under a Field Code.

In Ohio under the code a "petition" (§ 2309.02, R.C.) must contain "a statement of facts constituting a cause of action in ordinary and concise language" (§ 2309.04, R.C.). Under a "fact" pleading system the pleader, in pleading the "facts... in ordinary and concise language," must steer a narrow, indefinable course between pleading "conclusions of law" on the one hand and "evidence" on the other in order to escape a demurrer, a motion to strike, or a motion to make definite and certain, the form of the language being all important. The drafters of the Field Code thought that pleading under the code should be simple, rather than technical. The simplified forms which accompanied some of the original codes and in Ohio the simplified forms in Swan's Pleadings and Precedents (1867) so indicate. But at the turn of the century the "technical" or "railroad pleading era" set in with *New York & St. Louis R. R. v. Kistler*, 66 Ohio St. 326 (1902). That case, for example, initiated the "specifications of negligence" doctrine wherein in a petition the pleader may not use such words as "negligently and carelessly" or "immoderate and dangerous rate of speed" (such words being conclusions of law) unless such words are accompanied by a list of "facts" setting forth in specific detail the nature of the fault involved. Whether that kind of pleading is "ordinary and concise language" is a continuing, if meaningless, debate. See, *Grieser, Plaintiff's Pleading*, Personal Injury Litigation in Ohio 180 (1965).

Under Rule 8(A) much less emphasis is placed on the form of the language in the complaint, distinctions between "facts," "conclusions of law," and "evidence" being minimized so long as the operative grounds underlying the claim are set forth so as to give adequate notice of the nature of the action. See, *Conley v. Gibson*, 355 U.S. 41 at 47, 48 (1957).

An example, borrowed from the federal rules system, will illustrate the principles of simplified pleading under Rule 8(A).

The main body of the complaint for a negligence action reads as follows (Federal Rules of Civil Procedure, Appendix of Forms, Form 9):

On June 1, 1936 in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

The operative grounds of the negligence claim meeting minimum pleading standards have been set forth. Thus, the complaint indicates that defendant proximately violated a duty owing when he negligently ran into the plaintiff in a public highway and injured plaintiff. Inasmuch as the operative grounds of the claim have been set forth, there is no argument about whether the form of the language contains "conclusions of law" or "evidence" or "facts." Defendant under Rule 12(E) can move for a more definite statement only if the pleading is so vague that he cannot respond. But defendant may utilize other devices provided by the rules: he may resort to discovery (Rules 26 through 37); he may, if the pleadings are a sham, resort to summary judgment (Rule 56); and he may derive procedural benefits from the pretrial procedure provided by Rule 16.

The Form 9 pleading above is a far cry from the "specifications of negligence" doctrine initiated by the *Kistler* case, *supra*, but it is quite similar to the pre- *Kistler* simplified code pleading to be found in the Appendix of Forms in Swan's Pleadings and Precedents (1867):

Plaintiff says that on _____ the defendant being the owner of a stage coach, the plaintiff took passage therein at _____ to be carried to _____ that the stage was upset by the carelessness of the driver in the service of the defendant, and the plaintiff thereby had his arm broken, and was otherwise injured, in consequence of which he had to expend _____ dollars for medical services and was otherwise damaged; and says he has sustained damage to the amount of _____ dollars.

Whereupon he asks judgment for _____ dollars.

In short, simplified pleading under Rule 8(A) merely carries the pleader back more than a hundred years to the simplified pleading originally intended by the drafters of the Field Codes. Guides to pleading under Rule 8 may be found in the Appendix of Forms as authorized by Rule 84. See, Ohio Form 8, Complaint for Negligence.

A note of caution to the pleader should be added. Simplified pleading under Rule 8 does not mean that the pleader may ignore the operative grounds underlying a claim for relief. Thus, a pleading which might read "Plaintiff says that defendant owes plaintiff $1,000.00. Wherefore plaintiff demands judgment against defendant in the sum of $1,000.00 and costs," would be subject to a motion to dismiss for failure to state a claim for relief. Does such pleading sound in contract? Tort? What are the operative grounds underlying

states that have not adopted a procedural system based upon the Federal Rules of Civil Procedure, it is a fundamental rule that a cause of action or a defense be based upon allegations of fact.[1] Ohio departs from the rule of "fact" pleading and requires instead a statement of a claim for relief giving notice of the nature of the pleader's claim or action. A "claim for relief," as that term is used in the Ohio Rules of Civil Procedure, whether such a claim for relief is set forth in an original claim, a counterclaim, a cross claim, or a third-party claim[2] or as grounds of defense intended to be made the subject of the litigation,[3] must be set forth in the pleadings of the party who seeks to enforce such a right of action or to avail himself of such grounds of defense.[4] However, unlike the requirements of pleading a "cause of action" under prior law, the Civil Procedure Rules provide merely that a pleading setting forth a "claim for relief" must contain:[5] (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he or she deems himself or herself entitled. The thrust of the Civil Procedure Rules is to reduce the emphasis formerly placed upon the form of the language of a complaint and to minimize the distinctions previously made between "facts," "conclusions of law," and "evidence," so long as the operative grounds underlying the claim are set forth so as to give adequate notice of the nature of the action.[6] Thus, Rule pleading may be viewed as "simplified" pleading in that a short and plain statement of a party's claim is required.[7] It seems clear that the purpose of the Civil Procedure Rules is to give notice to the opposite party of the nature of the pleader's claim or action and not to formulate

[Section 14]

[1]Am. Jur. 2d, Pleading § 5.

[2]Ohio R. Civ. P. 8(A).

[3]As to the requirements regarding answers, generally, the form of denials, and the defenses that must be pleaded affirmatively, see §§ 154 et seq.

[4]C. & S.R. Co. v. Ward, 5 Ohio Dec. Rep. 391, 7 Ohio Dec. Rep. 230, 5 Am. Law Rec. 372, 1 W.L.B. 332, 1876 WL 6046 (Ohio Super. Ct. 1876).

[5]§ 42.

[6]Staff Notes to Rule 8(A).

[7]Clermont Environmental Reclamation Co. v. Hancock, 16 Ohio App. 3d 9, 474 N.E.2d 357 (12th Dist. Clermont County 1984).

Generally, see § 42.

issues or fully to summarize the facts involved.[8] Therefore, while a pleading that sets forth a claim for relief need not state all the elements of the claim, enough must be pleaded so that the person or entity sued has adequate notice of the nature of the action.[9] The pleading must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be on the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.[10]

§ 15 Facts, generally

Research References

West's Key Number Digest, Pleading ⇐8, 9

The Ohio Rules of Civil Procedure pertaining to pleading are intended to free pleading from the formal restrictions imposed under the prior law and, in particular, to de-emphasize and minimize the distinctions formerly made by the courts between the pleading of "facts" and "evidence."[1]

A pleader who can use one of the forms of complaint appearing in the Appendix to the Ohio Rules of Civil Procedure[2] or one of the forms of answer presenting defenses[3] sets forth an answer presenting defenses concerned with the distinctions discussed in this and the following section.

A former provision of the Revised Code required that a plaintiff's initial pleading contain a statement of facts constituting a cause of action in ordinary and concise language.[4] The Ohio Rules of Civil Procedure, on the other hand, require only that each averment of a pleading be

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[8]§§ 77 et seq.

[9]Saylor v. Providence Hosp., 113 Ohio App. 3d 1, 680 N.E.2d 193 (1st Dist. Hamilton County 1996); Fancher v. Fancher, 8 Ohio App. 3d 79, 455 N.E.2d 1344 (1st Dist. Hamilton County 1982).

[10]Fancher v. Fancher, 8 Ohio App. 3d 79, 455 N.E.2d 1344 (1st Dist. Hamilton County 1982).

[Section 15]

[1]§ 14.

[2]Rules of Civil Procedure, Appendix of Forms, Form 2 to 13 set forth forms of complaint.

[3]Rules of Civil Procedure, Appendix of Forms, Form 15.

[4]Former R.C. § 2309.04.

B. AIDER OR CURE

I. INTRODUCTION

A. IN GENERAL

Statutory References
Ohio R. Civ. P. 7(A), 8(A)

Research References

Text References
Am. Jur. 2d, Pleading §§ 1 to 4

West's Digest References
Pleading ⇐1, 2

Annotation References
A.L.R. Digest: Pleading §§ 1 to 5
A.L.R. Index: Pleadings

Trial Strategy References
Tactics and Strategy of Pleading, 3 Am. Jur. Trials 681

§ 1 Generally; definitions and distinctions

Research References
West's Key Number Digest, Pleading ⇐2

Pleadings are defined generally as the documents in a legal proceeding or action that set forth the allegations of the respective parties as to the issue or issues to be tried or determined; they either support or defeat the cause of action or claim being brought. The issues presented in pleadings may be issues of law or issues of fact. Pleadings are distinguished from other documents customarily used in legal actions or proceedings, such as motions, mere statements not entitled to filing, pretrial memoranda, or affidavits.[1] In Ohi
ment in writing i
facts (as distingui
the plaintiff's cau
defense.[2]

◆ **Comment:**
define the term
required by the
definition of th
"claim for relief
term "cause of
appear to be ob

Under the Civil
relief to be suffici
"Pleadings" includ
answer.[6]

A cause cannot
made up for trial[7]
filed.[8]

§ 2 Necessity an

Research Referenc
West's Key Number

The Ohio Rules
advising the respec

[Section 1]
[1]Am. Jur. 2d, Pleadi
Trial Strategy
Tactics and Strategy of
Am. Jur. Trials 681.
[2]A.M. White & Co. v
Ohio Dec. Rep. 749, 2
Ct. R. 30, 1870 WL
Super. Ct. 1870).
[3]§§ 4 et seq.
[4]Staff Notes to Ohi
8(A).
[5]§ 77.

However, the Anaple case does not **508 mention 'substantial nature' and appears instead, as far as the nature of the defect is concerned, to turn on the following language, at page 541, 124 N.E.2d at page 130:

'Whether the duty of ordinary care, which the occupier of premises owes to one of his business invitees, requires such occupier to prevent, remove, or warn against a particular hazard will necessarily depend on factor such as *the potential hazard involved, the opportunity which such on invitee apparently would or would not have to avoid that potential hazard by the exercise of ordinary care, and the practicability of preventing, removing or warning against such hazard.* See Schwer, Admx., v. New York, Chicago & St. Louis R. Co., 161 Ohio St. 15, 22, 23, 117 N.E.2d 696, and cases cited therein.'(Emphasis added.)

[3] However, this is essentially another way of stating that '[t]he test or standard of negligence is the exercise of ordinary or reasonable care, or the conduct of ordinarily or reasonably prudent persons in like circumstances.'65 C.J.S. Negligence § 1, p. 310. With respect to this more or less universal common-law standard of care, it is obvious that the conduct of reasonably prudent municipalities with relation to defects in and the use by the general public of their public ways will normally differ from the conduct of a reasonably prudent businessman with relation to defects in and the use by his business invitees of his business premises.

It is not apparent from the Taylor case that a municipality has any duty to discover the condition which causes injury or that a member of the public using the public ways is not required to be on the alert for defects. Although we have not found that the Supreme Court of Ohio has specifically adopted the common-law rules of negligence with relation to business invitees included in the Restatement of Torts, we have not *219 found any Supreme Court decisions inconsistent therewith, or which preclude their application. We consider the following comments in 2 Restatement of the Law of Torts, 939, 942, Section 343, particularly pertinent:

'a. *Distinction between possessor's duty to gratuitous licensee and duty to business visitor.* There is only one particular in which one who holds his land open for the reception of business visitors is under a greater duty in respect to its physical condition than a possessor who holds his land open to the visits of a gratuitous licensee. The possessor has no financial interest in the entry of a gratuitous license; and, therefore such a licensee is entitled to expect nothing more than an honest disclosure of the dangers which are known to the possessor. * * * Such a visitor is entitled to expect that the possessor will take reasonable care to discover the actual condition of the premises and either make them safe or warn him of dangerous conditions. * * *'

'd. *What business visitor entitled to expect.* A business visitor is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein. Therefore, a business visitor is not required to be on the alert to discover defects which, if he were a bare licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to discover a defect, as well as in determining whether the defect is one of which the possessor should believe that his visitor would not discover and as to which, therefore, he must use reasonable care to warn the visitor.'

See, also, Campbell v. Hughes Provision Co., 87 Ohio App. 151, 161, 94 N.E.2d 273,**509 affirmed, 153 Ohio St. 9, 90 N.E.2d 694, and Crampton v. Kroger Co., 108 Ohio App. 476, 162 N.E.2d 553.

[4][5] We conclude, with respect to this first assignment of error which we find without merit, that,

tuted consequential expenses generally regarded as economic loss, for purposes of determining whether damages were recoverable.

[3] Products Liability 313A ⇐156

313A Products Liability
313AII Elements and Concepts
313Ak154 Nature of Injury or Damage
313Ak156 k. Economic Losses; Damage to Product Itself. Most Cited Cases
(Formerly 313Ak17.1, 313Ak17)

Determination of whether recovery in tort is available for damage to defective product itself should involve analysis of damage within context of transaction, considering relationship between parties, nature of product's defect, and manner in which damages were sustained, rather than simple labeling of damage as "property damage" or "economic damage.".

[4] Products Liability 313A ⇐155

313A Products Liability
313AII Elements and Concepts
313Ak154 Nature of Injury or Damage
313Ak155 k. In General. Most Cited Cases
(Formerly 313Ak17.1, 272k2)

Products Liability 313A ⇐156

313A Products Liability
313AII Elements and Concepts
313Ak154 Nature of Injury or Damage
313Ak156 k. Economic Losses; Damage to Product Itself. Most Cited Cases
(Formerly 313Ak17.1, 272k2)

In negligence, law imposes upon manufacturer of product the duty of reasonable care, and that duty protects consumer from physical injury, whether to person or property, but law of negligence does not extend manufacturer's duty so far as to protect consumer's economic expectations; such protection would arise not under law, but rather solely by agreement between parties.

[5] Products Liability 313A ⇐156

313A Products Liability
313AII Elements and Concepts
313Ak154 Nature of Injury or Damage
313Ak156 k. Economic Losses; Damage to Product Itself. Most Cited Cases
(Formerly 313Ak17.1, 272k64)

Products Liability 313A ⇐235

313A Products Liability
313AIII Particular Products
313Ak235 k. Miscellaneous Machines, Tools, and Appliances. Most Cited Cases
(Formerly 313Ak17.1, 272k64)

Law of negligence would not provide remedy for economic losses-additional expenses incurred because arch dryer system did not perform as expected-against designer manufacturer of arch dryer system.

[6] Contracts 95 ⇐324(1)

95 Contracts
95VI Actions for Breach
95k324 Nature and Form of Remedy
95k324(1) k. In General. Most Cited Cases
(Formerly 272k102)

Products Liability 313A ⇐156

313A Products Liability
313AII Elements and Concepts
313Ak154 Nature of Injury or Damage
313Ak156 k. Economic Losses; Damage to Product Itself. Most Cited Cases
(Formerly 313Ak71)

Products Liability 313A ⇐301

313A Products Liability

727 N.E.2d 1277
88 Ohio St.3d 493, 727 N.E.2d 1277, 2000 -Ohio- 406
(Cite as: 88 Ohio St.3d 493, 727 N.E.2d 1277)

statutory violation, are not synonymous.

[4] Negligence 272 ⇐259

272 Negligence
272IV Breach of Duty
272k259 k. Violations of Statutes and Other Regulations. Most Cited Cases
Courts view the evidentiary value of the violation of statutes imposed for public safety in three ways-as creating strict liability, as giving rise to negligence per se, or as simply evidence of negligence; approaches reflect three separate principles, with unique effects upon a plaintiff's burden of proof, and to which the concept of notice may or may not be relevant.

[5] Negligence 272 ⇐259

272 Negligence
272IV Breach of Duty
272k259 k. Violations of Statutes and Other Regulations. Most Cited Cases
Where statute imposed for public safety is interpreted as imposing strict liability for a violation of statute's requirements, the defendant will be deemed liable per se-that is, no defenses or excuses, including lack of notice, are applicable.

[6] Negligence 272 ⇐259

272 Negligence
272IV Breach of Duty
272k259 k. Violations of Statutes and Other Regulations. Most Cited Cases
Violation of a statute imposed for public safety will not preclude assertion of defenses and excuses-or in other words, will not result in strict liability-unless the statute clearly contemplates such a result.

[7] Negligence 272 ⇐259

272 Negligence
272IV Breach of Duty
272k259 k. Violations of Statutes and Other Regulations. Most Cited Cases
Violation of a statute imposed for public safety which does not expressly provide for strict liability either will be considered as evidence of negligence, or will support a finding of negligence per se; distinction between the two depends upon the degree of specificity with which the particular duty is stated in the statute.

[8] Negligence 272 ⇐259

272 Negligence
272IV Breach of Duty
272k259 k. Violations of Statutes and Other Regulations. Most Cited Cases
Where a statute imposed for public safety contains a general, abstract description of a duty, a plaintiff proving that a defendant violated the statute must nevertheless prove each of the elements of negligence in order to prevail; thus, proof will be necessary that the defendant failed to act as a reasonably prudent person under like circumstances, to which the defendant's lack of notice of a defective condition may be a relevant consideration.

[9] Negligence 272 ⇐259

272 Negligence
272IV Breach of Duty
272k259 k. Violations of Statutes and Other Regulations. Most Cited Cases
Where a public safety statute sets forth a positive and definite standard of care, and a jury may determine whether there has been a violation thereof by finding a single issue of fact, a violation of that statute constitutes negligence per se.

[10] Negligence 272 ⇐238

272 Negligence
272III Standard of Care
272k238 k. Standard Established by Statute or Regulation. Most Cited Cases

Negligence 272 ⇐259

313AII Elements and Concepts
313Ak154 Nature of Injury or Damage
313Ak156 k. Economic Losses; Damage to Product Itself. Most Cited Cases
(Formerly 313Ak5)
Under Ohio law, there can be recovery of economic loss on a theory of strict liability in tort.

[14] Products Liability 313A ⚿156

313A Products Liability
313AII Elements and Concepts
313Ak154 Nature of Injury or Damage
313Ak156 k. Economic Losses; Damage to Product Itself. Most Cited Cases
(Formerly 313Ak17.1, 313Ak17)
Under Ohio law, recovery of plaintiff who sues under strict liability in tort for the recovery of economic loss should not be limited to direct economic loss when indirect economic loss has also been suffered.

[15] Products Liability 313A ⚿156

313A Products Liability
313AII Elements and Concepts
313Ak154 Nature of Injury or Damage
313Ak156 k. Economic Losses; Damage to Product Itself. Most Cited Cases
(Formerly 313Ak6)
Under Ohio law, economic loss cannot be recovered in a products liability suit on a negligence theory.
*357 Marvin L. Karp, Cleveland, Ohio, for plaintiff.

Lawrence Zelle, Minneapolis, Minn., David Davies, Arter & Hadden, Cleveland, Ohio, for defendant Allendale.

Selvin Seidel, Hale, Russell, Gray, Seaman & Birkett, New York, New York, Daniel W. Hammer, Thompson, Hine & Flory, Cleveland, Ohio, for defendants ASEA and Stal-Laval.

MEMORANDUM OF OPINION AND ORDER

MANOS, District Judge.

The plaintiff, Mead Corporation (hereinafter "Mead"), was organized under the laws of Ohio and has its principal place of business in Ohio. Mead has brought this action against four defendants, Allendale Mutual Insurance Co. (hereinafter "Allendale"), Allmanna Suenska Elektriska Aktiebolaget Inc. (hereinafter "ASEA Inc."), Stal-Laval Turbine AB (hereinafter "Stal-Laval"), and Allmanna Suenska Elektriska Aktiebolaget AB (hereinafter "ASEA AB"). Two of the four defendants are citizens of the United States and two are citizens of Sweden. Allendale was organized under the laws of Rhode Island and has its principal place of business in Rhode Island, and ASEA Inc. was organized under the laws of New York and has its principal place of business in New York. Both Stal-Laval and ASEA AB are Swedish companies with headquarters and principal plant facilities in Sweden.

This action arose in March of 1974 when a generator Mead bought from ASEA Inc. broke down. Jurisdiction is based upon 28 U.S.C. s 1332 (1976) and the matter is before the court on defendants ASEA Inc., Stal-Laval, and ASEA AB's motions for summary judgment.Fed.R.Civ.P. 56.

I. FACTUAL BACKGROUND [FN1]

FN1. For purposes of the defendants' motion to dismiss, the operative facts of this case are not in dispute. The account set out above is based upon the voluminous exhibits attached to the parties' motions for summary judgment.

Although they are separate legal entities, ASEA Inc., Stal-Laval, and ASEA AB are closely related. ASEA AB is the parent corporation of both ASEA

Most Cited Cases
(Formerly 208k8(4))
Claims asserted by parents of minor summer camp participant, who died as result of **injuries** sustained while horseback riding at summer camp, were within scope of agreement whereby host of summer camp would indemnify owner of summer camp facilities for **injuries** occurring as result of use of facilities; parents and owner of camp facilities reached settlement agreement with respect to claims asserted against owner of camp, plain language of indemnity agreement provided that host of summer camp would indemnity and hold harmless owner of camp facilities from and against any and all claims arising out of tort asserted by third parties, including camp participants, for damage to person or property related to use of camp facility, and horseback riding was "use" of facility.

[3] Indemnity 208 ⇐30(4)

208 Indemnity
208II Contractual Indemnity
208k26 Requisites and Validity of Contracts
208k30 Indemnitee's Own Negligence or Fault
208k30(4) k. Personal **Injury** Liability. Most Cited Cases
(Formerly 208k3)
Clear and unambiguous language of indemnity agreement between host of summer camp and owner of camp facilities indicated that host agreed to indemnity owner for **injuries** sustained as result of owner's negligence, even though agreement did not specifically list negligence as covered claim, given that both parties were sophisticated, long-standing corporations, parties were in equal in bargaining position, there was no issue with regard to whether agreement was unconscionable, and agreement stated it included "any and all" claims relating to use of camp facility, whether negligence was perpetrated by owner of facilities or not.

[4] Judgment 228 ⇐181(19)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(19) k. Contract Cases in General. Most Cited Cases
Genuine issue of material fact as to whether acts and omissions of owner of summer camp facilities constituted willful and wanton misconduct, and the amount of settlement between owner and parents of child who died as result of injuries sustained while horseback riding at camp that was attributable to willful and wanton misconduct, precluded summary judgment for owner on indemnity claim against host of summer camp and on claim for attorney fees.

[5] Appeal and Error 30 ⇐204(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k202 Evidence and Witnesses
30k204 Admission of Evidence
30k204(1) k. In General. Most Cited Cases
Failure to raise issue of whether expert report could be considered for purposes of summary judgment, when it was not properly authenticated, could not be raised for first time on appeal; lacking objection, trial court could properly consider report as evidence.

[6] Appeal and Error 30 ⇐173(12)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k173 Grounds of Defense or Opposition
30k173(12) k. Asserting Rescission, Discharge, Settlement, or Payment. Most Cited

{¶ 10} Prior to addressing the assignments presented, we note the following standard of review for cases involving summary judgment:

{¶ 11} When reviewing an appeal of a summary judgment, this court reviews the case de novo. *Locsei v. Mayfield School District,* No. 75277, unreported, 2000 Ohio App. LEXIS 1179, at *19. Summary judgment is appropriately rendered when no genuine issue as to any material fact remains to be litigated; the moving party is entitled to judgment as a matter of law; it appears from the evidence that reasonable minds can come to but one conclusion;* * * and when the evidence is construed most favorably in favor of the party opposing the motion the conclusion reached is adverse to that party. *Id.,* citations omitted.

{¶ 12} The burden of proof in a motion for summary judgment is a shifting one. First, the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (emphasis in original). Although there is no requirement in Civ.R. 56 that the moving party support its motion for summary judgment with any affirmative evidence, i.e., affidavits or similar materials produced by the movant* * *[,] it is clear that the moving party bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of material fact on a material element on the nonmoving party's claim. *Id.* at 292, 662 N.E.2d 264.

{¶ 13} Once the moving party has satisfied this criteria, the burden then shifts to the nonmoving party, who has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.* at 293. (Emphasis omitted.)

{¶ 14} *Hood v. Classic Cuts Produce, Inc.* (May 17, 2001), Cuyahoga App. No. 78065, 2001 Ohio App. LEXIS 2190 at 4-6.

*3 {¶ 15} The first assignment or error provides:

{¶ 16} I. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR SUMMARY JUDGMENT OF AMERICAN CANCER SOCIETY ON THE CROSS-CLAIM OF GIRL SCOUTS OF LAKE ERIE COUNCIL.

{¶ 17} In this assignment appellant generally argues that the activity which the decedent minor was engaged in at the time of his injury, horseback riding, is outside the scope of Section 5(b) of the Guest Group Facility Use Agreement and thereby not subject to indemnification.

{¶ 18} In assessing the construction of the contract in issue, we are guided by the following:

{¶ 19} Indemnity is the right of a party, who has been compelled to pay what another should have paid, to require reimbursement. It arises from a contract, either express or implied. In the construction of a written contract, it will be read as a whole, and the intent of each part will be gathered from a consideration of the whole. The language and terms of the contract are to be given their plain, common, and ordinary meanings. But if the language is ambiguous, then a court must construe the language against the party who prepared the contract. Language is ambiguous if it is reasonably susceptible to two or more constructions. (Footnotes omitted.)

{¶ 20} *McClory v. Hamilton Cty. Bd. of Elections* (1998), 130 Ohio App.3d 621, 624-624, 720 N.E.2d 954, citing *Worth v. Aetna Casualty & Surety Co.* (1987), 32 Ohio St.3d 238, 240, 513 N.E.2d 253, 256; *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* 78 Ohio St.3d 353, 361, 1997-Ohio-202, 678 N.E.2d 519, 526; *Central*

four grounds: (1) an intervening cause, Hodge's negligence, had relieved Hoffmeier from liability; (2) Hoffmeier had no notice the windows were dangerous; (3) the lack of evidence showing the failure to supply window latches created a dangerous condition; and (4) the unknown circumstances of Michael's accident. The trial court agreed with all these points in granting summary judgment to Hoffmeier. We address them in turn, except for the intervening-cause argument. We do not reach it, because there are three independent reasons Hoffmeier was not liable. But we are skeptical that intervening cause would have applied to these facts.

IV. Hoffmeier Not Put on Notice

{¶ 14} To be liable for defects, a landlord must be put on notice of them.[FN8] A landlord has been held liable to a woman **raped** in his apartment building because he was aware both of a **tenant's** window **locks** being broken and of the crime problem in the neighborhood.[FN9]And where a landlord had quickly made repairs in the past when notified but had failed to quickly repair a window latch reported to it, the landlord was liable for a child falling through the window.[FN10]

FN8. *Sikora v. Wenzel,* 88 Ohio St.3d 493, 496, 2000-Ohio-406, 727 N.E.2d 1277; *Stancil v. K.S.B. Invest. and Mgmt. Co.* (1991), 62 Ohio App.3d 765, 770, 577 N.E.2d 452.

FN9. *Benser v. Johnson* (Tex.App.1998), 763 S.W.2d 793.

FN10. *Jones v. Chicago Housing Auth.* (1978), 59 Ill.App.3d 138, 376 N.E.2d 26.

*3 {¶ 15} In this case, Hoffmeier had previously rented the house to **tenants** with small children and the issue of window **locks** had never arisen. Hoffmeier himself was a father and testified that he had not considered window **locks** necessary in his home when his child was small. If we accept that the failure to provide **locks** was a dangerous condition, it was one that became known to Michael's parents only the day before his accident when Michael got onto the porch roof. Even if we assume that Hoffmeier had been put on notice by his tenants-and there is no evidence he had been-he would have had but a single day to cure the supposed defect. That would not have been reasonable. Hoffmeier could not be held responsible for a failure to install window **locks** because of both the lack of notice and the lack of time to install them.

V. Hoffmeier's Duty to His Tenants

{¶ 16} At common law, a landlord had no liability for dangerous conditions in premises controlled by his **tenant**.[FN11]But legislatures and courts have so greatly curtailed this today "the exceptions nearly have swallowed up the general rule."[FN12]For example, a landlord's immunity may be limited if he has failed to follow the law.[FN13]

FN11. *Shump v. First Continental-Robinwood A ssoc.,* 7 1 Ohi o St.3d 4 14, 4 17-418, 1994-Ohio-427, 644 N.E.2d 291.

FN12. See *id.*

FN13. *Shroades v. Rental Homes, Inc.* (1981), 68 Ohio St.2d 20, 23, 427 N.E.2d 774.

{¶ 17} "A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property * * * by a dangerous condition * * * if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of: (1) an implied warranty of habitability; or (2) a duty created by statute or administrative regulation."[FN14]

FN14.*Id.* at 24, quoting Restatement of the Law 2d, Property (Landlord and Tenant) (1977), Section 17.6.

{¶ 18} Cipollone claims that Hoffmeier violated the Landlord Tenant Act, which sets the standard for

to the user, and that there was also an open changing area adjacent to each stall, which consisted of a small bench and some metal hooks affixed to the wall.

{¶ 13} According to Clark, defendant's security was inadequate. Specifically, Clark opined that students should have been provided the ability to **lock** themselves in the shower. Clark advised that the presence of a **lock** or even a simple latch on the door of the shower stall could have prevented the attack on plaintiff. In essence, Clark opined that even minimal resistance encountered by the rapist may have served to thwart his course in that he would have lost the element of surprise. Clark maintained that plaintiff was most vulnerable to attack in the shower and that without the presence of a latch, she lost the opportunity, albeit even if only momentary, to realize that she was in imminent danger to which she could respond.

[1]{¶ 14} Upon review of the evidence and testimony presented at trial, the court makes the following determination. The court finds that plaintiff failed to prove that the offender gained access to the twelfth floor as a result of lax security measures at the entrance level of Daniels Hall. Indeed, plaintiff was unable to prove by a preponderance of the evidence that the assailant was not authorized to be on the twelfth floor of Daniels Hall either as a resident or as some resident's visitor.

[2]{¶ 15} However, the court finds that defendant acted unreasonably by failing to install locks or latches on the shower doors. Ordinarily, there is no duty to prevent a third person from harming another unless a "special relationship" exists between the parties. *Eagle v. Mathews-Click-Bauman, Inc.* (1995), 104 Ohio App.3d 792, 663 N.E.2d 399; *Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.* (1989), 45 Ohio St.3d 171, 173, 543 N.E.2d 769.A "special relationship" exists when a duty is imposed upon one to act for the protection of others. *Gelbman v. Second Natl. Bank of Warren* (1984), 9 Ohio St.3d 77, 79, 458 N.E.2d 1262.

Such a "special relationship" may exist between a business and its invitees. *Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App.3d 188, 583 N.E.2d 1071.In the instant case, the experts themselves confirmed that UC recognized the need to protect resident students from criminal acts of third parties. There was ample evidence that the university readily assumed this duty inasmuch as access to the dormitory was monitored by student-employees and the university had installed locked exterior doors that were alarmed. Further, students were warned during orientation about the known crimes occurring in and around the campus and they received printed materials about safety measures. Indeed, the court finds that students reasonably relied on the university to keep them apprised of crime statistics and safety measures.

*4 {¶ 16} In addition, the court recognizes that students are not in a position to alter the premises such that individual **locks** might be utilized. Testimony and evidence at trial established that the dormitory rooms were equipped with **locks** and that **locks** or latches were present on the doors of other campus bathrooms and showers. Without the means to secure the shower door, plaintiff was vulnerable and unprotected from not only inadvertent interruption, but in this instance, violent attack. Had the rapist's progress been frustrated by a lock or latch, the court finds that the assailant may have abandoned his plan; certainly, he would have faced an increased risk of discovery. The installation of such lock or latch would have been a simple, inexpensive task and the court finds that defendant's failure to provide such a device was unreasonable.

{¶ 17} To find liability in negligence against a defendant based upon the criminal act of a third party, an invitee must demonstrate that the criminal act was foreseeable. *Reitz,* supra, at 191-192, 583 N.E.2d 1071; *Howard v. Rogers* (1969), 19 Ohio St.2d 42, 249 N.E.2d 804, paragraphs one and two of the syllabus. The foreseeability of criminal acts occurring on premises is determined by using a totality of the circumstances test. *Reitz,* supra.The to-

763 S.W.2d 793
763 S.W.2d 793
(Cite as: 763 S.W.2d 793)

H

Court of Appeals of Texas,
Dallas.

A lbert **BENSER**, d/b/a Carrier Square Apartments,
Appellant,
v.
Cynthia **JOHNSON**, Individually & as Next Friend of Alysia **Johnson**, a Minor, Appellee.
No. 05-87-00692-CV.

March 24, 1988.
Rehearing Denied May 11, 1988.

Tenant and her daughter brought suit against landlord following criminal intrusion by another into their apartment and tenant's rape. A jury before the 14th District Court. Dallas County, John McClelland Marshall, J., found in favor of tenant and awarded substantial damages. On appeal, the Court of Appeals, McClung, J., held that evidence was sufficient to support finding that landlord's negligence in providing workable locks on windows was proximate causation of tenant's rape.

Affirmed.

West Headnotes

[1] Negligence 272 ⇐371

272 Negligence
272XIII Proximate Cause
272k371 k. Necessity of Causation. Most Cited Cases
(Formerly 272k56(1.1))

Negligence 272 ⇐387

272 Negligence
272XIII Proximate Cause
272k374 Requi sites, Definitions and Distinctions
272k387 k. Foreseeability. Most Cited Cases
(Formerly 272k59)
The two elements of proximate cause are cause in fact and foreseeability.

[2] Negligence 272 ⇐380

272 Negligence
272XIII Proximate Cause
272k374 Requi sites, Definitions and Distinctions
272k380 k. Substantial Factor. Most Cited Cases
(Formerly 272k56(1.9))

Negligence 272 ⇐379

272 Negligence
272XIII Proximate Cause
272k374 Requi sites, Definitions and Distinctions
272k379 k. "But-For" Causation; Act Without Which Event Would Not Have Occurred. Most Cited Cases
(Formerly 272k56(1.12))
"Cause in fact," for purposes of proximate causation analysis, means that the negligent act or omission was a substantial factor in bringing about the injury and without which no harm would have been incurred.

[3] Negligence 272 ⇐387

272 Negligence
272XIII Proximate Cause
272k374 Requi sites, Definitions and Distinctions
272k387 k. Foreseeability. Most Cited Cases
(Formerly 272k59)
"Foreseeability," for purposes of proximate causation analysis, denotes that the actor, as person of or-

763 S.W.2d 793
763 S.W.2d 793
(Cite as: 763 S.W.2d 793)

dinary intelligence, should have anticipated the dangers that his negligent acts created for others.

[4] Negligence 272 ⚖433

272 Negligence
272XIII Proximate Cause
272k430 Intervening and Superseding Causes
272k433 k. Intentional or Criminal Acts. Most Cited Cases
(Formerly 272k62(3))
Criminal conduct of a third party is a superseding cause which relieves negligent actor from liability unless criminal conduct is foreseeable result of such negligence.

[5] Appeal and Error 30 ⚖989

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)1 In General
30k988 Extent of Review
30k989 k. In General. Most Cited Cases

Appeal and Error 30 ⚖1003(7)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1003 Against Weight of Evidence
30k1003(7) k. Manifest Weight of Evidence. Most Cited Cases
In reviewing a factual insufficiency point, Court of Appeals must consider and weigh all of evidence in case in determining whether evidence is insufficient or if verdict is so against great weight and preponderance of evidence to be manifestly unjust.

[6] Landlord and Tenant 233 ⚖169(6)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k169 A ctions for Injuries from Negligence
233k169(6) k. Weight and Sufficiency of Evidence as to Injuries to Tenants or Occupants and Their Employees. Most Cited Cases
Evidence was sufficient to support finding of negligence of landlord resulting from rape of tenant; landlord's knowledge for long period of time that tenant's window locks were inoperative, landlord's refusal to install working locks in violation of statute, apartment's location in high crime area, and testimony by police officer that stick in window demonstrated to attacker there were no working locks were sufficient.

***794** Larry Feldman, Dallas, for appellant.

Sam W. Pettigrew, Jr. and Forrest W. Wagner, Grand Prairie, for appellee.

Before STEPHENS, McCLUNG and BAKER, JJ.

McCLUNG, Justice.

This is a negligence case. Albert Benser, d/b/a Carrier Square Apartments, appeals from a $70,000 judgment entered on behalf of appellee Cynthia Johnson, individually and as next friend of Alysia Johnson, a minor. In appellant's sole point of error he contends that his motion for new trial should have been granted because there was insufficient evidence to support the jury's answer concerning the issue of proximate cause. We affirm.

On February 1, 1983, Cynthia Johnson and her daughter moved into appellant's apartment complex. She soon discovered that the locks on the living-room window and her daughter's bedroom window were inoperable. When Mrs. Johnson com-

763 S.W.2d 793
763 S.W.2d 793
(Cite as: 763 S.W.2d 793)

plained about the locks, the complex gave her a "screw-type" lock for both the living-room and bedroom windows. There was also a stick in one of these windows to "secure" it in lieu of a lock. Mrs. Johnson placed the stick in the living-room window and installed the "screw-type" locks. The "screw-type" locks were defective and would not secure the windows. On February 18, 1984, an intruder drilled a small hole in the bottom of the living-room window and knocked the stick out of the way. The hole drilled was too small for one to stick his hand through and unlock the window. However, as the lock provided to Mrs. Johnson did not work, the intruder ***795** was able to open the window and enter the apartment. Once inside the apartment the intruder proceeded to rape Cynthia Johnson. The rape of Mrs. Johnson was viewed by her daughter. Mrs. Johnson then brought suit against appellant alleging that appellant was negligent in not providing proper locks and security to her apartment. This appeal followed.

In appellant's sole point of error, he alleges that there is insufficient evidence to support the jury's finding that appellant's actions were the proximate cause of appellee's damages.

[1][2][3][4] The two elements of proximate cause are cause in fact and foreseeability. *Nixon v. Mr. Property Management Company, Inc.*, 690 S.W.2d 546, 549 (Tex.1985); *Missouri Pac. R. Co. v. American Statesman*, 552 S.W.2d 99, 103 (Tex.1977). Cause in fact means that the negligent act or omission was a substantial factor in bringing about the injury and without which no harm would have been incurred. *Id.* Foreseeability denotes that the actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for others. *Missouri Pac. R. Co.*, 552 S.W.2d at 103. The criminal conduct of a third party is a superseding cause that relieves the negligent actor from liability unless the criminal conduct is a foreseeable result of such negligence. *Nixon*, 690 S.W.2d at 550.

The RESTATEMENT (SECOND) OF TORTS § 448 (1965) states:

> The act of a third party in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

[5][6] In reviewing a factual insufficiency point, we must consider and weigh all of the evidence in the case in determining whether the evidence is insufficient or if the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex.1986). The record in this case reflects appellant was aware for a long period of time that appellee's locks on her windows were broken, yet appellant refused to install working locks in violation of the requirements of sections 92.052 and 92.153 of the Property Code.[FN1]

FN1. Section 92.052 states, in pertinent part:

> § 92.052 Landlord's Duty to Repair or Remedy
>
> (a) A landlord shall make a diligent effort to repair or remedy a condition if:
>
> (1) the tenant specifies the condition in a notice to the person to whom or to the place where rent is normally paid;
>
> (2) the tenant is not delinquent in the payment of rent at the time notice is given; and
>
> (3) the condition materially affects the

763 S.W.2d 793
763 S.W.2d 793
(Cite as: 763 S.W.2d 793)

physical health or safety of an ordinary tenant.

Section 92.153 states, in pertinent part:

§ 92.153 Duty to Install, Change, or Rekey

(a) The landlord shall install, change, or rekey a security device according to this subchapter after the landlord receives a request from the tenant of a dwelling. If the tenant's lease is in writing, the lease may require the request to be written.

(b) The landlord may select how and where a security device is installed in a tenant's dwelling. The landlord's obligation under Subsection (a) is limited to installing:

(1) one window latch on each exterior window;

The evidence adduced at trial also showed that appellant was aware that the complex was located in a high crime area and that there had been previous instances of criminal activity in the complex. Other relevant testimony included that of a Grand Prairie police officer who testified that the stick in the living-room window would indicate to a potential intruder that the window could not be locked. The officer further testified that this knowledge would encourage an intruder to pick that home to commit his unlawful acts because it would be the easiest and quickest home to enter.

In the *Nixon* case, our supreme court held that a property owner *could be* liable for his actions which create an opportunity for a third person to commit an intentional *796 tort or crime. The court went on to list certain factors to consider in determining whether criminal activity is a foreseeable result of the property owners negligence. Chief among these factors are whether the property is located in a high crime area and whether previous criminal activity has occurred on the property. Both of these factors are present in our case.

Neither party has cited any Texas cases issued subsequent to *Nixon* directly addressing the issues of premises liability, proximate cause, and third-party criminal activity. Our research has also failed to discover any such cases. However, several of the federal circuit courts as well as our sister state courts have issued opinions in cases with strikingly similar facts as our case. We find several of these opinions to be quite persuasive and will briefly discuss them below. The cases we refer to are: *Cain v. Vontz,* 703 F.2d 1279 (11th Cir.1983); *Spar v. Obwoya,* 369 A.2d 173 (D.C.1977); *Trentacost v. Brussel,* 82 N.J. 214, 412 A.2d 436 (N.J.1980); *Dick v. Great South Bay Company,* 106 Misc.2d 686, 435 N.Y.S.2d 240 (N.Y.Civ.Ct.1981); and *Smith v. ABC Realty Co.,* 66 Misc.2d 276, 322 N.Y.S.2d 207 (N.Y.Civ.Ct.1971).

In *Cain,* a previous break-in at Mary Cain's apartment resulted in the destruction of her front door lock. She asked the defendant apartment complex to replace her lock but it never did. Subsequently, an intruder entered through the unlocked front door and shot and killed Mary Cain. Mrs. Cain's mother brought a wrongful death action against the owner's of the complex. The trial court granted summary judgment for the defendants. On appeal, the 11th circuit, applying Georgia law, held that the plaintiff had stated a cause of action and that she had raised a fact issue as to proximate cause. The court went on to say that:

A dangerous situation was created when the defendant failed to repair the broken locks on a young woman's apartment door. It would not take a very farsighted person to be able to imagine the possible consequences of such an action. However, this is not for the court to determine. Georgia courts have said numerous times that questions of negligence, proximate cause, foreseeability and intervening

see articles that say "likely to target... smaller... etc" in cybercrime SIM study ID theft etc.

763 S.W.2d 793
763 S.W.2d 793
(Cite as: 763 S.W.2d 793)

causation are properly for a jury to determine. (citations omitted).

In *Spar,* the plaintiff was a student at a local university who was robbed and shot in the back by an assailant who had entered his apartment complex through the front entrance door to the complex. The lock on this door was broken and had not been repaired in spite of numerous complaints by the tenants. This complex was in a high crime area and had a history of previous crimes being committed on the premises. The court upheld the jury finding of liability on the part of the owners of the apartment complex stating:

The evidence supports the theory that the negligence of appellants here was not their failure to install the type of front door that would have repulsed *every c onceivable* criminal attack, but their failure to do anything to improve upon a front door lock which was easily rendered inoperative, as viewed against their knowledge, actual or constructive, of these circumstances.

In sum, then, we conclude that the jury possessed adequate information upon which to find proximate cause, and therefore their verdict on the issue of liability must stand.

In *Trentacost,* the plaintiff, while returning to her apartment, was mugged in the stairway of her apartment complex by an intruder who had entered the complex through the unlocked front door. The defendant had promised to install a lock on that door but never did. In upholding the jury verdict in favor of the plaintiff the supreme court of New Jersey stated:

There was sufficient support for finding that the absence of a lock on the entrance to the building, which was located in a high crime neighborhood, created a foreseeable risk of harm.

The court further stated:

The landlord was confronted with the existence of a high level of crime in the *797 neighborhood. *See ante* [82 N.J.] at 218-219 [412 A.2d 436]. Yet he failed to install a lock on the front door leading in to the building's lobby. By failing to do anything to arrest or even reduce the risk of criminal harm to his tenants, the landlord effectively and unreasonably enhanced that risk.

In *Dick,* the plaintiff was seriously injured by three robbers who entered the lobby of the building in which she lived through an unsecured front door. Repeated requests to repair the defective door lock were ignored. There was no evidence presented that the building was in a high crime area or of previous crimes in the complex. In upholding a jury verdict for the plaintiff the court held that "The jury could (and did) properly conclude that the defective door lock was a proximate cause of the attack." The court went on to state:

In light of the rising crime rate in this city, and the fact that muggings, robberies and homicides have occurred in all neighborhoods, a causal relationship between a defective door lock and violent criminal activity can be determined by a jury from its common experience.

It was for the jury to weigh the probability of the harm to plaintiff and the gravity of that harm against the cost or burden imposed by the required precaution. Here the jury did so and found defendants negligent. That finding should not be dis- turbed.

In *Smith,* the plaintiff was raped by an intruder who entered through her broken window. Her request of the landlord to repair and secure the window fell on deaf ears. In upholding a jury verdict for the plaintiff the court stated:

.... it must be held that a reasonable person in the landlord's situation should have anticipated that the opening in the fire escape window was an invitation

763 S.W.2d 793
763 S.W.2d 793
(Cite as: 763 S.W.2d 793)

to a criminal entry into the plaintiff's apartment. It is not necessary that the crime of rape have been anticipated. Any violent crime may be expected to accompany a burglary.

There can be little doubt that a principal purpose of a latch on an intact window abutting a fire escape has as its principal purpose the exclusion of intruders. Under such circumstances the defendant may not be heard to say that the entry of the intruder excuses its failure to repair the broken window.

The cases cited above clearly show that this jury could properly find that the landlord's negligence was the proximate cause of this tenant's injuries. The jury did so find in this case. We cannot conclude from an examination of the record here that this jury's finding's are so against the great weight and preponderance of the evidence as to be manifestly unjust. Consequently, we must affirm the judgment of the trial court.

Tex.App.-Dallas,1988.
Benser v. Johnson
763 S.W.2d 793

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187 N.E.2d 504
116 Ohio App. 212, 187 N.E.2d 504, 22 O.O.2d 55
(Cite as: 116 Ohio App. 212, 187 N.E.2d 504)

Court of Appeals of Ohio, Third District, Marion County.
White, Appellee,
v.
The STANDARD OIL CO., Appellant.
May 15, 1962.

Action for personal injury alleged to have been caused by a fall by plaintiff who was on defendant's business premises to pay a bill when the heel of the plaintiff's shoe caught in a crack between the rear edge of the top step of a flight of stone steps and the front edge of a slab of a flagstone sidewalk leading to the defendant's office building. The Common Pleas Court, Marion County, entered judgment in favor of plaintiff on jury verdict and defendant appealed on questions of law. The Court of Appeals, Marion County, Guernsey, P. J., held that the evidence as to plaintiff's life expectancy and as to the future duration and permanency of her injuries was insufficient for the jury.

Reversed and remanded for new trial.

West Headnotes

[1] Negligence 272 ⇐1085

272 Negligence
272XVII Premises Liability
272XVII(D) Breach of Duty
272k1085 k. In General. Most Cited Cases
(Formerly 272k32(1))
An owner or occupier of lands is liable in damages to those who, using due care for their safety, come thereon at his invitation or inducement, expressly or impliedly given, on any business to be transacted with or permitted by him, or an injury occasioned by the unsafe condition of the premises, which is known to him but not to them, and which he has negligently suffered to exist.

[2] Municipal Corporations 268 ⇐766

268 Municipal Corporations
268XII Torts
268XII(C) Defects or Obstructions in Streets and Other Public Ways
268k765 Nature of Defects
268k766 k. In General. Most Cited
A municipality is not liable for a defect in its premises unless the defect constitutes not only an unsafe condition but is also of a substantial nature.

[3] Negligence 272 ⇐233

272 Negligence
272III Standard of Care
272k233 k. Reasonable Care. Most Cited (Formerly 272k4)
The test or standard of negligence is the exercise of ordinary or reasonable care, or the conduct of ordinarily or reasonably prudent persons in like circumstances.

[4] Municipal Corporations 268 ⇐755(1)

268 Municipal Corporations
268XII Torts
268XII(C) Defects or Obstructions in Streets and Other Public Ways
268k755 Nature and Grounds of Liability
268k755(1) k. In General. Most Cited Cases
The liability of a municipality for injuries due to defects existing in its ways is not the same as the liability of a businessman to his business invitee for injuries due to defects existing on the business premises.

[5] Negligence 272 ⇐1708

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1705 Premises Liability

NOTE DATE (TIME TO STUDY LAW)

577 N.E.2d 147
61 Ohio Misc.2d 216, 577 N.E.2d 147, 69 Ed. Law Rep. 511
(Cite as: 61 Ohio Misc.2d 216, 577 N.E.2d 147)

disabled students and there has been no showing that disabled students attended the communications class; also, the plaintiff is not a disabled student. Therefore, Standard 825.4 is not applicable to the instant case.

[2] The plaintiff, as a student at said university, was an invitee. The defendant, therefore, had a duty to exercise ordinary care to see that the premises were safe for an invitee using the premises in the exercise of due care. In addition, CSU had the duty to provide notice of any danger of which ***219** it had knowledge or, by using ordinary care, should have discovered. See 76 Ohio Jurisprudence 3d (1987) 18, Premises Liability, Section 7. Nevertheless, the defendant is not an insurer as to all accidents and injuries to such invitees. *S.S. Kresge Co. v. Fader* (1927), 116 Ohio St. 718, 158 N.E. 174; *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 65 O.O.2d 129, 303 N.E.2d 81.

The Restatement of the Law 2d, Torts, which sets forth the general rule in reference to the duty owed to an invitee, states:

"A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

"(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

"(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

"(c) fails to exercise reasonable care to protect them against the danger." Restatement of the Law 2d, Torts (1965) 215-216, Section 343.

[3][4] The burden of proof is upon the plaintiff to show that the condition which caused the injury was unreasonably dangerous; that the possessor knew of or should have discovered the condition; and, that the defendant failed to warn the invitee or take necessary precautions to protect the invitee from danger. Unreasonably dangerous conduct would involve an unreasonable risk of foreseeable harm to invitees such as the plaintiff. Risks are unreasonable if a reasonable person would ****149** find it necessary to take precautions against them.

Findings

[5] The class attended by the plaintiff consisted of approximately one hundred students. The evidence indicates that several students had preceded the plaintiff down stairwell E and across the doormat without incident. The mat had not been reported by any other student to be in a dangerous condition. The court is of the opinion that Officer Colbert's testimony concerning the plaintiff's statement is credible, especially since he recorded the facts immediately after the event. Also, the housekeeping assistant superintendent stated that if he had seen a mat in the condition described by the plaintiff he would have replaced it. The plaintiff's version of her fall could have been affected by her examination of the area sometime later.

In view of the above, the court finds that the plaintiff has failed to prove by a preponderance of the evidence the exact location of her fall and the cause thereof, as well as the fact that the defendant's negligence, if any, in placing ***220** an undersized doormat in a larger recessed area proximately caused her fall and subsequent injuries. Accordingly, the court further finds that the defendant was not negligent. If this court found that defendant was negligent, *arguendo,* it is the court's opinion that such negligence was not the proximate cause of the plaintiff's injuries, and was less than fifty percent of the cause of plaintiff's fall.

In finding that the plaintiff has not sustained her burden of proof, this court enters judgment for the defendant and against the plaintiff. Costs are assessed to the plaintiff.

Judgment for defendant.

190 N.E. 924
128 Ohio St. 335, 190 N.E. 924, 40 Ohio Law Rep. 649
(Cite as: 128 Ohio St. 335, 190 N.E. 924)

H

Supreme Court of Ohio.
GEDEON
v.
EAST OHIO GAS CO.
No. 24518.

May 16, 1934.

Error to Court of Appeals, Cuyahoga County.

Action by Edward Gedeon, administrator, etc., against the East Ohio Gas Company. Judgment in favor of the defendant was affirmed by the Court of Appeals and the plaintiff brings error.-[Editorial Statement.]

Judgment of the Court of Appeals reversed, and cause remanded to the court of common pleas in accordance with opinion.

As the parties stand here in the same relative positions as they stood in the court of common pleas, they will be referred to as plaintiff and defendant.

The action was one for personal injury. At the trial, counsel for the plaintiff, as part of his opening statement, read the petition and made certain explanatory remarks disclosing the following facts:

The plaintiff's decedent was driving a truck eastwardly on the south side of Denison avenue near the intersection of Fifty-Sixth street in the city of Cleveland. Joseph Ferencz, at the same time, was driving west-wardly on the north side of said Denison avenue. Just before these two automobiles passed each other, August Tesnow parked a car along the north curb of Denison avenue headed west, got out of said car on its left side directly into the street, and, without looking for traffic, started to cross Denison avenue toward the south. As alleged in the petition, Tesnow stepped from his parked car 'directly into the path of the automobile operated by Joseph Ferencz, at a time when said Joseph Ferencz was so close to the said Tesnow that it was impossible for said Joseph Ferencz in the exercise of ordinary care, to bring said automobile to a stop before reaching the said Tesnow.'To avoid striking Tesnow, Ferencz swerved his automobile to the left and 'into the path of the truck operated by the plaintiff's decedent at a time when said truck was so close that it was impossible for the plaintiff's decedent * * * to avoid a collision. * * *' The collision occurred just a little south of the center line of Denison avenue, which is a heavily traveled street with double car tracks. It is approximately forty feet wide.

Tesnow was a meter reader employed by the defendant. When the accident occurred he had just come from a building where he had read a gas meter and was on his way from the place where he had parked his car to a building across the street where he intended to read another.

The plaintiff's decedent was injured in the collision and the suit was for injuries so sustained. He died subsequently to the accident, but from other causes.

On the pleadings and the opening statement of counsel the defendant made a motion for judgment which was granted by the trial court. This judgment was affirmed by the Court of Appeals. The case comes into this court on allowance of a motion to certify the record.

West Headnotes

[1] Negligence 272 ⇐387

272 Negligence
272XIII Proximate Cause
272k374 Requi sites, Definitions and Distinctions
272k387 k. Foreseeability. Most Cited Cases
(Formerly 272k59)
Act constitutes negligence, authorizing recovery of damages for injury resulting therefrom, if reason-

ably prudent and careful person, under same or similar circumstances, should have anticipated that injury to plaintiff or to those in like situation would probably result.

[2] Negligence 272 ⚿232

272 Negligence
272III Standard of Care
272k232 k. Ordinary Care. Most Cited Cases
(Formerly 272k1)
"Negligence" is failure to exercise that degree of care which ordinarily careful and prudent person would exercise under same or similar circumstances.

[3] Automobiles 48A ⚿245(28)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(26) Identity and Status of Operator
48Ak245(28) k. Servant or Agent. Most Cited Cases
Where truck driver suffered injury in collision with automobile which, traveling along street in opposite direction, swerved to left to avoid hitting defendant's employee attempting to cross street, whether defendant's employee, in getting out of automobile parked along curb and attempting to cross street without observing traffic conditions, breached duty owing to truck driver so as to render defendant liable under doctrine of respondeat superior, *held* question of fact for jury.

[4] Negligence 272 ⚿386

272 Negligence
272XIII Proximate Cause
272k374 Requi sites, Definitions and Distinctions
272k386 k. Natural and Probable Consequences. Most Cited Cases
(Formerly 272k58)
Tort-feasor can be held legally responsible only for probable consequences of his act.

[5] Automobiles 48A ⚿245(65)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(B) Actions
48Ak245 Questions for Jury
48Ak245(50) Proximate Cause of Injury
48Ak245(65) k. Intervening Efficient Cause. Most Cited Cases
Where truck driver suffered injury in collision with automobile which, traveling along street in opposite direction, swerved to left to avoid hitting defendant's employee attempting to cross street, whether negligence, if any, of defendant's employee in getting out of automobile parked along curb and in attempting to cross street without observing traffic conditions, was "proximate and probable cause" of injury to truck driver, *held* question of fact for jury.

[6] Negligence 272 ⚿387

272 Negligence
272XIII Proximate Cause
272k374 Requi sites, Definitions and Distinctions
272k387 k. Foreseeability. Most Cited Cases
(Formerly 272k59)
Effect of wrongful act may be traced through conduct of human being, into consequence complained of, if probability of such result should have been anticipated by mind of reasonably prudent and careful person.

Syllabus by the Court.

*335 Damages for an injury resulting from a negligent act of the defendant may be recovered if a reasonably prudent and careful person, under the same or similar circumstances, should have anticip-

anyone. It is enough that the probability of injury to those in the plaintiff's general situation should have been perceived by a reasonably prudent and careful person. Lane v. Atlantic Works, 111 Mass. 136; Toledo Railways & Light Co. v. Rippon, 8 Ohio Cir. Ct. R. (N. S.) 334, 18 O. C. D. 561,affirmed without opinion 75 Ohi o St. 6 09, 8 0 N. E . 1 133; Harriman v. Ry. Co., supra, 45 Ohio St. at page 36, 12 N. E. 451, 4 Am. St. Rep. 507.

Tested by these principles, it is, in our opinion, impossible to say as a matter of law that Tesnow was free from negligence. Common experience attests the danger of stepping from the left side of a parked car directly into a heavily traveled street. Common experience likewise gives daily warning of the danger of crossing such a street in traffic without looking for the approach of vehicles. It is for the jury to say whether any reasonably careful and prudent person might be expected to know that his sudden and unexpected appearance in such a street in front of an on-coming car would probably cause its driver to take emergency action to avoid striking him, emergency action which might consist in swerving into another lane of traffic with a consequent collision.

In our opinion it was for the jury to say whether, under the facts stated, the plaintiff's decedent fell within the range of Tesnow's duty of care and whether that duty was fulfilled. Adams v. Yo ung, 44 Ohio St. 80, 4 N. E. 599, 58 Am. Rep. 789;Drew v. Gross, supra.

[4][5] Third. If Tesnow was guilty of negligence, was such negligence the proximate cause of the injury complained of? The law, in determining liability for harm done, refuses to follow the logical chain of causation beyond what it regards as the direct or proximate cause. Baltimore & Ohio Rd. Co. v. Wheeling, Parkersburg & Cincinnati Transportation Co., 32 Ohio St. 116. 'Proximate,' in this connection, is used in contradistinction*340 to the term 'remote.' The maxim, 'In jure non remota causa sed proxima spectatur,' was accepted as law in the time of Lord Bacon. 'It were infinite,' said he, 'for the law to judge of the causes of causes, and their impulsions one of another; therefore, it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree.'While the precise meaning of this classical statement has never perhaps been entirely clear, and much refinement of detail has been wrought into the doctrine since it was written, the general principle enunciated has never been abandoned. Not only do the practical limitations of judicial administration prohibit the attempt to follow backward to the end this 'infinite' series of causes, but the object of the judicial search is the breach of a legal duty to the person injured by a responsible human agent. It is idle to prosecute the search beyond those from whom a duty is owing. This consideration has led a majority of the courts to the adoption of the rule that a tort-feasor can be held legally responsible only for the probable consequences of his act. Hoag v. Lake Shore & M S. Rd. Co., 85 Pa. 293, 27 Am. Rep. 653; Crane Co. v. Busdieker (C. C. A.) 255 F. 664; Davis v. Schroeder (C. C. A.) 291 F. 47; Milwaukee Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256. The subject has been much labored, both by courts and by the writers of textbooks and articles, and many phrases have been propounded as the correct expression of the basic idea: 'Natural and probable;' 'natural and proximate;' 'proximate and probable;' 'direct and natural;' these and many other phrases have been used to describe the consequences for which compensation **927 is sought. By 'probable,' however, is not meant 'more likely than not,' but rather 'not unlikely,' or 'such a chance of harm as would induce a prudent man not to run the risk; such a chance of harmful result that a prudent man would foresee an appreciable risk that some harm *341 would happen.'25 Harvard Law Review, 103, 116; 33 Canada Law Journal, 717; Gilson v. Delaware & Hudson Canal Co., 65 Vt. 213, 26 A. 70, 36 Am. St. Rep. 802, note at pages 808 and 809.

Was the collision between the Ferencz car and that of the plaintiff's decedent a consequence legally traceable to the alleged, heedless act of Tesnow in

stepping in front of the Ferencz car? Much of what was said upon the second point, supra, becomes applicable here. The jury should have been allowed to pass upon the question whether the probability that such collision would result from such an act should have occurred to the mind of a reasonably prudent and careful person.

[6] There remains, however, one further point: Was the chain of causation broken by the independent act of Ferencz in deflecting the course of his car? Cases may be found to the effect that the volitional act of a human being midway in the logical chain of cause and effect breaks the legal nexus and prevents recovery. Pittsburg Reduction Co. v. Horton, 87 Ark. 576, 113 S. W. 647, 18 L. R. A. (N. S.) 905. But by the great weight of authority the effect of a wrongful act may be traced through the conduct of a human being, into the consequence complained of, if the probability of such result should have been anticipated by the mind of a reasonably prudent and careful person. Mouse v. Central Savings & Trust Co., 120 Ohio St. 599, 167 N. E. 868, 29 O. L. R. 257, 7 Ohio Law Abs. 334;Harriman v. Ry. Co., supra; Brunnworth v. Kerens-Donnewald Coal Co., 260 Ill. 202, 103 N. E. 178; Farnon v. Silver King Coalition Mines Co., 50 Utah, 295, 167 P. 675, 9 A. L. R. 248. This question, therefore, becomes but a corollary of the principal inquiry: Was the collision a probable consequence of Tesnow's act?

In our opinion, for the foregoing reasons, the petition and the opening statement of counsel made a case to go to the jury. The judgment of the Court of Appeals, therefore, will be reversed and the cause remanded*342 to the court of common pleas for further procedure in accordance with this opinion.

Judgment reversed.

WEYGANDT, C. J., and STEPHENSON, JONES, MATTHIAS, and ZIMMERMAN, JJ., concur.
Ohio 1934
Gedeon v. East Ohio Gas Co.
128 Ohio St. 335, 190 N.E. 924, 40 Ohio Law Rep.

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190 N.E. 924
128 Ohio St. 335, 190 N.E. 924, 40 Ohio Law Rep. 649
(Cite as: 128 Ohio St. 335, 190 N.E. 924)

ated that injury to the plaintiff or to those in a like situation would probably result.

*337 **925 Quigley & Byrnes and William A. Kane, all of Cleveland, for plaintiff in error.

Tolles, Hogsett & Ginn, of Cleveland, for defendant in error.

BEVIS, Judge.

For the purpose of this opinion the facts, as set forth in the pleadings, and as stated to the jury, must be taken as true.

The theory of the plaintiff's case is as follows:

(a) Tesnow was an employee of the defendant company, and at the time of the accident was engaged in his master's business and acting within the scope of his employment.

(b) In stepping from the left side of his parked car and, without looking for traffic, starting across the street into the path of an approaching machine close upon him, he failed to exercise the care required by his duty toward other persons upon the street, including the plaintiff's decedent.

(c) That such failure of exercise of due care was the proximate cause of the injury to the plaintiff's decedent.

Each part of above contention is controverted by the defendant.

The first point gives us no trouble. Tesnow was employed by the defendant to read meters. He had driven in his car from a building where he read a meter to the point where he parked the machine, and was on his way from that point to a building across the street where he intended to read another meter. He was upon his master's business; he was within the scope of his employment. By every criterion the rule of respondeat superior applies. It can make no difference that he was not then driving his master's car or *338 using any other instrumentality belonging to his employer. Pickens v. Diecker, 21 Ohio St. 212, 8 Am. Rep. 55; 29 Ohio Jurisprudence, 598.

[1][2][3] The second question, whether, upon the facts shown, there was a breach of duty toward the plaintiff's decedent, was in our opinion for the jury.

It is not claimed that Tesnow violated any statute or ordinance. His conduct, therefore, must be tested by the common law rules of negligence as they exist in Ohio. 'Negligence' is the failure to exercise that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances. Davison v. Flowers, 123 Ohio St. 89, 174 N. E. 137; 29 Ohio **926 Jurisprudence, 383. But before failure to use such care can be made the basis for recovery it must appear that the plaintiff falls within the class of persons to whom a duty of care was owing. Harriman v. Ry. Co., 45 Ohio St. 11, 20, 12 N. E. 451, 4 Am. St. Rep. 507; Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767; 29 Ohio Jurisprudence, 385. It is not enough that Tesnow was bound to look out for himself or was under a duty to exercise care for the safety of persons other than the plaintiff.

In delimiting the scope of duty to exercise care, regard must be had for the probability that injury may result from the act complained of. No one is bound to take care to prevent consequences which, in the light of human experience, are beyond the range of probability. Only when the injured person comes within the circle of those to whom injury may reasonably be anticipated does the defendant owe him a duty of care. Drew v. Gross, 112 Ohio St. 485, 489, 147 N. E. 757; Ford v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 107 Ohio St. 100, 140 N. E. 664; 29 Ohio Jurisprudence, 419, 420.

It is not necessary, however, that injury to the plaintiff himself be foreseeable. It is enough that the act in question may, in all human probability, produce harm *339 to persons similarly situated. Nor is it necessary that the defendant, himself, actually anticipate or foresee the probability of injury to