

Appeal No. 03-16946

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UNITED STATES COURT OF APPEALS  
NINTH CIRCUIT

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PHILIP R. MCNEIL,  
Appellant,

v.

VERISIGN, INC.,  
INTERNET CORPORATION FOR ASSIGNED NAMES & NUMBERS and THE  
STANLEY WORKS,  
Appellees.

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Appeal from the United States District Court  
for the Northern District of California,  
San Francisco Division  
Civil Action No. CV02-04534  
Judge Marilyn Hall Patel

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APPELLANT'S OPENING BRIEF

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## I. CORPORATE DISCLOSURE STATEMENT

Appellant is not a corporation, and FRAP 28-2.1 is inapplicable.

## II. STATEMENT OF JURISDICTION

### (a) Jurisdictional Prerequisites.

1. **Parties.** Appellant is a Canadian citizen who engaged in business in the United States, and in this forum, and who asserted claims below against three companies involved in an Internet domain dispute.

Appellee The Stanley Works (hereinafter "Stanley") is a Connecticut corporation with substantial business activities in the forum state. Stanley initiated a domain dispute proceeding (against Appellant) with ICANN ("Internet Corporation For Assigned Names & Numbers), a California corporation responsible for adjudicating domain disputes. Appellee VeriSign, Inc. is a California corporation which threatened to transfer Appellant's domains unless suit was filed in the district court. VeriSign has offices in the forum state. In addition, VeriSign registered Appellant's domains, and currently has custody and control over the domains.

2. **Nature Of Claims.** Appellant asserted contract and other claims against Appellees, and further requested declaratory and injunctive relief pursuant to 15 U.S.C. § 1125 and other federal law. Jurisdiction is therefore based on 28 U.S.C. § 1332(a)(2) (foreign citizen diversity), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1367 (supplemental), 28 U.S.C.A. § 1332(a)(2), 28 U.S.C.A. § 2201, and 28 U.S.C.A. § 1391(a),(b).

(b) **Basis For Claiming Judgment Or Order Appealed from Is Final.**

This appeal is from the District Court's order dated August 26, 2003. *ER:154-168*. The order resulted in the complete dismissal of the case, and is final and appealable pursuant to FRAP 54(b) and 28 U.S.C. § 1292.

(c) **Statute Showing Appeal is Timely.** Notice of appeal was filed September 26, 2003, and was therefore timely pursuant to FRAP 4.

**III. STATEMENT OF RELATED CASES**

There are no related cases pending.

**IV. STANDARD OF REVIEW**

The district court's ruling that collateral estoppel is available, is a mixed question of law and fact which is reviewed *de novo*. *Davis & Cox v. Summa Corp.* 751 F.2d 1507, 1519 (9<sup>th</sup> Cir. 1985).

Dismissal on grounds of abstention and/or *forum non conveniens* is reviewed for abuse of discretion. *Gemini Capital Group, Inc. v. Yap Fishing Corp.*, 150 F.3d 1088, 1091 (9<sup>th</sup> Cir. 1998). A dismissal on grounds of *forum non conveniens* must be accompanied by legal and factual findings that an alternate forum was adequate and available. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1982).

The district court's remaining conclusions and factual findings are reviewed under a "clearly erroneous" standard pursuant to Fed.R.Civ.P. 52(a).

**V. STATEMENT REGARDING ORAL ARGUMENT**

Collateral estoppel necessitates *de novo* review. In *de novo* review, the facts are reexamined, making oral argument useful, if not indispensable. Also,

recent court rulings on jurisdiction and venue in Internet domain disputes continue to be contradictory, conflicting, inconsistent and virtually irreconcilable, making oral argument additionally helpful.

## **VI. CERTIFICATE OF COMPLIANCE**

Appellant certifies pursuant to FRAP 32(a)(7)(C) that the brief complies with the type-volume limitations set forth in FRAP 32(a)(7)(B)(i), and contains 12,989 words using a proportionally-spaced typeface of 14 point or greater.

## **VII. ISSUES PRESENTED**

1. Whether McNeil —a Canadian engaged in business in the United States and operating websites through U.S.-based domains that criticize a U.S. corporation —had standing to assert violations of constitutional rights, including but not limited to free speech, freedom of the press, due process or equal protection.
2. Whether McNeil has standing to assert claims for declaratory and/or injunctive relief under 15 U.S.C. § 1125, federal common law, or the Lanham Act.
3. Whether the issues, claims and parties in a prior suit filed by McNeil were sufficiently similar to warrant complete dismissal of McNeil's second suit on the basis of collateral estoppel.
4. Whether Canada was an adequate proper forum for the parties' dispute, given that the Canadian action was not related, and had lain dormant for 4 years.
5. Whether the complaint stated any viable claims against any party and, if not, whether leave to amend should have been allowed.

6. Whether McNeil has standing to challenge ICANN's authority to (a) enact mandatory domain rules, (b) enforce those rules through binding administrative proceedings, or (c) coerce domain litigants to utilize the forum mandated by ICANN rules by threatening transfer of the domains if suit is filed elsewhere.
7. Whether ICANN had proper authority to enact binding rules, adjudicative procedures and/or administrative rulings governing Internet domain disputes.
8. Whether ICANN, the exclusive contractor of DOC for routine administration of the Internet domain database, was acting *under color of law* in enacting binding rules, adjudicative procedures and administrative rulings governing McNeil's domain name dispute with Stanley.
9. Whether ICANN had authority to enact a rule requiring McNeil to relinquish certain domain names unless he instituted litigation in a forum specified by ICANN rules.
10. Whether the Canadian forum was adequate given that: (a) additional claims and parties were involved, over which Canada has no jurisdiction, (b) all material events to the instant suit occurred in California, and all parties engaged in business there, (c) the Canadian action had now lain dormant for 4 years, unpursued by Stanley, and (e) the Canadian tort action involved subject matter unrelated to the instant dispute.



**B. Ruling Below.**

The district court dismissed the action in its entirety. However, in doing so, it ignored a multitude of forum contacts, and every significant aspect of the law applicable to standing, collateral estoppel and *forum non conveniens*. In fact, in stretching for dismissal, the district court mis-cited two Supreme Court decisions it contended stood for the proposition that foreign citizens cannot assert claims for violations of certain constitutional rights. *ER:160*.

In dismissing all claims against all parties, the district court further failed to grant leave to amend, ruling that no facts or cognizable legal theories to support the claims even existed. The district court also ruled that collateral estoppel barred Appellant's claims against Stanley, which Appellant had sued in a prior action *involving different parties, different legal theories, and different factual circumstances*. The district court further held that, in any event, the forum was inconvenient, and dismissed on that basis as well.

**C. District Court Rulings Were Clearly Erroneous.**

The rulings of the district court are factually and legally insupportable. In misstating and mis-citing applicable law, the district ruled, in effect, that: (1) a Canadian citizen doing business in California, (2) can be dragged into an administrative proceeding instituted by a California corporation, (3) while that same California corporation (ICANN) — acting at the behest, and with the authority, of a federal agency, (4) requires the Canadian citizen to stipulate to California as the forum for resolving the parties' dispute, (5) then threatens the



Canadian citizen deprivation of property (i.e., immediate transfer of the domains) if the citizen brings court proceedings related to the domain dispute anywhere but in the forum selected by ICANN, i.e., San Francisco, California.

Paradoxically, at least according to the district court, that same litigant must then go to Canada — a country with no meaningful or tangible connection whatsoever with the parties or the legal controversy, and no demonstrated authority or jurisdiction over several of the parties or claims — in order to litigate any adverse administrative rulings or other legal issues relating to the parties' business transactions, domain names and relationships. Relationships that arose and exist exclusively in California.

The district court's ruling is facially implausible, and resulted from a gross misinterpretation and misapplication of the principles of *forum non conveniens*, collateral estoppel, established Supreme Court precedent, and other applicable law. As such, the ruling is patently inconsistent with federal law, clearly erroneous, and should be reversed.

**D. Procedural Background.**

Three years ago the district court dismissed McNeil I (*Philip R. McNeil v. The Stanley Works*, District Court Civil Action No. 00-1509 — Appeal No. 00-16557) on grounds of *forum non conveniens*.

On August 26, 2003, after concluding the instant action (hereinafter "McNeil II") was identical to McNeil I (even though it was not), the district court dismissed McNeil II, arguing it was barred by principles of collateral estoppel. In its order, the district court misinterpreted and misapplied the law governing constitutional rights applicable to foreign citizens.

The court further insisted that, regardless of the presence of new parties, claims, issues and circumstances, the suitability of the forum was an issue that had already been adjudicated, and could not be re-litigated. The district court concluded, in fact, that no viable claims had been stated against any of the Appellees. In its order of dismissal, the district court did not grant leave to amend the complaint.

At the conclusion of its order, the district court urged the imposition of sanctions, suggesting (incorrectly) that Plaintiff had brought "*the **identical** action back to this court.*" Further admonishing the Plaintiff, the court said: "*Even a perusal of Stanley's moving papers, would easily have discovered the frivolousness of plaintiff's complaint,*" and that the circumstances had "*not changed in any respect between plaintiff's first complaint and the action now before this court.*" ER:163-164.

**E. Summary Of District Court's Erroneous Rulings.**

The district court characterized or, more aptly, *mischaracterized* the gravamen of the complaint as being: (a) an alleged abridgment of "First Amendment" rights, and (b) a denial of due process for having been denied federal court access by ICANN. ER:159.

The court did not mention or acknowledge McNeil's alleged right to standing under the ACPA pursuant to interstitial federal common law, or discuss in any detail the alleged violations of due process or equal protection. As the primary legal support of its dismissal of McNeil's constitutional claims, the district court mistakenly relied on *U.S. v. Verdugo-Urquidez*, and *Kwong Hai*

*Chew v. Colding, supra* —two Fourth Amendment cases that have little, if any, relevance to the circumstances identified in the complaint, or the legal ruling ultimately issued by the district court. *ER:160*.

As it stands, no material observation made by the district court was correct, and its order of dismissal mischaracterized both the nature and basis of the relief sought.

The complaint sought standing and relief under the ACPA. The complaint also identified, and sought relief for, a well-documented and pressing legal dilemma that had resulted from ICANN's arbitrarily imposed forum selection rules —rules which forced Appellant to file suit in San Francisco in order to avoid transfer of his domains and immediate termination of the websites operating through those domains —an infringement the district court wrongly determined to be *de minimis*. The complaint further challenged the ACPA's facially discriminatory standing requirements on due process and equal protection grounds. For whatever reason, the district court ignored many of these claims.

Simply stated, the complaint stated viable federal claims the district court was obligated and *required* to hear — claims that are dramatically different from those asserted in *McNeil I*, and which were explained and further delineated in *McNeil's Verified Response To Defendants' Various Motions To Dismiss. ER:135-154*. As a result, the venue determination in *McNeil II* was materially different and, in any event, rendered the doctrine of collateral estoppel totally inapplicable. Claims against VeriSign and ICANN —major participants in the domain dispute —were also adequately pled and improperly

dismissed, without leave to amend.

Accordingly, the district court's order of dismissal should be REVERSED, and the case remanded for proceedings consistent with this Court's opinion.

### IX. SUMMARY OF ARGUMENT

#### A. Introduction.

The complaint in the instant case requested, among other things, declaratory relief under 15 U.S.C. §1125 (the "Anti Cyber-Piracy Protection Act" or "ACPA"). *ER:15-21*.<sup>1</sup>

In the complaint, Appellant contends it is fundamentally unfair, and constitutionally unacceptable, for the ACPA (or federal law in general) to accord Stanley standing to obtain a domain determination under federal law, but to

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The ACPA permits trademark owners *worldwide* to seek and obtain injunctive and declaratory relief vis-a-vis a domain owner, or against the name itself. Under the Act, federal courts must issue a declaration of the domain owner's right to use the name, and/or compel transfer of the name to the alleged trademark owner. Under its literal terms, however, the Act appears to only grant standing to trademark owners challenging the right of others to register, own or use the names in question. Standing for domain owners to obtain a judicial clarification regarding their rights — even upon threat of legal action by the trademark owner — is not specifically granted by the Act.

In the instant action, Stanley could have used the ACPA to obtain an expedited *federal court* ruling on McNeil's right to own and use Stanley-related domains for anti-Stanley web sites. Yet Stanley has consistently avoided a federal adjudication, preferring instead to file multiple ICANN petitions before ICANN arbitrators who have little or no knowledge or understanding of trademark and/or constitutional law. Ironically, in those ICANN filings, Stanley consistently stipulates to San Francisco as the forum for appeals and related court proceedings. Then, when McNeil files an appeal there, objects on the basis of *forum non conveniens*.

deny McNeil that same right. Though the district court ruled Appellant was barred from asserting such claims on the basis he was not a U.S. citizen, there is legal authority contradicting the district court's opinion. See *Times Newspapers Limited v. McDonnell Douglas Corporation*, 387 F.Supp. 189 (C.D. Ca. 1974) (First Amendment guarantees available to foreign newspaper). Either way, McNeil's complaint alleges that the disparity in remedies afforded by the ACPA is constitutionally infirm irrespective of whether McNeil is a U.S. citizen, or "state action" is present. ER:15-21.

Fact is, McNeil engaged in business activities in the United States by purchasing domain names and publishing websites, and is entitled to the protection of U.S. laws, and the availability of U.S. courts for pursuit of his legal and constitutional claims. 28 U.S.C. § 1332(a)(2). Thus, much like the London newspaper in *Times*, McNeil has standing to challenge infringements on First Amendment freedoms. Regardless, he has an implied right of standing under the ACPA, and citizenship and "state action" are irrelevant to his standing under that Act.

A single ACPA declaratory action —which is exactly what McNeil seeks — is far superior to the multiple, piecemeal ICANN proceedings thus far filed by Stanley, and to sending 3 California companies (and a Canadian citizen doing business in this forum), to Canada to litigate claims which arose, in every respect, within the ambit, venue and jurisdiction of United States law and United States courts. Contrary to the district court's decision, no federal trademark law —certainly not the ACPA —contains any provision which even remotely restrict the availability of "fair use" or other defenses to U.S. citizens alone.

Either way, the district court's contentions that (a) McNeil could not assert constitutional claims, and (b) that the ICANN proceeding did not constitute "state action," are patently frivolous and baseless.

As will be demonstrated (and was already demonstrated to the court below), McNeil has standing to assert constitutional claims. Secondly, state action exists, because ICANN is the government's sole arbiter of domain disputes, and erected an entire (and improper) legal framework for resolution of domain disputes. ICANN oversees and maintains that framework *exclusively* for DOC, and undeniably was acting under "color of law." Thus the district court's ruling on "state action" was also clearly wrong.

The allegations of the complaint clearly suffice to state cognizable federal, legal and constitutional claims, including satisfying the state action requirement vis-a-vis any claims for abridgment of fundamental rights. *ER:1-28*. See *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941); *Ort v. Pinchback*, 786 F.2d 1105, 1107 (11<sup>th</sup> Cir. 1986); *Carswell v. Bay County*, 854 F.2d 454 (11<sup>th</sup> Cir. 1988) (private physician who was contractor for county jail acted under *color of state law* in providing medical services to inmates for county); *West v. Adkins*, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

McNeil's complaint (*ER:15-21*, ¶¶77-79, 88-90, 95) directly requests declaratory relief pursuant to the ACPA and/or federal trademark law (*ER:15,17* ¶¶74,84), and further states such relief is implied under the Act and/or federal common law. Otherwise, as the complaint contends, the Act is invalid insofar as it denies McNeil equal protection and/or due process of law. In this regard, McNeil specifically challenges the Act's provisions permitting *trademark*

owners, but not *domain owners*, to obtain declaratory and injunctive relief under the Act.

The complaint also raised an issue that apparently few courts are willing to entertain, i.e., that ICANN is operating illegally.

Due to the disparate and discriminatory standing provisions of the ACPA, and pursuant to ICANN rules, Stanley has the ability to file multiple legal proceedings in the U.S. through ICANN —informal proceedings that are adjudicated without confrontation of witnesses, the right to a hearing or other constitutional protections. Yet, according to the district court, McNeil has no accompanying right to challenge the ICANN determinations in a U.S. court.

Stanley also has the option of filing a federal action under the ACPA in a federal district court. McNeil, on the other hand — *at least on the face of the ACPA* — has no standing whatsoever, which the complaint contends is fundamentally unfair.

In a nutshell, the complaint contends McNeil came into the country to engage in business, purchase domains, publish an anti-Stanley message through U.S.-based domains and engage in business with U.S. companies, yet is being denied the rights and protections of its laws, including court access to pursue those parties and due process of law.

The complaint specifically notes the alleged unconstitutional discrepancy in treatment, noting: ***“To accord Stanley the right to American courts to retrieve the names, but to deny McNeil standing to enforce his legal rights to the names, constitutes a denial of due process and equal protection.”*** ER:18, ¶ 89.

The district court ignored every substantive claim raised by McNeil, including his due process and equal protection claims, ruling in effect that the absence of "state action" completely undercut McNeil's right to assert those claims. Nothing could be further from the truth.

There is, first and foremost, no statutory requirement under any federal trademark law, or the ACPA, that prevents foreign citizens, and U.S. citizens alike, from having the ability to assert "fair use" or other trademark defenses, or to assert defense based on equal protection and/or lack of due process claims. Under those statutes, any citizen of any country is subject to trademark claims, and has the ability to raise all statutory and constitutional defenses. The cases cited by the district court in support of its notion that McNeil — a Canadian citizen — has not standing to assert constitutional claims are, to say the least, inapposite.

McNeil's complaint points out the discriminatory standing provisions of the ACPA, and appropriately requests a declaration regarding his implied right of action under the ACPA. It further requests a court determination on the merits of his claim to own and use the domain names purchased, and which reside and are used, in this country. ER:19-20, ¶ 94(e),(f).

**B. *ICANN: An Entity Operating Illegally, And Outside The Confines Of Its Executive Mandate.***

The district court briskly dismissed McNeil's claims against ICANN. Yet the complaint identified a flawed executive and operational mandate, and challenged the very authority of ICANN to compel parties to participate, and be bound by, ICANN rulings.



At a more fundamental level, the complaint also challenged the authority of ICANN to enact, implement and enforce rules governing Internet domain disputes. The complaint alleges, in fact, that ICANN is a forum operating outside the confines of the law, in excess of a grant of authority from the executive branch of government (DOC), and in accordance with self-enacted rules and hearing procedures that, as noted in the complaint, lack due process, equal protection and substantive legal protections.

McNeil's claims go to the very core of ICANN's flawed (or non-existent) executive mandate. These allegations are serious and material, imply federal law, and should be decided by a U.S. court.

Notably, ICANN actions — unlike ACPA actions and formal governmental administrative proceedings — do not permit hearings, confrontation of witnesses, formal presentation of evidence, or other procedural safeguards mandated by the constitution and built into the federal court system.

As a result of ICANN's enactment, implementation and enforcement of non-viable, unconstitutional legal rules and procedures, its continued operation not only poses identifiable risks for McNeil, but routinely imposes an unconstitutional adjudicatory process on thousands of domain litigants annually.

A quick perusal of various websites devoted to reporting ICANN decisions (or reference to Appellant's brief below), illuminates and reveals an organization in the midst of legal chaos, insofar as ICANN routinely issues contradictory, legally baseless written opinions that are in direct conflict with federal trademark law, and which consistently ignore (or uphold) "fair use" and other trademark

defenses—depending on the whim of a particular ICANN adjudicator. *ER:1-28, 96-134, 135-154; www.udrplaw.net.*

As such, McNeil and the remainder of the Internet community long ago recognized something the legal community has yet to formally acknowledge, i.e., ICANN is out of control. As is obvious from closely examining ICANN's legal mandate, rules and decisions, it routinely operates outside the scope of its legal authority, its adjudicatory functions need to be terminated, and its authority to issue anything but advisory opinions, permanently enjoined. As noted in the complaint, it is also legally and constitutionally unacceptable that the *res* of an ICANN action (i.e., the domain names themselves) are forfeited within ten days unless suit is filed in the forum specified by the parties and by ICANN, within 10 days of an adverse ruling.

In refusing to honor the parties' forum choice (governed by ICANN rules), the district court ignored every substantive aspect of the U.S. Supreme Court's holdings in *Carnival* and *Bremen, supra*, not to mention this Court's holding in *Monegro v. Rosa*, 211 F.3d 509 (9<sup>th</sup> Cir. 2000). McNeil's instant appeal challenges the district court's dismissal of the case on all the foregoing grounds.

**C. Recent Court Rulings.**

McNeil seeks a hearing on the merits, which is warranted under existing law. However, the district court and the Appellees ——— perhaps offended by McNeil's anti-Stanley websites, and reluctant to confront or accept the legality of same — consistently and staunchly oppose such a hearing.

It should not be forgotten that this dispute arose as a result of Stanley's alleged defrauding of McNeil, and that McNeil was devastated financially as a result. If anyone has a right to launch a website critical of a company, it is someone defrauded by that company. Thus, for whatever reasons Appellees (or the district court) remain unenamored with McNeil's approach, the origin of his opposition to Stanley is something that should be acknowledged and accepted.

Regardless, recent court decisions aptly illustrate the legally vapid nature of the legal opposition to McNeil to date. The Sixth Circuit, and more recently the United States Supreme Court, clarified some of the legal rights of domain owners. Yet ICANN rulings still do not reflect an acknowledgment of these decisions. In fact, ICANN rulings continue to routinely ignore, defy or distinguish these critical court decisions on grounds that are illogical and irrelevant. Numerous ICANN decisions demonstrate the inherent and continuing unconstitutionality of ICANN rules, decisions and procedures, just as noted in McNeil's complaint and verified briefs. *ER:1-28, 96-134, 135-154.*

The ICANN administrative process quite simply cannot pass constitutional muster, and McNeil is justified in seeking other options, e.g., this federal court, where he should be entitled to standing under the ACPA, and/or federal common law. The district court erred in denying McNeil access to a federal forum, warranting reversal.

## **X. ARGUMENT AND CITATION OF AUTHORITY**

### **A. Factual Background.**

Philip R. McNeil is a former tool distributor for The Stanley Works ("Stanley"). McNeil contends Stanley defrauded him, breached his distributor

agreement, and committed numerous violations of the Alberta Franchise Act. McNeil's initial suit over his distributorship, was filed against Stanley in Canada in 1998, and was referred to arbitration at Stanley's insistence. However, Stanley thereafter ignored McNeil's numerous requests to arbitrate, resulting in McNeil launching several web sites criticizing Stanley for its litigation practices and business practices, including its (a) mistreatment of distributors, and (b) reluctance and delay in undertaking arbitration. ER:4-5, 120-122.

Upon launching the web sites, McNeil learned Stanley had engaged in fraudulent business practices throughout Canada and the United States. On his websites he promptly posted documentation containing information about six- and seven-figure punitive damage verdicts rendered against Stanley for abusive management and business practices, and for its systematic mistreatment of thousands of current and former dealers. The fraudulent, unfair and deceptive business practices of this *former* Fortune 500 company, now occupy a prominent and unsavory place in the history of America's mobile tool industry. ER:4-5, 12, 109-110, 120-122. See also [www.StanleyWorks.net](http://www.StanleyWorks.net) and [www.MacTools.ab.ca](http://www.MacTools.ab.ca).

Stanley, although the target of hundreds of claims asserted by its U.S. dealers, had not been previously sued by any Canadian distributor —at least, not until pursued by Philip McNeil. After Stanley ignored numerous requests by McNeil to submit the parties' claims to arbitration, McNeil began launching anti-Stanley websites criticizing the company's treatment of dealers.

Stanley retaliated by filing a \$15 million tort suit against McNeil (seeking a court order destroying McNeil's computers and software, and a permanent injunction barring McNeil from any future Internet activities). Since filing, that suit has lain dormant for 4 years, with Stanley refusing to produce the first document evidencing McNeil's so-called defamation of the company. *ER:14, 112.*

1. Stanley Files 1st ICANN Proceeding. Shortly after Stanley filed the aforementioned frivolous, retaliatory \$15 million tort action against McNeil in Canada —a dispute which has little or nothing to do with the instant action — it filed a claim with the Internet Corporation for Assigned Names and Numbers (ICANN), a California corporation with exclusive authority from DOC to regulate Web-based domains, enact regulations governing domains, and adjudicate domain disputes. ICANN ruled that McNeil owned two domains that infringed on Stanley's trademarks, and McNeil attempted to appeal this ruling to the district court in McNeil I. *ER:51-56.*

In its first ICANN petition —and in every ICANN petition filed since then —Stanley stipulated to San Francisco as the forum for resolving all disputes over the ICANN determination, per ICANN rules. In the initial ICANN proceeding, Stanley sought to recover *thestanleyworks.net* and *stanleyworks.net*, — domains being used to host McNeil-operated web sites that were critical of Stanley. *ER:6.* By that time, ICANN had assumed sole responsibility for DOC functions, including: (a) oversight of Web-domains, (b) enactment of regulations governing domain registration and ownership, (c) adjudication of domain

disputes through an abbreviated, summary procedure that did not provide for hearings, evidence, witnesses, or confrontation of witnesses, and (d) adoption of formal rules and procedures governing domain registrars and any party having contact with the domain name database.

Following McNeil's first ICANN proceeding with Stanley, ICANN ruled in favor of Stanley, and awarded both the foregoing domains to Stanley. *ER:7*.

2. *ICANN Forum Stipulation*. As noted above, both McNeil and Stanley were forced, by the terms of ICANN-mandated registration (and/or dispute resolution) agreements, to stipulate to a specific venue for filing any appeals. According to that rule, an appeal had to be filed within ten (10) days of the adverse decision —otherwise, the domains would be transferred from McNeil to Stanley without further ado. *ICANN Rules 4(k), 3(b)(xiii)*. In the instant case, VeriSign announced its intention to immediately comply with these rules directly following the second ICANN determination. *ER:23-24*. The prompt transfer of the names posed irreparable harm to McNeil, and would have wrongfully, and without due process, resulted in termination of his web sites located at those domains.

In McNeil I, VeriSign's predecessor had done just that, i.e., wrongfully transferred the domains even though court proceedings were pending. However, the district court in McNeil I ignored McNeil's request to join the registrar as a party. *ER:46-47*.

Premature transfer of the names was a result McNeil sought to avoid in McNeil II, and part of the reason he joined VeriSign as a party from the outset. This made VeriSign immediately cognizant of the district court proceedings, and

subject to the authority of the court regarding name transfers. In fact, in an email sent by VeriSign to McNeil directly following the second ICANN ruling, VeriSign threatened to immediately transfer the domains *unless a court proceeding was instituted in the venue specified by ICANN rules (i.e., San Francisco)*. ER:23-24, 107-108.

McNeil thus joined VeriSign as a party defendant. However, information about other misconduct of VeriSign quickly surfaced. After McNeil II was filed, the Internet's domain name database (i.e., the "Whois" database), reflected that not only had the name been frozen for 9 months but, in contravention of its Snap Names agreement with McNeil, VeriSign officially transferred an expired name (which had been promised to McNeil) to Stanley. This change was not made public by VeriSign until after suit was filed, though Stanley reported that it *had* been consummated some time prior to that. McNeil brought the post-petition breach of contract claim to the district court's attention, but the district court ignored it, and failed to grant leave to amend. ER:119-120.

**B. *Claims Asserted In McNeil I.***

The facts, claims, circumstances and parties in McNeil II differed considerably from those involved in McNeil I, making collateral estoppel (and dismissal) inapplicable.

Firstly, the complaint in McNeil I asserted completely different claims, i.e.: (a) an appeal of the first ICANN ruling, (b) abuse of process, (c) intentional infliction of emotional distress, and (d) violations of 42 U.S.C. §1983. No claim under the ACPA was mentioned or asserted in McNeil I, nor was it ruled upon. ER:31-50.

Secondly, the dismissal of McNeil I rested on different facts and reasoning. In its order of dismissal (dated July 24, 2000), the district court cited the following reasons in support of its dismissal of McNeil I, said reasons which no longer existed by the time McNeil II was filed: (ER:51-56)

- 1) There was no "**federal question**" involved, thus the district court had no "**unflagging obligation**" to hear the suit;
- 2) The same issues "**are being litigated in other forums**" (i.e., the \$15 million tort action filed by Stanley against McNeil in Canada);
- 3) The \$15 million tort action in Canada constitutes a "**parallel proceeding**" within the meaning of the doctrine of *forum non conveniens*, and is clearly a "**more appropriate forum**" for handling the claims and parties involved;
- 4) It is important to avoid "**piecemeal litigation**," and clearly litigation of McNeil's tort claims in the U.S. would create "**duplicative litigation**;"
- 5) The "**witnesses and evidence are all in Canada**,"
- 6) "Canada's interest in this litigation is **much stronger** than that of the United States;"
- 7) Litigation of the claims in Canada would make the litigation "**less costly** for all parties;"
- 8) The "claims regarding the business relationship **arise out of occurrences in Canada**;"
- 9) The "**balance of private and public factors points toward Canada**" as the more appropriate forum;



- 10) McNeil's sole ties with the forum are his "*dealings with ICANN*" and his "*registration of certain domain names with ICANN*" —a "[California] corporation that is not a party to this litigation;"
- 11) Based on the foregoing reasons, hearing the case in the United States would "*be a waste of judicial resources.*"

C. *Events Transpiring Between McNeil I and McNeil II.*

Subsequent events also altered the legal landscape for the filing of McNeil II. After McNeil appealed the district court's *forum non conveniens* dismissal of McNeil I, and while the appeal in this Court was being decided, Stanley inexplicably abandoned the 2 domains, and McNeil re-registered one of the abandoned domains through VeriSign's "Snap Names" subsidiary. "Snap Names" is a VeriSign entity that monitors expiring domains, and renews them for the party subscribing to the "Snap Names" service.

Strangely enough, VeriSign "froze" the other expired domain for over nine months —giving rise to a breach of contract claim on McNeil's behalf —and refused to transfer it to McNeil throughout that period. VeriSign then eventually re-transferred the second abandoned domain to Stanley — all in direct violation of its Snap Names' agreement with McNeil (as mentioned in prior briefs and/or pleadings filed with this court). VeriSign also wrongfully withheld from the publicly-accessible Whois database its belated re-registration of the domain to Stanley until *after* the instant suit was filed. *ER:119-120.*

A few months later, Stanley filed a second ICANN proceeding (to recover 4 other domains owned and used by McNeil, said domains which were not

included in the first ICANN proceeding). As the complaint notes, the names involved in the two ICANN proceedings (and, accordingly, in McNeil I and McNeil II) were different. The complaint sought declaratory relief regarding the two domains from the first proceeding that Stanley had since abandoned.

As is obvious, several new claims and parties were joined in McNeil II, including ICANN and VeriSign. Also, in the second ICANN proceeding, just as in the first ICANN proceeding, Stanley and McNeil stipulated to San Francisco as the forum for resolving any appeals from the domain dispute. *ER:8*.

Despite the district court's suggestion to the contrary, the consequences of refusing to utilize the chosen forum, were significant. In fact, had McNeil not filed the instant action in San Francisco per the stipulation, then VeriSign — pursuant to ICANN rules — would have transferred the names to Stanley within ten (10) days. In an effort to underscore the imminence of transfer, and the legal requirement to bring any appeal to the ICANN ruling in San Francisco, VeriSign promptly sent McNeil an email warning him that the domains would be transferred if an appeal was not promptly filed in San Francisco. *ER:23-24*.

***D. Legal And Factual Conundrum Giving Rise To McNeil II.***

By the time McNeil II was filed, the circumstances had changed dramatically and materially. Moreover, all the above reasons cited by the district court for the prior dismissal of McNeil I, were either no longer applicable, or did not exist. The facts were different, the claims were different, the parties were different, and the statutory basis for McNeil's federal claims rested squarely on the ACPA and other federal law. Moreover, by that time

Stanley had abandoned the domains which were the subject of McNeil I, raising still another issue for the district court to adjudicate.

By this time, as already noted above, McNeil further realized that he had viable claims against 2 other California-based companies, including VeriSign (who had threatened to transfer the 4 most recent domains to Stanley unless an appeal was filed in San Francisco), and ICANN (which, as the district court acknowledged in its order dismissing McNeil I, was a party with which McNeil had forum connections). *ER:54.*

After the complaint in McNeil II had been filed, McNeil realized that, not only had VeriSign refused to transfer the second abandoned domain to him for 9 months, but now the official registration records showed it had been re-registered to Stanley—all in breach of McNeil's contract with Snap Names. These circumstances were mentioned in McNeil's aforementioned Verified Response, filed in district court, but the order of dismissal failed to give McNeil leave to amend. Another related factor not mentioned to the district court, was the fact that the agreements of Registrar.com (VeriSign's predecessor) and VeriSign, also required litigation to take place in California. *ER:76.*

In summarizing the new claims, new parties, and changed circumstances in McNeil, we note:

- 1) A direct challenge to ICANN's authority to expose McNeil to repeated U.S.-based ICANN actions was being leveled;
- 2) Claims asserted against the domain registrar, VeriSign, Inc.;

- 3) Canada no longer has any actual or perceived connection with the dispute, and the Canadian tort action has now lain dormant over 4 years;
- 4) Canada has no perceived jurisdiction over the parties, subject matter or claims set forth in McNeil II;
- 5) Stanley has now abandoned the 2 domains involved in McNeil I;
- 6) McNeil reacquired one of the abandoned domains, and launched a web site there, prompting Stanley to send McNeil a letter threatening to institute yet a *third* ICANN proceeding to recover that name;
- 7) VeriSign failed and refused to transfer the other abandoned domain to McNeil, in contravention of its Snap Names' agreement with McNeil, even though Stanley's registration had been expired for 9 months — a blatant violation of the parties' agreement;
- 8) Stanley sought acquisition of 4 more domains by virtue of the *second* ICANN decision, which would thereby terminate McNeil's web sites located at those domains. Thus, an appeal from the most recent ICANN determination had to be filed in the specified forum (i.e., San Francisco) within 10 days;
- 9) VeriSign confirmed to McNeil in an email that it would transfer 4 domains to Stanley (the subject of the *second* ICANN proceeding), unless an appeal was filed within ten days in the specified forum (i.e., San Francisco) per ICANN Rules.

The foregoing facts, circumstances, claims and parties contraindicated the applicability of collateral estoppel, and warranted the district court taking a new view of McNeil's legal contentions.

***E. McNeil II Raises Different Claims And Joins New Parties.***

ICANN rules required transfer of the disputed domains if legal action was pursued anywhere except ICANN's mandated forum. As noted in the complaint, a rule forcing *either* party to file suit in a specific venue —particularly one where the court of record had already expressed dissatisfaction with the ICANN forum choice rules — is not viable nor reasonable.

That is why McNeil asked the district court in *McNeil II*, to clarify the parties' rights and responsibilities as regards forum choice. Either way, McNeil would have suffered irreparable harm had he not filed *McNeil II* in San Francisco within the allotted ten-day time frame prescribed by ICANN, and his websites located through those domains would have been terminated without due process.<sup>2</sup>

ICANN's rule forcing immediate forfeiture of the names, and VeriSign's complicity and participation in involuntary name transfers such as the one sought and threatened in the instant case —without any due process guarantees

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<sup>2</sup>

The district court held that closing down McNeil's websites at those domains was of no legal importance. However, this conclusion is unsupported by competent evidence or law, and is illogical. First of all, the importance of McNeil's websites being accessed through those domains, is the focal point of the parties' legal dispute. Secondly, it is doubtful any entity (including the district court) would regard the involuntary closing of its own website as an inconsequential event.

whatsoever, or due process hearing —is unconstitutional, and thereby fatal (among other things) to ICANN’s regulatory scheme.

ICANN proceedings routinely eschew due process and ignore applicable law. ICANN rulings should therefore have limited applicability and should not carry legal consequences, e.g., the involuntary forfeiture of names without a hearing or other procedural safeguards mandated by due process. In any event, parties should not be forced into venues where the court of record contends they do not belong, as the only alternative to losing control over the property involved in the dispute. Accordingly, ICANN should be judicially limited to issuing only *advisory opinions*, with no force and effect until a due process hearing is held, or a “true” adjudication on the merits is obtained. *ER: 124-125.*

Stanley has continually insisted — as noted in McNeil’s complaint —on obtaining immediate control over any disputed domains and then avoiding a federal court determination of the parties’ legal rights. In addition, Stanley has threatened to file still a third ICANN petition. *ER:7-8.* Thus the threat of future ICANN proceedings and other resulting litigation, is imminent, and also formed a basis for McNeil’s request for declaratory relief. Arguably all these ICANN proceedings involve a claim yet to receive appropriate judicial attention, i.e., does operation of McNeil’s websites through the domains constitute infringement of Stanley’s marks, warranting transfer of the domains.

The threatened future ICANN filings, and the time and inconvenience involved in litigating them, is a consequence that McNeil II’s request for declaratory relief under the ACPA properly, but unsuccessfully, sought to avoid.

Yet, under the circumstances, judicial intervention by the district court was warranted and required.

If Stanley were truly a conscientious litigant bent on conserving judicial resources then, in an effort to avoid multiple ICANN filings and adjudication, it should have no problem agreeing to one, just one, federal disposition on the merits. Such a proceeding is warranted under existing federal law, but has never been given. Yet such a proceeding would resolve the underlying legal issues in a constitutionally appropriate setting. What possible objection could Stanley have to that method of resolution? None, unless it prefers to subject McNeil to repeated, meaningless and constitutionally-flawed ICANN hearings that carry harsh and illegal consequences, i.e., forfeiture of property rights prior to a due process hearing.

The complaint in McNeil II identified the benefits of one suit, and the legal conundrum caused by the ICANN forum choice provisions. The complaint, in fact, identified and explained the problem in detail, attached pertinent documents, and asked the district court for guidance in the form of declaratory relief under the ACPA. The circumstances, parties and claims were different from those asserted in McNeil I, and fell well within the ambit of the district court's statutory and constitutional functions, i.e., to resolve conflicts between parties involved in a justiciable controversy, and to define their rights. More importantly, they were claims the district court was compelled to adjudicate.

How much longer can ICANN's legal ruse be allowed to continue? Appellant's position is that the predicament in which he found himself, and

continues to find himself, goes to the very heart of the unconstitutionality and irrationality of the current domain adjudication, as well as ICANN's basic rules—rules which are being manipulated by each of the Appellees to achieve improper ends. These legally skewed and unconstitutional rules repeatedly impose unfair legal standards, and force parties into a legal process that lacks due process and results in deprivation of property. Directly parallel to ICANN's flawed adjudicatory process, is a law passed by Congress which improperly accords federal rights to *trademark owners*, but concomitantly denies similar rights of standing to *domain owners*. Both the foregoing are situations McNeil II seeks to prevent, avoid, rectify and reform.

To illustrate these points, it needs to be pointed out that the complaint in McNeil II *specifically* asked the district court for certain declaratory and injunctive relief, most of which was ignored in the district court's order of dismissal, including but not limited to:

- 1) Declaring McNeil had the right, either explicitly or implicitly, under the ACPA, i.e., 15 U.S.C. § 1125(d)(1), to obtain a judicial declaration in this district of his rights to retain and use certain domains; *ER:15*
- 2) Declaring that McNeil's rights to equal protection were violated in several respects, not only by ICANN, but by McNeil's inability to obtain a judicial declaration of his rights and duties, at least according to a literal interpretation of the ACPA, or other applicable law; *ER:15-17*



- 3) Upholding his right to use *stanleyworks.net* in view of the recent abandonment of the domain by Stanley; *ER:7*
- 4) Challenging the propriety of ICANN's rules requiring termination of the web sites and transfer of the domains unless ICANN appeals were filed within a specific jurisdiction; *ER:19-20*
- 5) Challenging the propriety of VeriSign's threat to terminate McNeil's web sites and transfer the pertinent domains if an appeal to the ICANN decision was not filed in San Francisco; *ER:21*
- 6) Declaring the rules and procedures adopted by ICANN to be incompatible with standards of due process; *ER:9-16, 19-20*
- 7) Declaring that McNeil's right to "fair use" under ICANN regulations, and/or other applicable law, was being impaired by certain alleged acts of the Defendants; (*ER:9-16, 19-20*) and
- 8) Clarification of other rights and duties of McNeil *vis-a-vis* the named defendants. *ER:18-21*

As is clear, McNeil's second complaint set forth distinctively different claims not contained in the first suit, and added different parties, including a direct federally-based challenge to ICANN's authority, and a specific request for declaratory relief pursuant to 15 U.S.C. §1125(the "Anti-Cyberpiracy Protection Act"). These differences were not even acknowledged by the district court.

The basis for McNeil's request for declaratory relief.(implicit in the ACPA), was the same statutory right accorded Stanley under the ACPA (and/or the Lanham Act and other federal trademark law) to obtain a judicial declaration of

its rights on the specific domain names involved in the dispute. That kind of ruling should also be obtainable *by McNeil* in any federal court of competent jurisdiction, including the United States District Court in San Francisco (to which the parties stipulated, and where all parties have engaged in business or reside).

The district court denied McNeil any such relief, which should clearly be made available under federal law. Under the foregoing facts, federal law provides McNeil with a federal cause of action that should have been adjudicated below.

***F. Legal Authority For Claims Asserted In McNeil II.***

The district court's suggestion that McNeil did not have standing to assert constitutional violations, coupled with its accompanying reliance on *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990) and *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), is clearly erroneous. The claims asserted in *McNeil II*, are warranted under existing law, which clearly accords McNeil standing to assert constitutional violations.

*Kwong Hai Chew* was a habeas corpus proceeding involving a question of whether or not an alien could be detained and deported without a due process hearing. Though later cases seem to controvert this holding (on different grounds), in *Kwong* the Supreme Court held that such a person could *not* be detained.

*Verdugo-Urquidez* was a case where the Supreme Court held that the Fourth Amendment did not apply to a search of an alien's residence (said residence which was located outside the U.S.). It is difficult to see even a remote connection, legal or factual, between those cases and the instant case.

In fact, the district court's proffered premise, i.e., that aliens have no constitutional rights, has been regularly rejected by various U.S. courts.

In fact, a case on all fours is *Times Newspapers Limited v. McDonnell Douglas Corporation*, 387 F.Supp. 189 (C.D. Ca. 1974) another California federal district court held that a foreign newspaper was protected by First Amendment guarantees to freedom of the press. McNeil's website definitely publishes newsworthy information which falls within the same constitutionally protective umbrella that Times Newspapers Limited did. In any event, the principles announced in *Times*, are clearly more applicable than those announced in the Fourth Amendment search and seizure cases cited by the district court.

A recent Ninth Circuit decision seems to concur with the principles underlying McNeil's claims, i.e., that Internet domain purchasers who launch websites on U.S.-based domains are within the Constitution's definition of "people," and therefore entitled to the protection of the Bill of Rights. See *Silveira v. Lockyer*, 312 F.3d 1052, 1070 (9<sup>th</sup> Cir. 2003) ("*the 'people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community*") citing *Verdugo-Urquidez* at 494 U.S. 259, 265.

The Internet --- founded and regulated by the U.S. government --- clearly embraces a class of "people" whose right to engage in business in the U.S., and to disseminate truthful information and/or criticism about U.S. companies, falls

within the scope of protections afforded by the U.S. Constitution and federal decisional law. When seen in that light, the court's articulation of classes of protected persons in *Verdugo-Urquidez*, arguably stands for a proposition precisely the *opposite* of that suggested by the district court.

Either way, McNeil stated a cognizable claim under the ACPA, and such a right is implied under federal law, and the Constitution. The gap in ACPA standing (i.e., granting relief only to trademark owners, and none to domain owners), must be filled interstitially with federal common law. There is considerable precedent for creation of a private cause of action under the Act, including declaratory relief. Regardless, it is constitutionally mandated by the due process and equal protection clauses.

When the ACPA was passed, little or no regard was given to the rights of domain owners. In fact, Congress' narrow intent at that time was simply to empower trademark owners with federal forum access to pursue domain owners (wrongly and generally referred to as "cybersquatters"). During that era, as a result of DOC's improvident and largely unsupervised rollout of the domain name database, cyber-squatting had raised gargantuan economic and legal concerns. Thus, Congress was preoccupied with empowering trademark owners, did not yet realize that abuses were possible on both ends of the spectrum, and created a statute with no reciprocal remedies for those wrongfully accused of cybersquatting and/or trademark infringement.

At the time of passage, Congress apparently had not pondered the possibility that domain owners could be improperly pursued by overbearing and financially well-endowed trademark owners seeking to utilize their financial

strength, and the Act, to overwhelm Internet domains who held domains that were either generic, part of the public domain, or protected by fundamental rights, including "fair use" or free speech.

The federal courts are obligated and required to rectify Congress' disparate treatment of *domain owners*. ACPA declaratory relief must be available to both camps. Moreover, as the complaint notes, the lack of standing given under the ACPA to domain owners (who typically defend ACPA and Lanham Act claims), compared with the rights and standing granted *trademark owners* (who typically harass or file suit against domain name owners), raises clear questions of due process and equal protection.

The instant case is the paradigm case for invoking the application of "interstitial federal common law," thereby enabling domain owners like McNeil to seek federal court access to obtain declaratory and injunctive relief from trademark owners threatening or pursuing legal action or administrative proceedings to recover domain names. See e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450-451, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957); *J.I. Case Co. v. Borak*, 377 U.S. 426, 430-431, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964) (private cause of action for false proxy statements, not provided in statute); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 383-387, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983) (private suits allowed under 10(b) of the Act); *Cannon v. University of Chicago*, 441 U.S. 677, 688-717, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (private cause of action under Title IX).

Just as with the foregoing statutes, the ACPA should be deemed to create an avenue of relief for domain owners seeking a judicial declaration over their rights to particular domain names, or groups of domains.

**G. *The Claims In McNeil I Vary Significantly From Those In McNeil II.***

As noted above, material differences exist between the claims asserted in McNeil I and McNeil II. Those differences render the doctrine of collateral estoppel inapplicable, and mandate reversal of the district court's order of dismissal.

In McNeil II, the new circumstances warranted the district court undertaking a new forum analysis. If a new analysis had been undertaken, the district court would have concluded that all parties involved in the suit resided or were engaged in business in the U.S. It would have also concluded that all claims arose or were related to the forum, and that the forum choice should have been honored.

In addition, the court would have noted that no claims were asserted that were even remotely connected with Canada, or which logically could have —or should have --- been deferred to the so-called “parallel” proceeding that lay dormant in Canada, a proceeding which had been *totally unpursued by Stanley for the last 4 years*. The court should have also concluded that the alleged dormancy of the Canadian proceeding —a fact unchallenged by Stanley —made it inappropriate to defer the action to a Canadian court.

The other claims asserted in McNeil's first case (e.g., malicious abuse of process, intentional infliction of emotional distress, and 42 U.S.C. § 1983) were

not asserted in McNeil II. Yet, strangely enough, the district court order concluded that the claims in the two suits were identical. As noted above, that conclusion also constituted clear error and should be overruled.

**H. *San Francisco Was The Proper Forum.***

As is clear from the foregoing, and from a careful read of McNeil's complaint and briefs, new parties and new claims were added in the second suit. In addition, all defendants—including McNeil—engaged in business in California, were licensed to do business in California, and/or had offices and property interest in the forum state.

In addition, VeriSign and ICANN were California corporations, and VeriSign's agreement with McNeil required litigation in this district. Stanley was a Connecticut corporation, but it had offices and significant business operations within the forum. Furthermore, the domain names which were the subject matter of both ICANN proceedings (i.e., the *res* of the action within the meaning of the ACPA) were registered in California, hosted on name servers there, and controlled by VeriSign, which had offices there. The alleged breaches of contract—not pled or even in existence at the time of McNeil I—also took place in the forum state.

Last but not least, ICANN, the subject of additional constitutional attacks from McNeil, called California its home, and was thus subject to jurisdiction there. In short, every material connection of every party involved in the controversy, including the domain names themselves, resided and/or did business in California, and for the district court to send these claims to a dormant Canadian court constituted clear error.

Based on the foregoing, the following conclusions of the district court were clearly erroneous, i.e.: (a) that the controversies in McNeil I and McNeil II were identical; (b) that the parties in McNeil I and McNeil II were identical; (c) that the legal issues in McNeil I and McNeil II were identical; (d) that the controversy had no material connection with the forum; (e) that Canada was better suited to resolve the controversy; (f) that foreign citizens cannot assert federal constitutional claims; (g) that ICANN was properly constituted and empowered; (h) that ICANN rules were constitutional; (i) that federal law does not provide any relief or remedy for the claims asserted by McNeil.

At the onset of McNeil II, the domain names from the first suit had since been abandoned by Stanley and were subject to a new dispute, additional parties and claims had now been implicated, the supposed Canadian connections had been eliminated (except for McNeil's citizenship ties, which were now completely irrelevant), all potential Canadian-based claims had been foregone, and the Plaintiff now sought relief under an implied right to seek declaratory and/or injunctive relief under the ACPA, interstitial federal common law, or other related trademark statutes. These claims should have been heard, but were instead dismissed.<sup>3</sup>

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McNeil's second complaint did, in fact, mention (a) an abridgment of "First Amendment" freedoms, and (b) blatant violations of McNeil's right to "fair use" of the names pursuant to the ACPA and federal trademark law.

The district court's second order of dismissal noted an absence of "state action" in the case, yet that is an inaccurate ruling. ICANN — established solely to administer DOC functions — operates as an arm of a federal agency, and is the entity exclusively responsible for legislating, implementing and enforcing federal policy and law. Consequently, in every respect, its actions constitute



Significantly, part of the relief McNeil now sought was specifically directed toward solving the Catch-22 ICANN "forum choice" dilemma he found himself in on the eve of this action. The new complaint sought clarification and elimination of the fundamental inequity of having to relinquish control of specific domain names which were the subject of a recent ICANN adjudication, unless an ICANN appeal was promptly filed in the jurisdiction specified by ICANN rules and stipulations. These are circumstances that no litigant acting in good faith should have to confront, and McNeil was thus justified in seeking relief under applicable law to clarify and define his rights. Any other conclusion or result, would be fundamentally unjust.

***I. Collateral Estoppel Did Not Preclude McNeil II, Insofar As New Parties, Issues, Claims and Circumstances Are Involved.***

Despite the dramatic differences between the claims, parties and issues in the two cases—including compelling new factors indicating that San Francisco

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"state action" within the meaning of federal law.

ICANN's total assumption of DOC duties thoroughly satisfies the "state action" requirement necessary to enforce a First Amendment claim.

Even so, a much simpler basis for McNeil's right to challenge the ICANN and ACPA restrictions on domain use and ownership exists, and that is because the defense of "fair use"—although originally enacted to perpetuate and protect free speech—is nevertheless a defense available to any defendant (whether a U.S. citizen or not) in a trademark infringement, ACPA or ICANN dispute.

For that reason, "state action," although it exists in this case vis-a-vis DOC's total delegation of duties to ICANN—particularly enactment of regulations that have the force of law, and implementation of an exclusive system for enforcing those regulations—is totally unnecessary to McNeil's right to claim "fair use" protection under the ACPA or federal trademark law.

was not only the most convenient forum, but the *only* suitable forum for the case —on August 26, 2003, the district court dismissed McNeil II, stating in pertinent part that: “*The issue of forum non conveniens has not changed in any respect between plaintiff’s first complaint and the action now before the court,*” and that McNeil had brought “*the identical action back to this court.*” Order, p. 9-10.

With all due respect to the district court, the foregoing conclusions were legally and factually incorrect. In fact, the predominant weight of legal authority (a) holds that collateral estoppel is inapplicable to McNeil II, and (b) squarely favors this forum as the one most appropriate for resolving the parties’ dispute.

1. *The Historical Purpose of Res Judicata and Collateral Estoppel Was To Prevent the Same Parties In the Same Factual Situation From Re-Litigating The Same Legal Issues.*

The doctrines of *res judicata* (claim preclusion) and *collateral estoppel* (issue preclusion), were adopted, and have historically evolved, for the purpose of conserving judicial resources by eliminating the need for re-litigation of *identical legal matters* that have previously been resolved. As will be seen, these doctrines have no application to this Court’s dismissal of McNeil I, insofar as the claims, issues, parties and circumstances are different.

The district court held that the venue issue adjudicated in McNeil I barred McNeil from re-litigating venue in McNeil II. However, a quick review of the philosophical underpinnings of the related doctrines of *res judicata* and *collateral estoppel*, completely refutes that notion.

2. *Background Of Res Judicata.*

Principles of res judicata bar re-litigation of claims previously adjudicated. In order for res judicata to bar a subsequent suit, the first suit must have been a "final judgment on the merits" involving "the same parties" and involving "the same claim." By definition then, res judicata does not apply to dismissal without prejudice or involuntary dismissals based on improper venue. See Fed.R.Civ.P. 41(b) "**Involuntary Dismissal**" ("*Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.*"); See also Restatement (Second) of Judgments, §§ 19-20; *Cooter & Gell v. Harmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed2d 359 (1990) ("*Dismissal ... without prejudice is a dismissal that does not operate as an adjudication upon the merits.*").

3. *Background of Collateral Estoppel.*

Collateral estoppel is a parallel legal theory. Under the doctrine of collateral estoppel, a party is barred from re-litigating issues previously adjudicated. As with res judicata, collateral estoppel requires that the prior litigation involve the same parties, circumstances and facts. *Moore's Federal Practice*, § 132,02[2]{a} ("*The doctrine of issue preclusion applies only when the issues presented in each matter are identical. Issue preclusion does not apply when the issues in the prior and current litigation are not identical, even though similar.*") citing *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9<sup>th</sup> Cir. 1992), *Fund for Animals v. Lujan*, 962 F.2d 1391, 1399 (9<sup>th</sup> Cir. 1992),

*Pension Trust Fund for Operating Eng'rs v. Triple A Mach. Shop*, 942 F.2d 1457, 1462 (9<sup>th</sup> Cir. 1991), *Steel v. United States*, 813 F.2d 1545, 1550 (9<sup>th</sup> Cir. 1987), *Milens of Cal. v. Richmond Redevelopment Agency*, 665 F.2d 906, 908 (9<sup>th</sup> Cir. 1982), *Blonder-Tongue Lab., Inc. v. University of Ill. Found.*, 402 U.S. 313, 323, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9<sup>th</sup> Cir. 1971)(citing Moore's), *Pardo v. Olson & Sons, Inc.*, 40 F.3d 1063, 1066-1067 (9<sup>th</sup> Cir. 1994).

Contrary to the district court's understanding of collateral estoppel, the doctrine does not bar a subsequent suit over a different statute, even though another relevant statute, however similar, was involved in the first suit. *Shriners Hosp. for Crippled Children v. United States*, 14 S.Ct. 51, 55 (1987). Neither does collateral estoppel bar litigation of an issue in a subsequent suit, when there has been a change of circumstances, even if there is some overlap in the evidence and argument presented. *Valley Disposal, Inc. v. Central Vt. Solid Waste Mgmt. Dist.*, 31 F.3d 89, 100 (2d Cir. 1994); See also *Polymer Industrial Products Co. v. Bridgestone Firestone, Inc.*, 211 F.R.D. 312, 318 (6<sup>th</sup> Cir. 2002) (collateral estoppel requires "a subsequent action between the same parties" and "an identity of the causes of action."); *In re Washing Public Power Supply System Securities Litigation*, 623 F.Supp 1466, 1473-1474 (W.D. Washington 1985) ("In order for preclusion to apply, the issue decided in the prior adjudication must be identical with the one presented in the case sub judice.").

According to the United States Supreme Court:

***Collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all***

*respects with that decided in the first proceeding and where the controlling facts and applicable legal rule remains unchanged. . .*

*..*

*If the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not preclude the legal issues which recur in the second case. . . .*

*In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue.*

See *Commissioner of Internal Revenue Service v. Sunnen*, 333 U.S. 591, 599-600, 68 S.Ct. 715, 92 L.Ed. 898 (1948).

Thus, based on the foregoing authorities, the district court's understanding of collateral estoppel, as set forth in its order of dismissal, was fundamentally incorrect.

4. *Collateral Estoppel Does Not Apply To Venue Rulings Involving Different Facts, Different Parties and Different Claims.*

Under applicable law, collateral estoppel simply has no application to venue rulings involving cases with different parties, facts, circumstances and/or claims. Given the weight and number of authorities on this issue, the principle is not easily overlooked. See e.g., *Mizokami Brothers of Arizona V. Mobay Chemical Corp.*, 660 F.2d 712, 716 (6<sup>th</sup> Cir. 1981) ("The record demonstrates sufficient differences in the underlying facts that consideration of the convenience of a Missouri forum is not foreclosed."); See also *Domingo v. States Marine Lines*, 340 F.Supp. 811 (S.D.N.Y. 1972); *Anastasiadis v. Mecom*, 265 F.Supp. 959 (S.D.Tex. 1966); See also 18 C. Wright, A. Miller & E. Cooper,

*Federal Practice and Procedure: Jurisdiction* § 4436, at 346 (1981) (“Dismissal on forum non conveniens grounds does not establish claim preclusion; ordinarily it cannot work issue preclusion as to other courts because the convenience issues are intrinsically different, but issue preclusion is appropriate if the issue actually remains the same.”).

Obviously, based on the foregoing authorities, collateral estoppel is inappropriate when a litigant alleges “objective facts relevant to the issue that materially alter the considerations underlying the previous resolution.” *Exxon Corporation v. Chick Kam Choo*, 817 F.2d 307, 314 (5<sup>th</sup> Cir. 1987); *Moore’s*, § 132.02[3] (“When an intervening factual change has altered the basis on which the earlier judgment depended, issue preclusion will not apply.”); *Third Nat’l Bank of Louisville v. Stone*, 174 U.S. 432, 434, 19 S.Ct. 759, 43 L.2d. 1035 (1899) (“A question cannot be held to have been adjudged before an issue on the subject could have possibly arisen.”); *International Shoe Mach. Corp. v. United shoe Mach. Corp.*, 315 F.2d 449, 455-456 (1<sup>st</sup> Cir.) cert. denied 375 U.S. 820 (1963) (issue arising from time period after evidence closed on first determination was held not to preclude litigation with respect to later time period); *Jarvis v. Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1425 (1<sup>th</sup> Cir. 1993) (issue preclusion applies when the two actions “involve application of the same principles of law to an historic fact setting that was complete by time of the first adjudication”); *Restatement (Second) of Judgments*, § 27, reporter’s note at 264 (1982).

The rationale behind the foregoing rule is that, in cases involving venue or jurisdiction determinations, the resulting judgment is not a determination of

the claim, but rather a refusal to hear it, and the plaintiff may thereafter pursue those issues, when the preconditions have been met. *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 679 n.18 (5<sup>th</sup> Cir. 1985), *cert denied sub nom., Amoco Prod. Co. v. EEOC*, 475 U.S. 1011 (1986), *Leaf v. Supreme Court of Wis.*, 979 F.2d 589, 595 (7<sup>th</sup> Cir. 1992), *cert. denied*, 508 U.S. 941 (1993), *In re Hall*, 939 F.2d 802, 804 (9<sup>th</sup> Cir. 1991). The district court's order overlooked the foregoing factors, and failed to address them in any material respect.

***J. Factors Upon Which Court's Venue Decision Was Based In McNeil I, Are Not Present In McNeil II, Making Collateral Estoppel Inapplicable.***

The district court took the position that McNeil's second suit reflected unreasonableness and intransigency. However, that is simply not the case. Based on the differing facts and circumstances, it is clear that under applicable law, the order of dismissal in McNeil I was entitled to no collateral estoppel effect whatsoever in the instant case.

More importantly, with the addition of 2 new parties and the ACPA claim, virtually every public and private factor cited in the district court's order of dismissal in McNeil I, no longer had any applicability. In fact, the distinctions and differences between the two cases are material, significant and voluminous, e.g.:

1. In McNeil I, although the court said it had no "unflagging obligation" to hear the dispute in McNeil I insofar as no "federal question" was involved, McNeil has now pled a cause of action, based on interstitial federal common law, pursuant to 15 U.S.C. § 1125, ICANN rules (emanating from the DOC), Lanham Act, and

other federal trademark and/or common law, which gives this court a "flagging" obligation to hear the case. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23-24, 103 S.Ct. 927, 74 L.Ed2d 765 (1983); See also 17 Moore's, *Change of Venue* § 111.77 ("The Court has made it plain that federal courts ought to exercise their jurisdiction in cases properly brought before them, especially in cases involving federal law.").

2. In *McNeil I*, the court said the "same issues are being litigated in other forums" (referring to *McNeil's* "state law claims" and the \$15 million tort action filed by Stanley against *McNeil* in Canada). However, that statement was incorrect. No state law claims were asserted in the instant case. Also gone are the claims for abuse of process, emotional distress and § 1983 violations. More importantly, absolutely nothing has happened in the Canadian case since shortly after its filing 4 years ago. Thus, no claims whatsoever are "being litigated" there, and deferral of any claims to the Canadian forum would be improper. Either way, the claims asserted in *McNeil I* do not relate in any way to the Canadian suit which, had an illegal purpose, i.e., the seizure and destruction of *McNeil's* computers, and a permanent ban on *McNeil's* Internet activities — a civil claim and/or remedy presumptively unconstitutional in these United States.
3. In *McNeil I*, the court stated that the \$15 million tort action in Canada constituted a "parallel proceeding" within the meaning of



the doctrine of *forum non conveniens*, and was thereby a "more appropriate forum" for handling the claims and parties involved. In *McNeil II*, however, the parties are different, the claims are different, the *res* is different (and/or has been subjected to intervening circumstances upon which no merits determination has ever been rendered), a federal claim has been asserted, and no "state law" or potentially Canadian-based claims have been pled. Either way, deferral of claims to a foreign lawsuit that has been stagnant for 4 years, in and of itself, denies due process and fulfills no legitimate federal objective.

4. In *McNeil I*, the district court noted that an important consideration in refusing to accept the case, was its interest in avoiding "*piecemeal litigation*," and that *McNeil's* tort claims created the possibility of "*duplicative litigation*." For the reasons stated above, including but not limited to the fact that there are no overlapping claims between the cases, the Canadian litigation has lain dormant for 4 years, and the Canadian court is pursuing a claim not even remotely available in the U.S., the risk of piecemeal or duplicative litigation no longer exists.
5. In *McNeil I*, the court noted that the "*witnesses and evidence are all in Canada*." *McNeil* has not identified (nor has Stanley) any witness or evidence located in Canada that is pertinent to the instant case. Thus, the balance of private factors on this point clearly weighs in favor of this court hearing the case.

6. In McNeil I, this court noted that “Canada’s interest in this litigation is much stronger than that of the United States.” Given the factors cited above, particularly the presence of 2 new U.S.-based parties (that the Canadian court could not bind to a judgment, even if it wanted to), the lack of Canadian claims, and no subject matter or witnesses in Canada, venue is more appropriately based in this court.
7. In McNeil I, the court noted that the litigation of the claims in Canada would make the litigation “less costly for all parties.” In McNeil II, given that (a) all parties are based, engaged in business, have offices, or are incorporated in California, (b) the domain names were purchased in California, registered in California and controlled on name servers located in California by a California company, (c) all witnesses and evidence are in California, and (d) all claims are based on U.S. law — venue in this forum is clearly reasonable and warranted, *if not mandated*. See Moore’s, *Change of Venue* § 111.78[1] (“The better reasoned approach is to deny dismissal of an action if American law applies.”); *Rivendell Forest Products, Ltd. v. Canadian Pacific Ltd.*, 2 F.3d 990, 993-994, fn.4 (10<sup>th</sup> Cir. 1993) ([in a contract action] “if domestic law applies . . . then *forum non conveniens* is inapplicable.”). These authorities, coupled with Supreme Court’s rulings in *Cone*, *Bremen* and *Carnival Cruise Lines*, make it clear that McNeil’s federal claim under the ACPA, his due process claims against ICANN and his

contract claims against VeriSign, not only make the doctrine of *forum non conveniens* inapplicable, but make San Francisco a logical forum choice — if not the only forum available on the planet — constitutionally capable of resolving the parties' conflicts.

8. The foregoing arguments also apply to the district court's comment in *McNeil I* that the "*claims regarding the business relationship arise out of occurrences in Canada.*" As stated above, the claims pled in *McNeil II* have to do with domain registrations, web site terminations, contract breaches and other ICANN- and VeriSign-related activities in California, all of which arose in the U.S. and are based on U.S. law.
9. In *McNeil I*, this court stated that the "*balance of private and public factors points toward Canada*" as the more appropriate forum. In fact, because the forum was chosen per ICANN rules and an ICANN stipulation, a *forum non conveniens* analysis was, and is, totally inapplicable. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 6, 8-18, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); *Carnival Cruise Lines, supra*.
10. In *McNeil I*, this court implied that *McNeil's* forum ties with ICANN might be significant and material, at least under different circumstances and pursuant to different legal claims. At one point, in fact, the court noted that *McNeil's "dealings with ICANN"* and his "*registration of certain domain names with ICANN,*" were forum connections, though pointing out that ICANN was a

"[California] corporation that is not a party to this litigation." VeriSign and ICANN are new to the suit, and are California corporations with significant business activities in the forum. Their presence in the instant action certainly serves to alter the "balance of public and private interest factors" that must be evaluated in a *forum non conveniens* analysis. To ignore these new ingredients being added to the current claims —particularly with no Canadian claims or subject matter present —was improper. Moreover, McNeil himself has obviously been involved in business activities with defendant VeriSign in this forum, pursuant to his original purchase of the domain names, the consummation of the Snap Names agreement, the operation of websites, and other activities. All these factors make the "balancing" test undertaken by the court in *McNeil I* inapplicable here. See *Gulf Oil Co. v. Gilbert* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed 2.d 1055 (1947) (requiring balancing of all public and private interests based on location and identity of parties and witnesses, nature and location of claims, evidence, circumstances, and all other pertinent factors).

The final point mistakenly relied on by the district court in dismissing *McNeil I* was that, due to all the cited factors, hearing the case in the United States would "be a waste of judicial resources." However, as noted above, Canada had and has (a) little or no legal interest in the subject matter or parties

involved in the instant case, (b) no law or public interests pertinent to the instant case, (c) no subject matter involved in the instant case, and (d) a dormant, irrelevant controversy with no apparent interest in properly enforcing the legal rights claimed by McNeil in the instant action.

## XI. CONCLUSION

In reviewing the district court's order or dismissal, it is difficult to imagine a ruling more at odds with the fundamental rights inherent in the Internet, federal common law, standing, or the doctrine of *forum non conveniens*.

McNeil clearly has standing to assert First Amendment claims, much like the British newspaper in *Times*. In addition, virtually every cited rationale for the district court's *forum non conveniens* dismissal in *McNeil I* no longer exists, or is no longer applicable.

Collateral estoppel is clearly not applicable because new facts have emerged, new claims have been asserted, new parties are involved and the *res* involved in the first case was abandoned by Stanley while *McNeil I* was on appeal. In fact, the factual and legal circumstances presented in the instant case involve justiciable issues never previously decided by this, or any other, federal court.

Either way, to dismiss all of McNeil's claims without permitting leave to amend, was an unacceptable, broadbrush method of ridding itself of a dispute that, for whatever reason, it did not want to hear —to the point of threatening sanctions. *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (failure to grant leave to amend is clear error); *Interroyal Corporation v.*

*Sponseller*, 889 F.2d 108 (6<sup>th</sup> Cir. 1989) (trial court committed clear error by granting summary judgment without giving plaintiff leave to amend complaint).

The district court erred in ruling the two actions brought by McNeil were "identical." The first suit involved claims for: (a) abuse of process, (b) intentional infliction of emotional distress, and (c) violations of 42 U.S.C. §1983. The second suit, by contrast, requested judicial clarification of domain rights in the abandoned domains, and in other potential domain proceedings threatened by Stanley. This request was made pursuant to federal interstitial law and/or 15 U.S.C. § 1125, the "ACPA." Viable constitutional claims were also asserted. The second case also challenges ICANN's existence, as well as its domain rules and adjudicative process, which are alleged to violate due process and equal protection guarantees. *ER:1-28, 125-128.*

The district court wrongly concluded that McNeil could not assert federal or constitutionally-based claims. The district court also wrongly held that the claims asserted by McNeil against ICANN, Stanley and VeriSign lack merit, should not be litigated in this particular venue, and do not impact venue in any way. Per the above-cited authorities, it is clear those rulings were incorrect. Regardless, it was clear error for the Court to dismiss McNeil's claims against VeriSign and ICANN without first giving McNeil leave to amend his complaint.

Federal law clearly permits McNeil, within the ambit of the Constitution, the ACPA, the Lanham Act, federal trademark law, and/or interstitial federal common law, to obtain declaratory and/or injunctive relief vis-a-vis Stanley, VeriSign and ICANN. As noted in the complaint, the ICANN ruling was

rendered without a hearing, without well-defined legal standards, in contravention of established legal standards and constitutional rights, and without a semblance of due process. McNeil —a Canadian citizen doing business in the U.S. —is entitled to challenge the constitutionality of ICANN rules, procedures and adjudications, and is further entitled to a due process hearing on the merits, with corresponding constitutional protections.

That ICANN can be sued in this district, is not subject to reasonable debate. Like any entity, it can be sued. Moreover, ICANN is a California corporation “set up to oversee Web-name assignments and resolve domain name disputes.” ER: 55, fn. 1). As a U.S.-based entity exclusively assigned governmental functions (i.e., enacting and enforcing U.S. Department of Commerce domain rules and procedures worldwide), where exactly is McNeil supposed to sue ICANN? If ICANN is not properly subject to venue and jurisdiction in California, then where can it be properly sued?

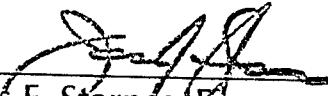
Either way, based on relevant law, it is apparent that this case should never be sent to Canada. The only action there (mislabeled as a “parallel” proceeding by the district court) has been dormant for 4 years, and is frivolous. Moreover, deferral to Canada is improper because a Canadian court clearly has no interest whatsoever in the case, and no way to enforce any order rendered. See e.g., Moore’s, *The Erie Doctrine And Applicable Law*, § 124.32[2] (“Due process requires fundamental fairness. . . . An important aspect of fundamental fairness is the parties’ expectations as to what law may be applied. A state ‘may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.’”), citing *Philips*

*Petroleum Co. v. Shutts*, 472 U.S. 797, 819, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985).

In urging the imposition of sanctions below, Stanley stated: "*McNeil had been placed on notice through the arbitration proceeding that he had no legitimate claim to those domain names.*" ER:92. This comment is inaccurate, misleading and has no legal foundation. The truth is, recent cases emanating from the Sixth Circuit and the Supreme Court reveal that McNeil will most likely ultimately prevail on the merits. See *Taubman Company v. Webfeats*, 319 F.3d 770 (6<sup>th</sup> Cir. 2003) ("cybergripping" use of domain name was protected, was not commercial, and created no potential for confusion); *Moseley v. V Secret Catalogue, Inc.*, 155 L.Ed.2d 1 (2003) (Federal Trademark Dilution Act requires showing of "actual injury" to the economic value of the mark, and/or lessening of the capacity of the mark to identify and distinguish goods or services sold by the mark owner, in order to sustain a Lanham Act claim).

As noted above, the dismissal of McNeil I was entitled to no collateral estoppel effect, and the order of the district court dismissing the claims against all parties on the basis of collateral estoppel, should be REVERSED and REMANDED.

Dated this 25<sup>th</sup> day of November, 2003.

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CERTIFICATE OF SERVICE

On the date set forth below, two copies of **APPELLANT'S OPENING BRIEF** and one copy of the **EXCERPTS OF RECORD** were served via United States Mail on the following parties and/or attorneys:

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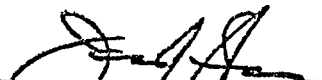
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Dated this 25<sup>th</sup> day of November, 2003.

  
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JAMES E. STARNES, Esq.