

**THE CONSTITUTIONAL FAILING OF THE  
ANTICYBERSQUATTING ACT**

NED SNOW\*

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## I. INTRODUCTION

A law exists that allows the government to strip a person of a specific sort of property if the person merely thinks about selling it for a profit, or about precluding another person from using it.<sup>1</sup> That law is the Anticybersquatting Consumer Protection Act (ACPA).<sup>2</sup> Courts and legal commentators have recognized that a person can hold valid property rights in a data arrangement that represents an Internet website address, otherwise known as a domain name; e.g., “business.com” is property.<sup>3</sup> Furthermore, a person can lawfully register a domain name containing a trademark even if that person is not the mark holder: registering “nike.com” is not unlawful, even if the domain-name registrant<sup>4</sup> is not Nike, Inc.<sup>5</sup> Under the ACPA, a court may strip a registrant of property rights to a domain name containing a trademark if the registrant possesses the domain name with a bad-faith intent to profit from the trademark.<sup>6</sup> The presence of a bad-faith intent—or in other words, the presence of a registrant thinking impermissible thoughts<sup>7</sup>—is the only condition necessary for a court

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1. See discussion *infra* Part IV.

2. 15 U.S.C. § 1125(d) (2000).

3. See discussion *infra* Part V.A.1.b.

4. Throughout this Article, the term “registrant” refers to a person who reserves the right to use an Internet domain name. It never refers to a person who reserves the right to use a trademark with the Patent and Trademark Office.

5. Panavision Int’l, L.P., v. Toeppen, 141 F.3d 1316, 1324 (9th Cir. 1998) (“Registration of a trademark as a domain name, *without more*, is not a commercial use of the trademark and therefore is not within the prohibition of the [Lanham] Act.”) (emphasis added) (internal quotations omitted) (quoting Panavision Int’l v. Toeppen, 945 F. Supp. 1296, 1303 (C.D. Cal. 1996)); accord Wash. Speakers Bureau, Inc. v. Leading Auths., Inc., 49 F. Supp. 2d 496, 498 (E.D. Va. 1999) (“Nothing in trademark law requires that title to domain names that incorporate trademarks or portions of trademarks be provided to trademark holders.”); HQM, Ltd. v. Hatfield, 71 F. Supp. 2d 500 (D. Md. 1999); see also discussion *infra* Part III.

6. The ACPA imposes liability for merely having a bad-faith intent while possessing a domain name. See discussion *infra* Part IV.A.1. As discussed in Part IV, this conclusion follows from the fact that the ACPA states only two conditions for liability—(1) bad-faith intent and (2) registration, trafficking, or use of a domain name—which conditions need not occur at the same time. See discussion *infra* Part IV.A.1. Because they need not occur at the same time, possession of a domain name always satisfied the second condition of liability, so that the statute imposes liability for possession of a domain name with a bad-faith intent. See discussion *infra* Part IV.A.1.

7. A person’s intent under the ACPA represents his or her state of mind, completely dependent on the person’s thoughts. See *People for Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 369 (4th Cir. 2001); see also THE OXFORD ENGLISH DICTIONARY 1078 (2d ed. 1989) (defining intent to mean “that which is willed, pleasure, desire . . . Mind, or an act of the mind; understanding; the mental faculties generally; frame of mind, will spirit; perception, judgement; what is in the mind, notion, opinion, or thought of any kind”).

to appropriate the registrant's domain name.<sup>8</sup> Impermissible thoughts include thoughts about selling the domain name to a mark holder, and thoughts about precluding a mark holder from using the domain name.<sup>9</sup> Possessing "nike.com" while intending to sell it for a profit to Nike, Inc., or alternatively, while intending to preclude Nike, Inc. from procuring it, is actionable under the ACPA.

The reason that the ACPA is based purely on a registrant's intent, rather than the actual use of the domain name, is that its purpose is to thwart the practice of cybersquatting.<sup>10</sup> Cybersquatting occurs when a domain-name registrant intends to profit from a trademark contained within the domain name.<sup>11</sup> Cybersquatters lawfully own domain names that contain trademarks, and in most instances, do absolutely nothing with them.<sup>12</sup> They merely intend to sell the domain names to the corresponding trademark holders. Because cybersquatting does not involve any use of a domain name, a law prohibiting cybersquatting cannot be based on a specific use. The law, the ACPA, must be based on intent.<sup>13</sup>

The following narrative depicts a situation analogous to cybersquatting that illustrates how and why the ACPA is based on a registrant's intent. A certain man, Mark, owned an apple orchard on an island that at one spot was within 50 yards of a nearby mainland. Mark sold his apples to a community on the mainland, each day filling a boat with apples, and then delivering them to the community where people paid a handsome price for the delicious commodity. Mark did well for many years, his apple business gaining notoriety throughout the community. Curiously, however, Mark never considered building

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8. See discussion *supra* note 6 and *infra* Part IV.A.1.

9. See discussion *infra* Part IV.B.

10. See S. REP. NO. 106-140, at 4 (1999).

11. *Id.*; 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:77 (4th ed. 2004); ROBERT A. BADGLEY, DOMAIN NAME DISPUTES § 1.01 (2003) (defining cybersquatting as occurring "when someone registers a domain name identical or confusingly similar to a well-known trademark with the hope of selling it to the trademark owner at a hefty profit").

12. See S. REP. NO. 106-140, at 5-6 (defining cybersquatters as persons who "register well-known brand names as Internet domain names in order to extract payment from the rightful owners of the marks" and who "register well-known marks as domain names and warehouse those marks with the hope of selling them to the highest bidder"); 2 MATTHEW BENDER CO., TRADEMARK PROTECTION AND PRACTICE § 7A.06 (Jerome Gilson ed., 2003) ("Cybersquatters register trademarks in Internet domain names with no intention of developing a viable web site but instead to hold the name for resale to either the trademark owner or a third party.").

13. See S. REP. NO. 106-140, at 4.

a footbridge between the island and the mainland so that consumers could purchase his apples more easily.

One day a certain entrepreneur, Cy, visited the community, and observed the success of Mark's apple business. Always trying to make a quick buck, Cy decided to build an inexpensive footbridge between the island and the mainland. He built it in less than an hour, and in doing so, secured the single spot on the island that was within 50 yards of the mainland. Cy then attempted to sell the bridge to Mark for an amount equal to Mark's apple profits over the last two years. Mark laughed at the offer, so Cy just sat on his bridge and waited. Before long, people noticed the bridge and gathered around in hopes of crossing it to buy apples from Mark without having to wait for Mark to come deliver them. Cy let no one cross his bridge. This continued for a month, every day more people gathering at the bridge with the hope and expectation of crossing it to buy island apples. Mark soon realized that if the bridge were open, he would likely reap twice his current profits. Although Cy's price was ridiculously high for the minimal labor that Cy had expended in building the bridge, the economics of the situation made sense for Mark to pay Cy the outrageous amount.

Mark was just about to pay Cy his asking price when the government unexpectedly intervened. Seeing the community's desire to cross the bridge, noting Mark's earnest efforts at producing a valuable product, and observing the ridiculously high price that Cy sought for his bridge, the government passed a statute to remedy the inequitable situation. The new law stated that any person who (1) acquires a bridge (by either building or purchasing one), and (2) intends to sell his or her bridge to an island business at a profit is obligated to immediately transfer ownership of the bridge to the island business. The statute did not require that the two conditions occur at the same time: a person would be liable for developing the prohibited intent even if that intent occurred well after the person had acquired a bridge. The statute also applied retroactively, such that any person in possession of a bridge at the time of its enactment, thereby having acquired it through some means, satisfied the first condition of liability. Thus, the statute attached liability for possessing a bridge with a specific intent. It deprived Cy of his bridge because he engaged in impermissible thinking. By the stroke of the legislative pen, Cy lost his bridge to Mark.

It seemed that everyone was happy with the new law: Mark reaped great profits; the mainlanders had better access to island ap-

ples; and the government had instituted a policy that resulted in a more productive market system. No one believed that Cy had been wronged as he had only expended less than an hour's worth of work in building the bridge. The people supported the market-efficient outcome of the bridge statute.

This analogy aptly depicts the cyberquatting situation. Like the bridge, a domain name containing a trademark could enable the public to access a commercial business. The public reasonably expects the domain name to belong to the mark holder, just as the public did the bridge. That expectation begets the domain name's value, as it did the bridge's value. That value, for both the domain name and the bridge, is ultimately derived from a third party's efforts to produce a quality product. Both the cybersquatter and the bridge owner seek to profit from another business's efforts.

The analogy also captures the relevant legal history of conduct made actionable under the ACPA. In the bridge narrative, Cy legally owned the bridge before the statute existed. Only after the statute did his conduct of building a bridge and intending to sell it become actionable. Similarly, prior to the ACPA, cybersquatting was legal.<sup>14</sup> Although some courts tried to define cybersquatting as behavior that trademark law could prevent, in the end, trademark law was impotent against this Internet arbitrage.<sup>15</sup> Trademark law could prohibit a registrant from using the domain name only in a way that promoted the sale of a good or service—in a way that made use of the mark in a commercial setting.<sup>16</sup> Cybersquatters engage in no such commercial use; they merely reserve a right to post a website at a particular domain name (which domain name happens to contain a trademark).<sup>17</sup> Consequently, prior to the ACPA, trademark law was paralyzed against cybersquatting, unable to prevent cybersquatters from ransoming domain names to mark holders.<sup>18</sup>

Finally, the bridge analogy illustrates the essential characteristics of the ACPA's liability conditions. Like the bridge statute, the ACPA requires that only two conditions exist for the government to strip a person of a domain name.<sup>19</sup> First, the person must register, traffic, or

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14. See discussion *infra* Part III.

15. See discussion *infra* Part III.

16. See 15 U.S.C. § 1127 (2000).

17. See discussion *infra* Part III.A.1.

18. See discussion *infra* Part III.B.2.

19. 15 U.S.C. § 1125(d)(1)(A).

use a domain name containing a trademark.<sup>20</sup> Second, the person must have a bad-faith intent to profit from the mark within the domain name.<sup>21</sup> Just as the two conditions in the bridge statute resulted in liability for mere possession plus intent, so also do these two ACPA conditions impose liability for mere possession of a domain name with a specific intent.<sup>22</sup> Like the first condition in the bridge statute, the first condition in the ACPA is essentially a requirement that a registrant acquire a domain name: acquisition of a domain name occurs through either registering or trafficking in domain names.<sup>23</sup> And similar to both conditions in the bridge statute, the two ACPA conditions need not occur simultaneously.<sup>24</sup> To be liable, a person need not acquire a domain name with a bad-faith intent; the person could acquire the domain name, much later develop a bad-faith intent, and then face liability.<sup>25</sup> Lastly, like the bridge statute, the ACPA's first condition of liability is retroactive such that even if a person had acquired a domain name prior to the ACPA, the person fulfills the condition that he or she must acquire a domain name to be liable.<sup>26</sup> The condition that a person register, traffic, or use a domain name is satisfied merely if a person possesses one.<sup>27</sup> Liability exists under the ACPA for possessing a domain name with a bad-faith intent.<sup>28</sup>

The ACPA and the hypothetical bridge statute effectively provide a legal means for resolving a most inequitable situation that is solely a function of a property owner's intent.<sup>29</sup> That effectiveness, however, exacts a high cost. Both laws violate the Takings Clause: they allow the government to take property without providing just compensation.<sup>30</sup> While this conclusion may appear evident in the bridge analogy, it is not immediately apparent in its virtual counterpart, the ACPA. Showing that the ACPA violates the Takings Clause

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20. *Id.* § 1125(d)(1)(A)(ii).

21. *Id.* § 1125(d)(1)(A)(i).

22. *See* discussion *infra* Part IV.A.1.

23. *See* discussion *infra* Part IV.A.1.

24. *See* discussion *infra* Part IV.A.1.

25. *See* discussion *infra* Part IV.A.1.

26. 15 U.S.C. § 1117 (2000) (statutory note) (“[The ACPA] shall apply to all domain names registered before, on, or after the date of the enactment of this Act . . . .”); *see also* discussion *infra* Part IV.A.1.

27. *See* discussion *infra* Part IV.A.1.

28. *See* discussion *infra* Part IV.A.1.

29. BADGLEY, *supra* note 11, § 1.01 (“The ACPA has proven a capable tool for wresting domain names from cybersquatters . . . .”); *see also* discussion *infra* Part IV.

30. *See* discussion *infra* Part V; U.S. CONST. amend. V.

requires establishing the following two premises: (1) that domain names are property subject to the protections of the Takings Clause, and (2) that under Supreme Court takings jurisprudence, the ACPA results in an uncompensated governmental appropriation of the property.<sup>31</sup> Support for the first premise arises from legal authority recognizing, implicitly and explicitly, that a registrant holds property rights in a unique data arrangement in the Internet medium, which data arrangement functions as a virtual “space.”<sup>32</sup> Further support for this premise arises from Supreme Court jurisprudence recognizing that property rights can exist in data arrangements.<sup>33</sup>

The second premise requires analyzing the ACPA under the Supreme Court’s three-factor balancing test for determining whether a government act constitutes a taking, as outlined in *Penn Central Transportation Co. v. City of New York*.<sup>34</sup> The first factor of the *Penn Central* test examines the character of the governmental act: whether it is a complete appropriation, or alternatively, a regulation.<sup>35</sup> If the character of the act is a complete appropriation, then the act is always a taking, regardless of the other two *Penn Central* factors; conversely, if the act is a regulation, it limits only some uses of the property, and so it is not necessarily a taking depending on the outcome of the other two *Penn Central* factors.<sup>36</sup>

At first glance, the ACPA seems to be a regulation rather than a complete appropriation because it prohibits only a single use of a domain—using a domain name to cybersquat.<sup>37</sup> Further examination of the purported regulation, however, reveals that the ACPA effects a complete appropriation.<sup>38</sup> It is a complete appropriation for two reasons. First, the single “use” of a domain name that the statute regu-

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31. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-01 (1984) (examining whether the plaintiff had property interests in a trade secret protected by the Takings Clause, and whether the governmental act in question resulted in a taking under existing Supreme Court jurisprudence).

32. E.g., *Kremen v. Cohen*, 337 F.3d 1024, 1030-36 (9th Cir. 2003); see also discussion *infra* Part V.A.1.b.

33. See *Monsanto*, 467 U.S. at 1002-03; see also discussion *infra* Part V.A.2.

34. See *Monsanto*, 467 U.S. at 1005 (applying the *Penn Central* balancing test to determine whether the government had taken the plaintiff’s property interest in an arrangement of data); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); see also discussion *infra* Part V.B.

35. *Penn Cent.*, 438 U.S. at 124; see also discussion *infra* Part V.B.1.

36. *Penn Cent.*, 438 U.S. at 124.

37. See discussion *infra* Part V.B.1.

38. See discussion *infra* Part V.B.1.a-b.

lates cannot be constitutionally regulated.<sup>39</sup> As mentioned above, cybersquatting amounts to nothing more than possessing a domain name with a bad-faith intent. The ACPA defines bad-faith intent based entirely on the speech of a registrar.<sup>40</sup> A First Amendment analysis of the ACPA reveals that its restriction of the expressed bad-faith intent is unconstitutional.<sup>41</sup> A registrant's intent is therefore not a constitutional basis for transferring the domain name: the ACPA's remedy is applied for no justifiable reason.<sup>42</sup> The statute effects a naked transfer of property, or in other words, a complete appropriation.<sup>43</sup>

The second reason that the ACPA effects a complete appropriation rather than a regulation is that under the ACPA, courts may strip a registrant of property solely because the registrant exercises a right essential to the meaning of property.<sup>44</sup> The right to preclude all others from possessing a res constitutes a fundamental property right, without which a person cannot own property.<sup>45</sup> Courts have found a bad-faith intent based on a registrant's intent to preclude a third party—a mark holder—from possessing the domain name.<sup>46</sup> Courts have therefore transferred ownership of a domain name because the registrant exercises rights inherent to the meaning of property; that is, the basis for stripping the registrant of property is the fact that the registrant exercises rights of ownership in the property.<sup>47</sup> The purported “use” that the ACPA regulates is ownership of the property. For this reason, the ACPA effects a complete appropriation, and accordingly fails the first factor of the *Penn Central* test.

The second factor of the *Penn Central* balancing test does not suggest that the ACPA results in a taking.<sup>48</sup> But the third factor

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39. See discussion *infra* Part V.B.1.a.

40. See discussion *infra* Part V.B.1.a.

41. See discussion *infra* Part V.B.1.a.

42. See discussion *infra* Part V.B.1.a.

43. See discussion *infra* Part V.B.1.a.

44. See discussion *infra* Part V.B.1.b.

45. See discussion *infra* Part V.B.1.b.

46. See, e.g., *Sporty's Farm L.L.C. v. Sportsman's Mkt.*, 202 F.3d 489, 499 (2d Cir. 2000) (procuring a domain name to preclude a competitor from posting a website); see also discussion *infra* Part V.B.1.b(ii).

47. See discussion *infra* Part V.B.1.b.

48. The second *Penn Central* factor is the economic impact of the governmental action on the property. *Penn Cent.*, 438 U.S. at 124. The Supreme Court has specifically held that regulations that result in less value in personal property—as opposed to real property—are not unconstitutional. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-28 (1992). Domain names appear to be personal property. See BLACK'S LAW DICTIONARY 1233 (7th ed. 1999) (defining personal property to be “[a]ny movable or intangible thing that is subject to owner-

does.<sup>49</sup> The third factor examines whether the regulation interferes with reasonable investment-backed expectations,<sup>50</sup> including whether the regulation consists of retroactive legislation.<sup>51</sup> The retroactivity of the ACPA upsets a registrant's reasonable investment-backed expectations.<sup>52</sup> As stated above, the first condition of liability under the ACPA—acquisition of a domain name containing a trademark—applies retroactively.<sup>53</sup> Courts have also applied the statute retroactively to the second condition of liability—possessing a bad-faith intent.<sup>54</sup> Applied retroactively to the bad-faith intent condition, the ACPA deprives registrants of property based on thoughts that, at the time the registrants were thinking them, were lawful.<sup>55</sup> After enacting the ACPA, the government was able to strip cybersquatters of their property based on their thoughts that had occurred before its enactment.<sup>56</sup> Such retroactive legislation interferes with the reasonable expectations of registrants.<sup>57</sup> Under Supreme Court jurisprudence, then, the ACPA effects a governmental appropriation of property.

The ensuing four parts of this Article prove the arguments briefly discussed in this introduction. Part II of this Article discusses the general principles of trademark law and sets forth a relevant factual background of how the Internet operates. Part III analyzes the general principles of trademark law as applied to the Internet domain-name context. It concludes that a mark holder's property rights do not include the right to enjoin a registrant from cybersquatting. Part III also examines judicial attempts to fit the practice of cybersquatting within the purview of conduct that trademark law excludes; it concludes that these attempts ultimately fail. Part IV recites the ACPA and provides

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ship and not classified as real property"); *but see* discussion *infra* note **Error! Bookmark not defined.** The economic impact of prohibiting a registrant from thinking about selling the domain name to profit from a trademark is accordingly of no consequence. *See Lucas*, 505 U.S. at 1027-28. Thus, this second factor in the *Penn Central* test does not imply that prohibiting an intent to sell domain names results in a taking.

49. *See* discussion *infra* Part V.B.3.

50. *Penn Cent.*, 438 U.S. at 124.

51. *See* *E. Enters. v. Apfel*, 524 U.S. 498, 528-29, 533 (1998) (plurality); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645-46 (1993); *United States v. Sec. Ind. Bank*, 459 U.S. 70, 78 (1982).

52. *See* discussion *infra* Part V.B.3.

53. *See* 15 U.S.C. § 1117 (2000) (statutory note).

54. *See, e.g., Sporty's Farm L.L.C. v. Sportsman's Mkt.*, 202 F.3d 489, 499 (2d Cir. 2000) (finding bad-faith intent based on thoughts occurring prior to the ACPA).

55. *See id.*

56. *See id.*

57. *See* discussion *infra* Part V.B.3.

a statutory analysis of its conditions for liability. It opines that these conditions are satisfied when a registrant merely possesses a domain name while thinking certain thoughts. Part IV also provides an account of how courts have enforced the ACPA by finding liability solely based on a registrant's intent.

Part V argues that the ACPA effects an unconstitutional taking. In support of this argument, Part V examines: (1) whether a domain name represents a res over which a registrant holds property rights independent of the registrant's service agreement with the registrar;<sup>58</sup> (2) whether the Takings Clause protects the property rights a registrant may hold in the domain name;<sup>59</sup> (3) whether the character of the governmental action under the ACPA is a complete appropriation rather than a regulation;<sup>60</sup> and (4) whether the retroactive nature of the ACPA interferes with the reasonable investment-backed expectations of a registrant.<sup>61</sup> The inquiry into the third point—the character of the governmental action—analyzes: (i) whether the registrant's expressions of a bad-faith intent merit First Amendment protection;<sup>62</sup> and (ii) whether the circumstances giving rise to a bad-faith intent are also part of a registrant's fundamental property rights.<sup>63</sup> These analyses in Part V all point to the conclusion that the ACPA effects a taking.

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58. See discussion *infra* Part V.A.1.

59. See discussion *infra* Part V.A.2.

60. See discussion *infra* Part V.B.1.

61. See discussion *infra* Part V.B.3.

62. See discussion *infra* Part V.B.1.a.

63. See discussion *infra* Part V.B.1.b.