

CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

LENNAR CORPORATION,)	
a Delaware Corporation,)	
)	
Plaintiff,)	
)	
v.)	No. 06-000493 CA
)	
MICHAEL CHARLES MORGAN a/k/a/)	
MICHAEL C. FISHMAN a/k/a/)	
MORGAN FLORIDA,)	
)	
Defendant.)	

**BRIEF OF PUBLIC CITIZEN AS AMICUS CURIAE
SUPPORTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT
DISMISSING PLAINTIFF’S TRADEMARK CLAIMS**

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**BRIEF OF PUBLIC CITIZEN AS AMICUS CURIAE
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In this case, a national developer and home builder seeks to suppress criticism by a Florida area realtor, contending both that his criticism is false and defamatory, and that his use of its corporate name in the domain name for his critical web site and in the purchase of “keyword advertising” violates Florida trademark law. Public Citizen takes no position on the defamation claims, but files this brief as amicus curiae in support of defendant’s motion for summary judgment on the trademark claims. The First Amendment protects the right to engage in non-commercial criticism of companies of whom the speaker disapproves; similarly, trademark law permits a critic to use the trademarked name of the target of his criticism both to denominate the subject of a non-commercial web site about the trademark holder, and to inform those interested in obtaining information about the trademark holder that he has a web site in which they may be interested.

FACTS

Lennar Corporation is a developer, real estate manager, and home builder which has

operations in more than sixty different markets in twenty different states throughout the United States. Lennar is headquartered in Miami, Florida, and hosts its official web site at www.lennar.com. Defendant Morgan is a real estate broker whose customers have had unsatisfactory business relationships with Lennar. Morgan complained to Lennar about alleged defects in homes that it had built, and was not satisfied with Lennar's responses. Accordingly, Morgan began criticizing Lennar publicly, posting messages on public Internet forums, sending letters and emails to Lennar customers, and eventually, most relevant to the subject of this action, creating web sites featuring his criticisms as well as reposting criticisms advanced by individual Lennar customers and media reports on Lennar. The web sites also contain a variety of consumer information about buying houses and obtaining mortgages. To denominate his web site, Morgan registered domain names that captured his criticisms of Lennar, such as www.defectivehomes.us and www.lennar-homes.info.

On their face, the web sites are completely noncommercial. They do not contain advertisements or links to other home builders or, with one exception, to other commercial enterprises. One page contains the names of law firms that handle construction defects litigation, <http://www.lennar-homes.info/lawfirms>; that web page asserts that there is no charge for inclusion in the list. The complaint alleges that Morgan asked to be paid money to refrain from his campaign of criticism, but so far as amici are aware there is no evidence in the record supporting this allegation. In the course of deciding whether to file this brief as *amicus curiae*, amici's counsel asked plaintiff's counsel if they had any evidence supporting this contention, but although plaintiff's counsel promised to consider providing such evidence, they have not provided any.

ARGUMENT

I. The Trademark Claims Infringe Morgan’s Free Speech Right to Describe the Subject of His Criticism.

Ordinarily, courts consider statutory issues first to avoid constitutional issues. However, trademark statutes are customarily construed in light of First Amendment concerns, particularly insofar as they distinguish between commercial and noncommercial speech. Accordingly, we begin our analysis with the First Amendment.

Morgan’s speech is indisputably protected by the First Amendment. Lennar’s trademark claims seek government action by a court, which is subject to First Amendment scrutiny insofar as it seeks injunctive relief, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971), or damages. *New York Times v. Sullivan*, 376 U.S. 254 (1964). Unlike copyright cases where fair use is co-extensive with the First Amendment, *e.g.*, *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 560 (1985), in trademark cases, First Amendment considerations routinely receive separate discussion, although they also inform statutory interpretation. Where a defendant is engaged in noncommercial speech, mere application of trademark law may violate the First Amendment. *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 32-33 (1st Cir. 1987). Even when trademarks have been used in a commercial context, courts still construe the trademark laws narrowly to avoid impingement on First Amendment rights. *E.g.*, *Cliffs Notes v. Bantam Doubleday*, 886 F.2d 490, 494 (2d Cir. 1989). First Amendment interests are weighed as a factor in deciding whether a trademark violation should be found, *e.g.*, *Anheuser-Busch v. Balducci Pubs.*, 28 F.3d 769, 776 (8th Cir. 1994); *Ocean Bio-Chem v. Turner Network Television*, 741 F. Supp. 1546, 1553 (S.D. Fla. 1990) (“When first amendment values are involved, the Lanham Act must be construed narrowly”); and injunctions must

be narrowly crafted to comply with the rule against prior restraints on speech. *Id.* at 778; *U-Haul Int'l v. Jartran*, 793 F.2d 1034, 1042 (9th Cir. 1986); *Better Business Bureau v. Medical Directors*, 681 F.2d 397, 404-405 (5th Cir. 1982).

In many cases, courts have struggled to decide whether a particular use of a trademark constituted commercial or noncommercial speech. *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1119-1121 (8th Cir. 1999); *Semco v. Amcast*, 52 F.3d 108, 111-114 (6th Cir. 1995); *U.S. Healthcare v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 927-939 (3d Cir. 1990). This question is significant not only because the application of the federal Lanham Act is limited to commercial speech, but also because commercial speech receives less protection under the First Amendment than does noncommercial speech. Indeed, recognition that the First Amendment would bar claims for misleading statements in noncommercial speech underlay Congress' creation of the Lanham Act's "commercial" requirement. *Semco v. Amcast*, 52 F.3d 108, 111-112 (6th Cir. 1995).

Thus, when, as in *Semco*, *Porous Media*, and *U.S. Healthcare*, one company makes statements about a competitor during an advertising campaign, courts apply multi-factor tests to determine whether the statements are noncommercial, and thus entitled to full First Amendment protection, or commercial, and thus entitled only to have their First Amendment interests weighed as part of a fair use or fair commentary defense. Similarly, when sellers of T-shirts or other commercial products spoof trademarks or use trademarks to denounce political positions, courts decide whether the alleged infringers or diluters are predominantly engaging in commentary, or are using trademarks mainly to sell their own products. *E.g.*, *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 968-970 (10th Cir. 1996); *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 402-403 (8th Cir. 1987). However, when an action is brought against plainly noncommercial

uses of trademarks for political commentary, courts have not hesitated to afford full First Amendment protection against the trademark holder's claim, either by holding that First Amendment principles bar application of the statute, or by holding that a state law is unconstitutional on its face or as applied in the particular case.¹

Morgan's website is just the sort of commentary that courts assiduously protect. Morgan's criticisms would be pointless if he had to omit Lennar's name; yet the complaint asks the Court to enjoin any use of Lennar's marks **anywhere** on Morgan's website.

Furthermore, it is not just the web sites generally, but Morgan's use of Lennar's trademark in his domain name and keyword advertising, that are protected speech. Courts have repeatedly held that the use of trademarks constitutes speech protected by the First Amendment, even when used **only** to designate source. *E.g.*, *Bad Frog Brewery v. New York Liquor Auth.*, 134 F.3d 87, 94-97 (2d Cir. 1998); *Sambo's Restaurants v. Ann Arbor*, 663 F.2d 686, 694 (6th Cir. 1981). Using trademarks in domain names is analogous to using trademarks in book titles, to which the courts give First Amendment protection because they are part of the authors' expression, and call attention to the fact that the works in question contain content on those topics. *E.g.*, *Twin Peaks Production v. Publications Int'l*, 996 F.2d 1366, 1379 (2d Cir. 1993); *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989). *Accord Mattel v. Walking Mountain Prods.*, 353 F.3d 792, 807 (9th Cir. 2003).

¹ *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 33 (1st Cir. 1987); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp.2d 1161, 1167 (C.D.Cal. 1998); *ACLU of Georgia v. Miller*, 977 F. Supp 1228, 1233 (N.D.Ga. 1997); *Lighthawk v. Robertson*, 812 F. Supp. 1095, 1097-1101 (W.D.Wash. 1993); *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp 1112, 1124-1125 (S.D.N.Y. 1980).

II. The Trademark Laws Apply Only to Commercial Uses of Trademarks.

Trademark law creates a commercial tort. The limitation of trademark law to commercial uses appears in the statutory language and caselaw, and its existence follows from the limitations that the First Amendment places on the exercise of government authority restricting free speech. *Taubman v. WebFeats*, 319 F3d 770, 774 (6th Cir. 2003).

The First Amendment does not authorize regulating noncommercial speech simply because it is misleading. For example, a political flyer or a newspaper article about a public figure could not be enjoined, or made the basis for an award of damages, simply because some readers would likely find it confusing. The concept of regulating speech that has the potential to be misleading, even though it is not strictly speaking false, has developed over the thirty years since the Supreme Court first extended First Amendment protection to commercial speech. *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001). Unlike noncommercial speech, commercial speech can be regulated even if it is “not provably false, or even wholly false, but only deceptive or misleading.” *Friedman v. Rogers*, 440 U.S. 1, 9 (1979). Thus, although “[a] company has the full panoply of protections available to its direct comments on public issues, . . . there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). *Accord Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) (“the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena”); *Smith v. United States*, 431 U.S. 291, 318 (1977) (“Although . . . misleading statements in a political oration cannot be censored, . . . misleading representations in a securities prospectus may surely be regulated.”); *Young v. American Mini Theatres*, 427 U.S. 50, 68 and n.31 (1976)

(“regulatory commissions may prohibit businessmen from making statements which, though literally true, are potentially deceptive”); *Mattel v. MCA Records*, 296 F.3d 894, 905 (9th Cir. 2002) (“consumer protection rationale [for trademark relief] averting what is essentially a fraud on the consuming public is wholly consistent with the theory of the First Amendment, which does not protect commercial fraud”).

In *CPC Int’l v. Skippy Inc.*, 214 F.3d 456 (4th Cir. 2000), the Fourth Circuit implicitly recognized that trademark law must be limited to commercial uses to be consistent with the First Amendment. The issue there was whether a trademark injunction forbade criticism of the maker of Skippy peanut butter at the domain name *skippy.com*. The Court began by noting that the purposes of the trademark laws all relate to giving consumers accurate information about commercial products, *id.* at 461, and that the trademark laws do not prevent critics from commenting on commercial products. *Id.* at 462. The Court further held that criticism of the markholder was not commercial speech simply because it might impair the markholder’s commercial interests. Although the Court’s analysis was rooted in the First Amendment, the case stands generally for the proposition that the trademark laws cannot be applied to forbid such noncommercial speech.²

The limitation of trademark law to commercial situations follows from the distinctions that First Amendment law draws between commercial and noncommercial speech. The fundamental precept of trademark law is that it prevents uses of trademarks that are misleading, in that they are “likely” to be “confusing” to consumers. *Moseley v. V Secret Catalogue*, 537 U.S. 418, 429-430

²See also *White v. Samsung Electronics America*, 971 F.2d 1395, 1401 (9th Cir. 1992) (rules against exploitation of personality permissible under First Amendment because of commercial speech context); *E&J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992) (trademark injunction permissible because it limits commercial speech).

(2003). To constitute infringement, use of the trademark need not be deliberately confusing, and it need not actually constitute a “false” statement of origin. Because these standards do not meet the First Amendment’s requirements for prohibiting **noncommercial** speech, the First Amendment provides an important reason to construe the trademark laws to apply only to **commercial** goods and speech.

Consequently, several federal courts have held that the operators of Internet web sites could not be sued under the trademark laws where the web sites were non-commercial in character. *Bosley Medical v. Kremer*, 403 F.3d 672 (9th Cir. 2005); *TMI v. Maxwell*, 368 F.3d 433, 436-438 (5th Cir. 2004); *Taubman v. WebFeats*, 319 F.3d 770 (6th Cir. 2003); *Crown Pontiac v. Ballock*, 287 F. Supp.2d 1256 (N.D.Ala. 2003); *Ficker v. Tuohy*, 305 F. Supp.2d 569, 572 (D.Md. 2004). *See also Tax Cap Committee v. Save Our Everglades*, 933 F. Supp. 1077 (S.D. Fla. 1996) (refusing to enjoin leaflets in campaign over constitutional amendment because they were not “used in commerce” as required for Lanham Act jurisdiction). For example, in *Taubman v. WebFeats*, *supra*, a Dallas man was sued for creating a web site to discuss a new shopping mall that was being built near his home, and the Sixth Circuit held that, so long as he removed all links to his own business web site and to his girlfriend’s business, the non-commercial character of the web site would immunize him from suit under the trademark laws. Similarly, in *TMI v. Maxwell*, *supra*, a Houston consumer was sued for creating a web site to criticize a home builder for deceitful statements about the availability of the model he wanted, and the Fifth Circuit held that the trademark laws did not create a cause of action based on this use of the builder’s name on his web site because the site was wholly non-commercial.

The fact that Morgan’s web site mentions and links to lawyers who can represent dissatisfied Lennar customers in litigation against Lennar does not render Morgan’s use of the Lennar trademark

commercial and hence susceptible to suit under the Lanham Act. *TMI v. Maxwell, supra; Bosley Medical v. Kremer, supra*. In *TMI*, the defendant included a “Treasure Chest” for home-related service providers whose work deemed worthy of recommendation, and in *Bosley* the defendant linked to the web site of the lawyers who were providing a pro bono defense against Bosley’s trademark suit and to other discussion sites about Bosley which themselves included advertisements. In each case, the references did not make the web sites impermissibly commercial because the defendants were not paid for providing the advertisements. Similarly, in *Lamparello v. Falwell*, 420 F.3d 309, 320 (4th Cir. 2005), the defendant’s link to a book for sale at www.Amazon.com was deemed non-commercial because the defendant did not stand to gain financially from sales of the book. Thus, so long as Morgan does not stand to gain financially from the links to web sites of construction defect attorneys – and there is no evidence that he does – those links do not bring his web site within the purview of the trademark laws.

Similarly, the fact that Morgan criticizes Lennar, and thus has the potential to injure its business, does not render his use commercial and hence subject to regulation under the trademark laws. Such claims were rejected by the Ninth Circuit in *Bosley v. Kremer*, 403 F.3d at 678-679. Similarly, in *CPC Int’l v. Skippy*, 214 F.3d 456 (4th Cir. 2000), the Fourth Circuit held that the trademark laws are limited to commercial uses, and may not be invoked to suppress speech critical of the trademark holder. *Accord, Nissan Motor v. Nissan Computer*, 378 F.3d 1002, 1016-1017 (9th Cir. 2004).

Finally, the complaint alleges that Morgan undertook his campaign of criticism, and began using Lennar’s trademarks, for the purpose of making a profit by inducing Lennar to pay him to be quiet. Although we question whether mere allegations of a willingness to stop criticism in return for

a payment state a cause of action, *Penn Warranty Corp. v. DiGiovanni*, 2005 WL 2741947 (N.Y. Sup. Ct. Oct. 24, 2005), many federal courts have held that registration of a domain name containing a trademark in a domain name for the purpose of selling the name to the trademark holder is commercial use of the trademark. *E.g.*, *Panavision Int'l v. Toeppen*, 141 F3d 1316, 1319 (9th Cir. 1998). If Lennar could show that this was Morgan's purpose, it could meet the "commercial use" requirement. However, so far as amici are aware, there is no evidence of such purpose. Accordingly, Morgan's motion for summary judgment should be granted for lack of commercial use.

III. The Trademark Claims Should Be Dismissed Because Morgan's Uses are Not Likely to Cause Actionable Confusion About Source or Sponsorship.

The second independent reason why Lennar's trademark claims should be dismissed is that trademark law does not bar all uses of registered marks, but only those that are likely to cause confusion in the mind of ordinary, reasonable consumers about the source or sponsorship of the makers of goods and services. No intelligent consumer would visit Morgan's web site at www.lennar-homes.info and believe it was Lennar's web site, as opposed to a web site created by a Lennar critic, and no reasonable Internet user would see one of Morgan's keyword advertisements and not understand that the site to which it links is that of a critic, not of Lennar. Thus, there is no actionable confusion as a matter of law.

The limited purpose of trademark protections set forth in the Lanham . . . Act is to avoid confusion in the marketplace by allowing a trademark owner to prevent others from duping consumers into buying a product they mistakenly believe is sponsored by the trademark owner. Trademark law aims to protect trademark owners from a false perception that they are associated with or endorse a product.

Mattel v. Walking Mt. Prod., 353 F.3d 792, 806 (9th Cir. 2003).

See also International Order of Job's Daughters v. Lindeberg & Co., 633 F.2d 912, 918-919 (9th

Cir. 1980). “The trademark laws exist not to ‘protect’ trademarks, but . . . to protect the consuming public from confusion, concomitantly protecting the trademark owner’s right to a non-confused public.” *James Burrough Ltd. v. Sign of Beefeater*, 540 F.2d 266, 276 (7th Cir. 1976). “All of [the] legitimate trademark purposes derive ultimately from the mark’s representation of a single fact: the product’s source. It is the source denoting function which trademark laws protect, and nothing more.” *Anti-Monopoly v. General Mills Fun Group*, 611 F.2d 296, 301 (9th Cir. 1979); *Smith v. Chanel*, 402 F.2d 562, 566-569 (9th Cir. 1968). *See also West Point Mfg. Co. v. Detroit Stamping Co.*, 222 F.2d 581, 590 (6th Cir. 1955) (“it is only when the feature in fact identifies source and the imitation is likely to deceive prospective purchasers who care about source that the imitator is subject to liability”).

A. Morgan’s Domain Names Do Not Cause a Likelihood of Confusion.

Insofar as Lennar’s trademark claims are predicated on Morgan’s use of its mark in the domain name for his “gripe site,” the claims founder because domain names may designate the subject of web sites, not just their source. Consequently, numerous federal courts have held that trademarks may be used as domain names for web sites that are about markholders or about trademarked goods or services, even sites that are operated by persons other than the markholders, because the names do not occasion confusion about source.

As applied to domain names, the concern about confusion is that a member of the public, wanting to find a particular website but not knowing its Internet address, may simply “name-guess” – type a trademarked name into his browser and be misled to the wrong location. If the user thus reaches the website of a competitor of the trademark holder, the trademark holder may lose business because the user does not realize, until it is too late, that he is doing business with someone other than

the trademark holder.

The courts have decided several cases where competitors disputed which of them is entitled to use particular trademarks to denominate their products, and therefore the web sites about those products. One of the leading cases is *Brookfield Communications v. West Coast Video*, 174 F.3d 1036 (9th Cir. 1999), which involved two different companies that were using the term “moviebuff” to denominate databases providing information about films. The fundamental dispute between the companies was about which had used the mark earliest, and thus had priority of right, but it played out in a controversy about the use of the mark in domain names and “meta tags,” an invisible form of code that many search engines were using at the time to index and rate the relevance of web sites listed in response to searches. When West Coast Video created a web site about its own product, and used “moviebuff” to denominate both the product and the web site, its product was the subject of the web site, and so its use of “moviebuff” in that context was implicitly identifying itself as the source and thus of the web site. Naturally enough, the court allocated the right to use “moviebuff” in the domain name or meta tags to the party that won the contest over the trademark, and in that context it is not surprising that the court would refer to domain names and meta tags as identifying the source of sponsor of the web site. But it bears emphasis that the *Brookfield* court **also** stated that it was not addressing the case in which the trademark was being put to a “fair use” on the web site to denominate a person other than the site operator, such as for the purpose of comparative advertising or criticism, as in, “why use Brookfield’s “moviebuff,” when our West Coast product is cheaper or better”? 174 F.3d at 1065-1066. Indeed, when a trademark is put to “nominative fair use,” to identify the trademark holder as a subject of commentary or comparison or criticism, it follows as a matter of law that there is neither infringement nor dilution of the protected trademark.

Playboy Enterprises v. Welles, 279 F.3d 796, 804 (9th Cir. 2002).

The problem arises in the Internet context because the Internet is so vast. According to a report last fall, there were 100 **million** discrete web sites with domain names and substantive content, double the number that existed only two years before. Walton, *Web reaches new milestone: 100 million sites*, <http://www.cnn.com/2006/TECH/internet/11/01/100millionwebsites/index.html> (November 1, 2006). For the web site operator whose site contains statements about a particular person or entity, the question then naturally arises – what are the permissible means to communicate truthful information about the content of his or her web site? How may the site operator inform Internet users who may be interested in the subject discussed that **this** is a web site that has information that may be relevant to them.

For example, it is well accepted in trademark law that likelihood of confusion analysis must accommodate the First Amendment interest of the authors of books, songs or movies in giving their works a title that reflects the content of the work. *Mattel v. MCA Records*, 296 F.3d 894, 902 (9th Cir. 2002); *Westchester Media v. PRL USA Holdings*, 214 F.3d 658, 664 (5th Cir. 2000) *Twin Peaks Production v. Publications Int'l*, 996 F.2d 1366, 1379 (2d Cir. 1993); *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989). Unless the title is deceptive about sponsorship by the trademark owner – for example, *The Authorized History of Lennar Homes*, or *The Autobiography of Leonard and Arnold* (the founders of Lennar, from whose names the company is drawn) – a title that is relevant to the content of the work will not be found to violate the trademark rights of the companies that own them.

Similarly, a domain name may as easily denote the subject of a web site as its author. For example, the web site at www.apples.com is about apples, but is not sponsored by Apple Computer,

and the web site at www.heartdisease.com is about heart disease. There is no reason why a domain name that incorporates a trademark cannot similarly be **about** the company or product denominated by that mark web site, but not be sponsored by the trademark holder.

Consequently, many courts have held that a commentary site about a trademark holder or its products may use a domain name even though the site is sponsored by a critic of the markholder (or even a fan of the markholder). Thus, for example, a web site praising a local shopping mall is operated by a local citizen at www.shopsatwillowbend.com without permission from the developer of The Shops at Willow Bend, *Taubman Co. Ltd. Partnership v. WebFeats*, 319 F.3d 770 (2003); a web site criticizing Jerry Falwell for his views on homosexuality is operated by a gay man who was offended by those comments at www.falwell.com over objections from Falwell himself, *Lamparello v Falwell*, 420 F.3d 309 (4th Cir. 2005); and a dissatisfied patient has placed a web site attacking the medical practices at a hair replacement enterprise at www.bosleymedical.com. *Bosley Medical Institute v. Kremer*, 2004 WL 964163 (S.D. Cal., April 29, 2004), *aff'd*, 403 F.3d 972, 674 (9th Cir. 2005) (“We hold today that the noncommercial use of a trademark as the domain name of a web site – the subject of which is consumer commentary about the products and services represented by the mark – does not constitute infringement under the Lanham Act.”). *See also* *Crown Pontiac v. Ballock*, 287 F. Supp.2d 1256 (N.D. Ala. 2003); *Northland Ins. Co. v. Blaylock*, 115 F. Supp.2d 1108 (D. Minn 2000). Even in the commercial context, the Seventh Circuit has held that a seller of used “Beanie Babies” could use the domain name www.bargainbeanies.com so long as the domain name was truthful, in that the **only** stuffed toys sold on her site were Beanie Babies. *Ty v. Prettyman*, 306 F.3d 509, 514 (7th Cir. 2002).

All of these cases note that the finding of no likely confusion as a matter of law rests in part

on the fact that the web sites in question in those cases were patently non-confusing, in that they reveal from the very beginning of the page that they are not sponsored by the trademark holder. But that is plainly true of Morgan's lennar-home.info web site as well. The page begins with a headline in a colored box stating, in large type, "Lennar Buyers Beware" and goes on to talk about "deadly defects." The first text on the page is a disclaimer, also in large type and highlighted with a yellow background, stating that the site is not affiliated with Lennar, and indeed providing a hyperlink to Lennar's own web site. Next is a large headline in bold black type, stating "Substandard Workmanship Code Violations – Deadly Defects" and then, in somewhat smaller but still prominent type, some of it in bright blue: "MUST READ – 'Lennar Homes Killed My Husband' – Click Here." No person – especially someone who is in the market for the purchase of a new home, which costs in the six or seven figures and hence is likely to pay close attention – could visit this web page and think they are looking at a web site that is sponsored by Lennar itself. As in cases like *Bosley*, *Lamparello*, and *Taubman*, the Court should conclude that Morgan's domain name poses no likelihood of confusion.

B. Morgan's Keyword Advertising Does Not Cause Likelihood of Confusion.

Although the purchase of keyword advertising to be displayed when a search engine user conducts a search for a trademarked term raises somewhat different considerations, and many fewer cases have been litigated on the subject, the result should be the same – paying a search engine to display non-confusing advertisements about the trademark holder to users who enter the trademark as a search term do not run afoul of the trademark holder's rights. The argument for a finding of infringement or dilution is that it is inappropriate for Internet speakers to be able to present their sites for consideration to any user who uses a search engine to locate the trademark holder's web site by

entering the trademark as a search term. However, even assuming that a search engine user expects only to find the mark owner's official web site when using the mark as a search term – itself a questionable assumption, as further discussed below – such advertising is analogous to marketing practices that are consistent with the trademark laws.

A critic of Lennar Homes would surely be entitled to post a huge billboard along the Florida Turnpike, or to buy a full page ad in the Miami Herald, using the Lennar Homes name in huge print, and stating, “If you think Lennar builds good houses at a fair price, think again,” and include a URL for a web site detailing his criticisms. But Lennar critics (or competitors) are not limited to advertising to the general public. They are also entitled to advertise in locations where consumers already interested in buying houses generally are likely to see their ads. Similarly, they are entitled to seek out advertising venues where their ads can be seen by people who are thinking about whether to buy Lennar homes, or seeking information about Lennar itself.

For example, if the *Miami Herald* or WPTV NewsChannel 5 ran a series of news stories about Lennar, either a favorable story or an exposé, either Morgan, or a rival developer for that matter, could properly buy advertising on the adjoining pages of the newspaper, or could buy spots specifically timed to run before or after the Lennar segments. This surely would not violate Lennar's trademark even if the *Herald* placed Lennar's name in the news index, or if the station ran teasers for its news coverage and readers' or viewers' attention was drawn to the news stories by the knowledge that information about Lennar could be seen there. Similarly, if Morgan were to pay a large enough sum of money to the person who owns the plot of land next to Lennar's headquarters in Miami, Florida, or next to one of Lennar's many regional offices, he could erect a large billboard offering his criticisms, and direction to his critical web sites, to draw the attention of customers who had come

to that location to visit Lennar. The neighboring landowner would not violate the trademark laws by holding an auction among other developers or others wanting to give information to potential Lennar customers for the placement of such a billboard, and the winning bidders would not face trademark scrutiny for paying for the billboard after winning the auction.

Moreover, if a customer came to see a realtor for the particular purpose of buying a Lennar home, the broker would not violate the trademark laws by responding that he thinks that Lennar makes an inferior product, and that some other developer would represent a better deal for them. By the same token, Morgan might pay several realtors to deliver this line for him, or to provide him with mailing lists of people who had come to them looking for Lennar homes. The purchase of mailing lists might implicate considerations of customer privacy, but, like the other examples discussed above, it would not violate the trademark laws. In each case, Morgan would be delivering his message to persons who had been drawn by Lennar's trademark to the location where they could be identified as prospective targets for his advertising.

In a similar manner, by purchasing keyword advertising, which displays a short description of his web site along with a link to the site itself when search engine users enter the trademarked name "Lennar" into a search engine, Morgan is simply bringing his message to the attention to Internet users who may have demonstrated an interest in finding out more about Lennar. So long as his advertisements and the underlying web site are themselves not confusing about their source, Morgan should not be found liable under the trademark laws.

Although litigation on the issue of keyword advertising is relatively recent, the decided cases under the Lanham Act suggest that no violation should be found unless consumers are likely to be confused about the origin of the ads based on the language of the ads themselves. Several cases have

held that keyword advertising does not present **any** issues under the trademark laws because the presentation of particular ads in response to the keyword searches is not a “trademark use” as required for a claim of infringement to proceed. *Rescuecom v. Google*, 456 F. Supp.2d 393, 403 (N.D.N.Y. 2006); *Merck & Co. v. Mediplan Health Consulting*, 425 F. Supp.2d 402, 415 (S.D.N.Y.2006), *reconsideration denied*, 431 F. Supp. 425 (S.D.N.Y.). Several other courts, although finding a trademark use, have held that the practice of keyword advertising itself does not create any likelihood of confusion as a matter of law, unless the particular ads that are displayed are confusing about sponsorship. *J.G. Wentworth v. Settlement Funding LLC*, 2007 WL 30115 (E.D. Pa.. Jan. 4, 2007); *Government Employees Ins. Co. (GEICO) v. Google, Inc.*, 2005 WL 1903128 (E.D. Va., Aug. 8, 2005). In several other cases, the issue of likelihood of confusion is still outstanding. *E.g., Buying for the Home v. Humble Abode*, 459 F. Supp.2d 310 (D.N.J. 2006); *800-Jr. Cigar v. Goto.com*, 437 F. Supp.2d 273 (D.N.J. 2006); *Edina Realty v. TheMLSOnline.com*, 2006 WL 737064 (D. Minn. March 20, 2006).

In our view, summary judgment should be granted dismissing the trademark claims in this case for several reasons. First, it is neither the sole nor even the principal function of a search engine to enable members of the public to reach a trademark holder’s official web site. One of the main flaws in plaintiff’s complaint is its apparent assumption that any member of the public who uses a search engine to conduct a search using the term “Lennar” must necessarily be looking for Lennar’s official web site, and only for that web site, and hence is likely to experience confusion about whether all of the ensuing search results are linked to Lennar’s own site. The underlying assumption is wrong. To the contrary, it is common knowledge that an Internet user who employs a search engine and uses a search term that is in common use is likely to receive a listing of hundreds or even thousands of web

sites relating to their search terms. For example, a search on Google using the term “Lennar” produced a list of approximately 1,250,000 search results; a search using the term “Lennar Homes” produced about 885,000 results; using the term “Lennar Corporation” produced more than 500,000 results. Searches on Yahoo! using those same keywords produced even more results. (Copies of these test searches are attached). Lennar’s own web site is prominently featured as the first listed search result, but others are obviously from news sites, finance information sites, job search sites, competitors, and other sites including Morgan’s “gripe site.” No rational Internet user could possibly think that all of these results identify Lennar’s own web site, and no Internet user with even minimal experience would use a search engine in the expectation of finding **only** the official site of a company in which they are interested. Any Internet user who encountered these search results and suffered confusion about whether every one of them was linked to Lennar’s official web site is, in our view, too careless to have his or her confusion weighed against the rights of the operators of the other web sites.³

To be sure, some searches are performed with the objective of finding a particular company’s official web site. Professor Milton Mueller, one of the nation’s leading experts on the domain name system, has argued that, although at one time members of the public commonly used “name-guessing” to locate the official web sites of companies and other entities (by typing their names plus the “dot-com” domain into a browser window), for a variety of reasons, search engines have replaced name guessing as the most common way for the public to find the web sites of companies in which they are

³Unlike British law, under which the standard of “a moron in a hurry” can be used as a point of comparison in trademark law, http://en.wikipedia.org/wiki/A_moron_in_a_hurry, American law protects only the expectations of “reasonably prudent purchasers exercising ordinary care.” *Machinists v. Winship Green Nursing Ctr.*, 103 F.3d 196, 201 (1st Cir.1996); *see also Entrepreneur Media v. Smith*, 279 F.3d 1135, 1151 (9th Cir. 2002).

interested. Expert Report of Milton Mueller in *Taubman v. WebFeats*, <http://dcc.syr.edu/miscarticles/mishkoff.pdf>, at 4-6 (last visited February 20, 2007). Hence, one common use for search engines today is to find the official web sites of even the most well-known companies.

But the mere fact that the user is looking for information that has some bearing on a trademarked word, such as “Lennar,” does not necessarily mean that the user wants to know only who owns the trademark and what the owner wants to convey. The user may be looking for information about the trademark, or about the trademark holder. He may be looking for historical information. The user might have a grievance about the trademarked item, and want information about other similar grievances (for example, the person might have bought a Lennar home and been dissatisfied with its condition or workmanship, and be trying to learn if others have had similar accidents and what they have done about it). Or, the user might want to find archives of information about disputes in which the trademark holder has been engaged.

Or the user might be trying to buy either the trademarked item or some other item similar to the trademarked item, and be seeking a comprehensive list of retailers who sell that item, to use the Internet for comparison shopping. And perhaps, instead of looking for realtors who sell only the goods of the trademarked brand, the user could be looking for realtors who sell multiple brands, on the theory that it is more efficient to engage in comparison shopping on the premises of a retailer who sells several similar products. And, even if the consumer came to the search engine with the principal objective of finding the official web site of the trademark holder, that does not mean that the consumer would not be grateful for being given **other** information about the markholder or about its goods and services.

In crafting rules for the use of trademarks on the Internet, it is important to bear in mind all

these potential objectives of Internet users, not to speak of the general purposes of trademark law, so that in trying to prevent customer confusion about the source, the courts do not impair the ability of Internet users to find information about the trademarked item, or the ability of search engine operators to accommodate these differing objectives. In this regard, it is useful to draw an analogy with ways of finding information in a library. Just as an unauthorized history of Lennar Homes could have the word “Lennar” in the title without violating plaintiff’s trademark, *see Rogers v. Grimaldi*, 875 F.2d 994, 1000 (2d Cir. 1989), the relevant entries for the card catalog could surely include the word “Lennar” in the title and subject cards. The author card would be different – only Lennar, as the owner of the Lennar trademark, could hold itself out as the author or sponsor of a book. Similarly, the rules governing the use of trademarks on the Internet must allow for these multiple uses of a single word as a target of searches for author, title and subject of each website.

Moreover, each advertisement that Morgan causes to be displayed when search engine users employ “Lennar” as a search term clearly reveals that it links to a web site that provides at least a “review” of Lennar’s products, if not “criticism,” indeed harsh criticism, of Lennar. The text of Morgan’s keyword advertisements as alleged in the Complaint are not at all confusing:

Lennar Homes - Reviews

Information, Comments, Reviews – Find
Out Before You Buy
www.LennarHomes.info

Lennar – Warning

www.defectivehomes.us

Lennar Homes – Warning

Defective Homes – Code
Violations Detailed
Home Inspections Required
www.DefectiveHomes.us

Similarly, recent searches on Google for “Lennar Homes” produced the following ads in the “Sponsored Links” past of the search results:

Lennar Home Kills Father

Electrocuted in New Lennar Home
- Read More Before You Buy
www.Lennar-Homes.info/Defects

Home Buyer Information

Buyer Complaints - Articles - Forum
How To File Complaint - Get Action
www.Lennar-Homes.info/Defects

Lennar Homes Information

Read What Other Lennar Owners Say -
Comments - Complaints - Problems
www.Lennar-Homes.info/Defects

Each of these advertisements plainly reveals that they link to a web site that will at least provide “reviews” if not a “warning” or references to defects, including fatal defects, complaints, problems, and the like. None of them appears to be from Lennar itself.

Although keyword advertisements must be short, and hence require extreme economy in word usage, such words and phrases as “defects”, “kills father,” “warning,” “complaints,” “code violations,” and “Read what other Lennar owners have to say,” plainly reveal to Internet users who come across these advertisements that they are not presented by Lennar itself. And, of course, those who click on those links are brought to Morgan’s home page, which as discussed in the previous section of this brief clearly shows from the very top of the page that the site is **anti**-Lennar.

IV. The Doctrine of Initial Interest Confusion Does Not Justify Lennar’s Claim.

Because neither Morgan’s web sites nor his keyword advertisements pose any realistic danger of confusing their viewers about whether Lennar is their source or sponsor, but rather plainly reveal to any prospective Lennar purchase that they are offered by a fierce critic of Lennar, Lennar’s only hope of preserving its trademark claims is by relying on the doctrine of initial interest confusion. In the Internet context, some courts say that initial interest confusion occurs when a consumer looking for a trademark holder is drawn by use of the mark in a domain name, meta tags, or keyword advertising, to a website that is **not**, once viewed, confusing about source. Nonetheless, the consumer may decide that he is interested in the goods or services marketed there, and thus stay and look further **despite** the lack of confusion. *Brookfield Communications v. West Coast Entertainment*, 174 F.3d 1036, 1062 (9th Cir. 1999). The hypothetical user decides not to continue to look for the trademark holder, not because of any illusions about who sponsors the website he or she is viewing, but because the website provides other attractive inducements. For example, the

consumer may perceive that the current website offers good comparative information, cheaper prices for functionally equivalent goods, or higher quality goods.

The Florida courts have never recognized this doctrine, and a Florida federal judge recently stated that the initial interest principle is “unpersuasive.” *Vital Pharmaceuticals v. American Body Bldg. Products*, 2007 WL 128816 (S.D. Fla., Jan. 12, 2007), at *15. “Initial interest confusion” has come to be a bit of a buzzword with imprecise meaning, Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 *Cardozo L. Rev.* 105 (2005); Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 *Emory L. J.* 507, 559-574 (2005), but because the doctrine is so plainly inapplicable here, this case does not provide the occasion to plumb its meaning. Even if the doctrine is ever worthy of application, for three critical reasons, initial interest confusion cannot help Lennar here.

First, initial interest confusion has its most important application when two commercial competitors are selling similar goods to the same set of consumers, *Nissan Motor v. Nissan Computer*, 378 F.3d 1002, 1019 (9th Cir. 2004); *Checkpoint Sys. v. Check Point Software Tech.*, 269 F.3d 270, 296-297 (3d Cir. 2001), and has less force when customers are likely to exercise care in making their final purchasing decisions. *Id.* Here, the doctrine of initial interest confusion has no relevance because Morgan is not selling rival goods but is simply expressing his views about Lennar. Moreover, Lennar is a builder of houses costing hundreds or even millions of dollars; accordingly, its customers can be expected to devote a fair amount of attention to their purchases. Lennar’s target audience will be quite able to distinguish between Morgan’s views and Lennar’s commercial web site. In these circumstances, the possibility of initial interest confusion is virtually non-existent.

Second, developments in both law and technology call into question the applicability of initial

interest confusion to web sites that accurately use domain names to denote web sites' subjects. The early domain name cases spoke with assurance of the supposed lack of sophistication of Internet viewers and the absence of a reliable index of web sites. *E.g.*, *Panavison v. Toeppen*, 141 F.3d 1316, 1327 (9th Cir. 1998); *Jews for Jesus v. Brodsky*, 993 F. Supp. 282, 303 (D.N.J. 1998). Courts assumed that a customer who got to the wrong website would just give up "due to anger, frustration or the assumption that plaintiff's homepage does not exist." *Id.*, 993 F. Supp. at 307. On this theory, when a customer was confused into visiting another person's website by a misleading domain name, even though confusion was dispelled as soon as the customer reached the rival site, the customer would find it too hard to find the site that he was really seeking. In this context, the doctrine of initial interest confusion protected the consumer against unduly high search costs that would have been incurred as a consequence of the temporarily confusing use of the mark.

This analysis has become outdated through both changes in the sophistication of Internet viewers and developments in search technology. Although it authored *Brookfield*, the Ninth Circuit has repudiated the view that Internet viewers are naive or unsophisticated. *Entrepreneur Media v. Smith*, 279 F.3d 1135, 1147 (9th Cir. 2002). Next, in *Interstellar Starship Serv. v. Epix*, 304 F.3d 936, 942 (9th Cir. 2002), that court retreated from the suggestion that initial interest confusion was an independent violation that could be found without reference to other factors. And numerous courts, not to speak of the expert report of Milton Mueller, *supra* at 20, have recognized that search engines now **do** provide an excellent index for the World Wide Web, or at least large portions of it, and have acknowledged the diminution of the consequences of landing at the "wrong" website as a result of initial interest confusion. *E.g.*, *Strick Corp. v. Strickland*, 162 F. Supp.2d 372 (E.D. Pa. 2001); *Bihari v. Gross*, 119 F. Supp.2d 309, 320 n.15 (S.D.N.Y. 2000). As *Strick* stated:

[A]ny initial confusion that arises from Defendant's use of his strick.com domain site, specifically, that consumers will realize that they are at the wrong site and will go to an Internet search engine to find the right one, is not enough to be legally significant. . . . It is clear that Internet surfers are inured to the false starts and excursions awaiting them and are unlikely to be dissuaded, or unnerved, when, after taking a stab at what they think is the most likely domain name for particular web site [they] guess wrong and bring up another's webpage.

162 F. Supp.2d at 377 (quotation marks and citations omitted).⁴

Here, of course, Morgan's hyperlink to Lennar's own website means that viewers who suffer from initial interest confusion need not even press the "back" button or go to a search engine; they need only click on the hyperlink to go straight to Lennar's site. Before Morgan registered his domain name, consumers who name-guessed "lennar-homes.info" would have received an error message telling them that there was no such web site; Morgan's web site, with its hyperlink, actually directs lost consumers to Lennar's own web site.

Third, an injunction against noncommercial use of the trademark pursuant to the doctrine of initial interest confusion, or an award of damages based on profits lost because the critic was too persuasive, would be inconsistent with the First Amendment. Even if a compelling government interest were served by forbidding mere "likelihood of confusion," and there were thus a constitutionally permissible basis for issuing an injunction against noncommercial speech, the constitutional basis for the injunction is even more problematic if the confusion caused by the trademark is merely ephemeral. If, for example, the confusion caused by use of the trademark in a domain name is dispelled as soon as the viewer begins to read the homepage and recognizes that the

⁴David Bernstein, a prominent trademark enforcement lawyer, stated that "99 times out of 100, consumers are able to find the site they are looking for." Loomis, *Domain Name Disputes Decline as Internet Matures*, <http://www.law.com/jsp/article.jsp?id=1044059430652> (last visited February 20, 2007).

site is critical of the markholder and does not promote the markholder's viewpoint, there is no "compelling government interest" served by enjoining the domain name. *Cf. Northland Ins. Co. v. Blaylock*, 115 F. Supp.2d 1108, 1119-1121 (D. Minn. 2000) (declining as a matter of trademark law to apply initial interest confusion absent proof of commercial motive). For reasons such as these the United States Court of Appeals for the Fourth Circuit recently declined the invitation to adopt the doctrine of initial interest confusion in a case involving a noncommercial commentary web site, *Lamparello v. Falwell*, 420 F.3d 309, 316-318 (4th Cir. 2005). This Court should similarly refuse to adopt the doctrine to find trademark infringement in a case such as this.

CONCLUSION

Defendant's motion for summary judgment should be granted.

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