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FIRST AMENDMENT ❖ TRADEMARK ❖ COPYRIGHT ❖ DOMAIN NAME LAW ❖ INTERNET LAW

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PLEASE REPLY VIA EMAIL OR FAX

**SENT VIA EMAIL
SEPTEMBER 29, 2009**

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Re: Proposed Stipulation in WIPO Case No. D2009-1182

Dear Mr. Kaplan,

As you may be aware, from reading our Response in this case, there is a split of authority in the WIPO decisions as to how criticism sites should be examined. See “WIPO Overview of WIPO Panel Views on Selected UDRP Questions,” at Paragraph 2.4.

View 1 states: “The right to criticize does not extend to registering a domain name that is identical or confusingly similar to the owner’s registered trademark or conveys an association with the mark.”

View 2 states: “Irrespective of whether the domain name as such connotes criticism, the respondent has a legitimate interest in using the trademark as part of the domain name of a criticism site if the use is fair and non-commercial.”

Naturally, View 2 is the prevailing view of American panelists and panels that apply American law to UDRP proceedings. View 1 seems to be more popular with international panelists and panels that apply European law.

Unfortunately, given that UDRP decisions regularly incorporate international legal principles, this case could be assigned to a foreign panelist or to an American panelist who applies transnational principles. I personally would find it distressing if the panel were to make a decision that completely disregards the U.S. Constitution in favor of a foreign perspective that adopts View 1.

To be candid, we found the fact that Mr. Beck filed this action at all to be most puzzling. Although, it was obvious why he did not file in a U.S. court given the law surrounding

nominative fair use of trademarks as fully explained in our Brief. Naturally, a defamation claim as alluded to in Mr. Beck's complaint would be humiliatingly doomed as well in a U.S. court. See *Greenbelt Coop. Pub. Ass'n. v. Bresler*, 398 U.S. 6 (1970) (when it is apparent, in the context of a statement, that its meaning is figurative and hyperbolic, the falsity of the literal meaning does not equal a knowing falsehood or reckless disregard for the truth, thus a public figure can not prove actual malice as a matter of law); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (although this was an intentional infliction of emotional distress claim, by the time it got to the U.S. Supreme Court, the initial action included a defamation claim. The preposterous nature of the parodic claims led the jury to find against Falwell); *Dworkin v. L.F.P., Inc.*, 839 P.2d 903 (Wyo. 1992) (plaintiff referred to as "shit-squeezing sphincter," and "a cry baby who can dish out criticism but clearly can't take it"); *Lampkin-Asam v. Miami Daily News, Inc.*, 408 So. 2d 666 (Fla. 3d DCA 1981) (even otherwise defamatory words are hyperbolic, and thus protected speech when taken "in their proper context."); *Horsley v. Rivera*, 292 F.3d 695, (11th Cir. 2002) (a claim that plaintiff was an "accomplice to homicide" protected as rhetorical hyperbole when taken in context); *Fortson v. Colangelo & NY Post*, 434 F.Supp.2d 1369 (S.D. Fla. 2006) (when words literally accuse plaintiff of a crime, there is no defamation when the context makes it clear that it is rhetorical and parodical speech).

Accordingly, we found it to be most ironic that Mr. Beck, facing the fact that the U.S. Constitution would stand in his way in a U.S. court, sought to bring this action before an international domain name arbitration panel. On March 30, 2009, he said on his show:

Let me tell you something. When you can't win with the people, you bump it up to the courts. When you can't win with the courts, you bump it up to the international level.

Of course, we levy no critique at Mr. Beck for seeking to vindicate his perceived rights in this forum. We do not share his opinion as articulated on March 30, and we respect his creativity in seeking an alternate avenue where his claims *might* have a chance of success.¹ Unfortunately, despite the general wisdom among UDRP panelists, we find that occasionally they render decisions that make First Amendment champions cringe.

We are certain that despite our disagreement with Mr. Beck's legal position, that all parties involved hold equal reverence for the First Amendment. Therefore, I have prepared a proposed stipulation that will ensure that no matter which panelist is assigned to this case, the First Amendment will illuminate these proceedings like rays of light from the Torch of Liberty.

I hate to presume anything about anyone, but I presume that Mr. Beck will agree to this stipulation. It would be an interesting day indeed if Mr. Beck preferred to risk that a panelist would apply *French law*² to a case between two Americans over a matter of public discourse.

¹ We must all admit that Mr. Beck *could* prevail in the UDRP action.

² To be clear, we have nothing but respect for the French legal system. Nevertheless, the Gallic commitment to free speech rights is not as broad as ours.

I recall that Beck publicly called Harold Koh, the Dean of Yale Law School, a “threat to American democracy” for his views on transnational law. Beck said of Koh:

he wants to subordinate the American Constitution to foreign and international rules. We see that in his attack on First Amendment free speech principles, which he finds opprobrious.

Similarly, Mr. Beck said it best when he warned of the dangers of allowing international legal principles to trump our cherished constitutional rights:

Once we sign our rights over to international law, the Constitution is officially dead.

I am certain that neither party wishes to see First Amendment rights subordinated to international trademark principles, thus unwittingly proving Mr. Beck’s point. Lest this case become an example of international law causing damage to the constitutional rights that both of our clients hold dear, I respectfully request that your client agree to stipulate to the application of American constitutional law to this case.

I have attached a proposed stipulation for your review.

Sincerely,

A handwritten signature in blue ink that reads "Marc J. Randazza". The signature is fluid and cursive, with a long horizontal line extending to the right.

Marc John Randazza

Before the:

**WORLD INTELLECTUAL PROPERTY ORGANIZATION
ARBITRATION AND MEDIATION CENTER**

*Mercury Radio Arts, Inc.
And Glenn Beck
COMPLAINANT*

Disputed Domain Name:
Glennbeckrapedandmurderedayounggirlin1990.com

-v-

WIPO Case No. D2009-1182

*Isaac Eiland-Hall
Panama City PC
RESPONDENT*

STIPULATION

WHEREAS, the parties to this dispute are all U.S. Citizens

WHEREAS, the parties to this dispute desire to ensure that U.S. law and U.S. Constitutional principles are given controlling weight in the above-styled proceeding,

The Parties hereby stipulate to the following measures in this action

1. The Parties hereby stipulate that the U.S. Constitution, including (and especially) the First Amendment thereto should apply to these proceedings and should govern the Panel's decision in this case.
2. The Parties hereby stipulate that the Panel shall not enter a decision in this case that would be contrary to the protections afforded to American citizens under the First Amendment, regardless of any international principles previously adopted by other UDRP panels or other international bodies.



Matthew A. Kaplan
Attorney for Complainant

Marc J. Randazza
Attorney for Respondent