

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, SS.

A.C. No. 2011-P-1533

JENZABAR, INC.,

Plaintiff - Appellant,

v.

LONG BOW GROUP, INC.,

Defendant - Appellee.

ON APPEAL FROM JUDGMENT
OF THE SUPERIOR COURT

REPLY BRIEF FOR PLAINTIFF-APPELLANT JENZABAR, INC.

Joshua M. Dalton
BBO# 636402
josh.dalton@bingham.com
Lawrence T. Stanley, Jr.
BBO# 657381
lawrence.stanley@bingham.com
Bingham McCutchen LLP
One Federal Street
Boston, MA 02110
617.951.8000

Lawrence R. Kulig
BBO# 544646
lkulig@eckertseamans.com
**Eckert Seamans Cherin &
Mellott, LLC**
Two International Place,
16th Floor
Boston, MA 02110
617.342.6800

Jamison J. Barr
BBO# 639601
jbarr@jenzabar.net
Jenzabar, Inc.
101 Huntington Avenue
Suite 2205
Boston, MA 02199
617.492.9099

Attorneys for
Plaintiff-Appellant
Jenzabar, Inc.

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PRELIMINARY STATEMENT¹

Long Bow's response brief ("LB Br.") reflects its continued mischaracterization of Jenzabar's claims. This case is not about preventing free speech; it is about preventing the needless and willful misappropriation of Jenzabar's goodwill to further Long Bow's own commercial and political aims. While Long Bow's brief is largely devoted to arguing that the First Amendment bars Jenzabar's claims -- a defense the Trial Court never considered -- Long Bow cannot dispute that in marketing itself in internet search results, it used the title tag "**Jenzabar**," a website description that failed to inform consumers that the Web Page is not affiliated with Jenzabar, and search engine optimization ("SEO") tricks that ensured that its link would appear tucked between links for actual Jenzabar-authorized sites on the very first page of searches for the word "JENZABAR". The subject link read:

Jenzabar

The information on these pages about Ling Chai and **Jenzabar**, the software company she runs with her husband, Robert Maginn, contains excerpts from and links . . .
square.tv/film/jenzabar.html - Cached - Similar

Long Bow contends that "there is nothing about this description that implies that Jenzabar is the source of the page." LB Br. at 39. But how can Long Bow credibly

¹ Defined terms have the same meaning as set forth in Jenzabar's Principal Brief ("Jenzabar Br.").

claim, or the Trial Court hold, that **no reasonable juror** could find that **this** link with **this** title and **this** placement implies that Jenzabar at least sponsored or is otherwise associated with the page? They cannot. Only a jury can make that decision.

In criticizing Jenzabar, Long Bow took a series of steps that trampled Jenzabar's goodwill, **none of which were necessary to convey Long Bow's commentary.** Long Bow did not have to use the Jenzabar name alone as its sole title tag, did not have to overload its metatags with the Jenzabar name, and did not have to use a misleading description of its website in search results. Had Long Bow made the opposite choice each time, Jenzabar's goodwill would have been spared, and Long Bow's ability to freely convey its message would not only have remained intact, but would have been amplified by removing confusion about source. Thus, and contrary to Long Bow's and amicus curiae Digital Media Law Project's ("DMLP") ubiquitous assertions, this case is not about quelling free speech. It is about protecting consumers from Long Bow's deceptive and confusing misuse of the goodwill that Jenzabar worked hard to develop for over a decade.

Far from being pro-censorship, Jenzabar's wish to prevent a blurring of the sources and associations of speech serves only to further the First Amendment. Indeed, Jenzabar agrees with DMLP that this Court should "craft its decision in a way that recognizes the clear

delineation between valid uses of trademark law (to avoid consumer confusion) and invalid ones (to suppress commercial speech)." DMLP Br. at 8. That line, however, already exists in the law, albeit still forming in the internet search result context. Established law from related contexts makes clear that a person **never** has the right to use another's trademark to masquerade as something they are not. That, however, is precisely what Long Bow has done.

Long Bow seeks to avoid the consequences of its misconduct by encouraging the Court to abandon the existing balance between speech and trademark rights, in favor of a rule that would allow any person to use another's trademark in any fashion in internet search results and advertisements so long as the destination website eventually makes clear that the website is not affiliated with or sponsored by the trademark holder. DMLP argues that any other holding would effectively shut down the internet and prevent commentary or criticism of trademark holders (*i.e.*, essentially everyone).

Long Bow and DMLP could not be further off base. Permitting users to occlude the true sources and affiliations of speech by pretending to be something they are not in internet search results would, as one court put it, result in a "cacophony," not a conversation. The extremist view urged by Long Bow and DMLP would effectively create a lawless vacuum around internet

search results and advertising. That is not and cannot be the law.

Long Bow has a First Amendment right to criticize whomever it wants. But Long Bow has no right to use the JENZABAR mark in a manner that suggests sponsorship by, or an affiliation with, Jenzabar. There is, simply put, no First Amendment right to confuse. Applying a proper likelihood of confusion and nominative fair use analysis to the actual infringing use, the Order was erroneous and should be reversed. At a minimum, a jury should decide whether the intentional placement of a search engine advertisement among the very first results for someone else's trademark that uses that mark as its sole title and a misleading description of its content is likely to cause confusion. The Order must be reversed.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT INSULATE LONG BOW FROM LIABILITY UNDER THE LANHAM ACT

A. There Is No First Amendment Right to Cause Confusion

No doubt aware that its deceptive use of Jenzabar's trademark in its search engine advertisements is actionable, Long Bow tries to create a censoring straw man and then claim First Amendment rights against this imagined foe. The truth, of course, is that Jenzabar simply asks this Court to recognize the well-established line between protectable speech and unprotectable misappropriation. Indeed, it is only through a healthy

respect for both free speech **and** trademark rights that the ability to effectively obtain information is preserved.

Far from serving to curtail free speech, ensuring that trademarks cannot be misappropriated to cause confusion as to the source of each communication serves only to benefit the exchange of ideas. "Trademark rights promote the aims of the first amendment by enabling producers of the spoken and written word to differentiate themselves. If multiple businesses use the same (or confusingly similar) names, the result is cacophony rather than discussion or debate." *Te-Te-Ma Truth Foundation v. World Church*, 297 F.3d 662, 667 (7th Cir. 2002). The line between protected expression **about a subject** and unprotected misappropriation of the goodwill **of that subject** is clear. "The First Amendment protects an individual's right to speak out against a markholder, **but it does not permit an individual to suggest that the markholder is the one speaking.**" *SMJ Group, Inc. v. 417 Lafayette Restaurant LLC*, 439 F. Supp. 2d 281, 291 (S.D.N.Y. 2006)²; see also *Morrison & Foerster LLP v. Wick*, 94 F. Supp. 2d 1125, 1135 (D. Colo. 2000) (use of plaintiff's mark "to deceive Internet users into believing that they were accessing [plaintiff's] web site

² All emphasis has been added unless otherwise noted.

. . . is not protected by the First Amendment"). In other words, "[a] defendant may use a plaintiff's trademark to identify the plaintiff's goods so long as there is no likelihood of confusion about . . . the markholder's sponsorship or affiliation." *Merck & Co., Inc. v. Mediplan Health Consulting, Inc.*, 425 F. Supp. 2d 402, 413 (S.D.N.Y. 2006).³

"In analyzing [a defendant's] First Amendment defense to a Lanham Act claim, the central inquiry is whether [defendant's] use is likely to cause confusion." *Pfizer Inc. v. Sachs*, 652 F. Supp. 2d 512, 524 (S.D.N.Y. 2009). "The relevant issue is not the content of the defendants' message, but rather defendants' use of plaintiffs' marks." *SMJ Group, Inc.*, 439 F. Supp. 2d at 291. The cases are legion where, as here, a defendant purported to exercise its First Amendment rights to criticize, parody, or otherwise comment on a trademark holder but was found liable under the Lanham Act because

³ Massachusetts state and federal jurisprudence concur. See, e.g., *Planned Parenthood Federation of America, Inc. v. Problem Pregnancy of Worcester, Inc.*, 398 Mass. 480, 489 (1986) ("The public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement."); *Universal Communications Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 423 (1st Cir. 2007) ("Trademark injury arises from an improper association between the mark and products or services marketed by others.").

they crossed the line into implying some affiliation with the markholders thereby causing actionable confusion.⁴

Accordingly, although Long Bow has a right to criticize Jenzabar, it does not have a First Amendment right to masquerade as something it is not, including by using a title tag and description in Google search results that suggest sponsorship by Jenzabar. See *generally Planned Parenthood*, 398 Mass. at 482.

B. Jenzabar Does Not Seek to Suppress Free Speech

Long Bow's contention that "Jenzabar seeks to suppress public access to the criticism of Jenzabar" is a red herring. LB Br. at 21. Jenzabar does not seek to prevent consumers from accessing the content of the Web Page. Rather, Jenzabar's complaint lies with the use of its trademark in the search results that **advertise** the Web Page itself. Jenzabar seeks to prevent Long Bow from pretending it is sponsored by or affiliated with Jenzabar in search results, revealing its lack of affiliation only **after** consumers click on the advertised link.

⁴ See, e.g., *United We Stand America, Inc. v. United We Stand, America New York, Inc.*, 128 F.3d 86, 92 (2d Cir. 1997) (defendants not protected by First Amendment where they used slogan as a mark to suggest plaintiffs were the source of defendants' speech); *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F.3d 769 (8th Cir. 1994) (defendant's parody subject to Lanham Act where "no significant steps were taken to remind readers that they were viewing a parody and not an advertisement sponsored or approved by Anheuser-Busch").

Massachusetts law has long understood the distinction. "[A] defendant has equal right with the plaintiff to solicit the patronage of the public. **But it has no right to intentionally mislead the public to the harm of the plaintiff**" *Summerfield Co. of Boston v. Prime Furniture Co.*, 242 Mass. 149, 155 (1922). This was re-affirmed in the SJC's *Planned Parenthood* decision. See 398 Mass. at 489 (finding defendant's use of plaintiff's mark in such a way that the public believes "the mark's owner sponsored or otherwise approved the use of the trademark" was actionable). Long Bow runs afoul of this law in its search engine advertisements.

C. There is No "Commercial" Transaction Requirement for Jenzabar's Lanham Act Claims

Long Bow tries to avoid application of the Lanham Act altogether by arguing that its use of the JENZABAR mark is "noncommercial," and therefore not subject a claim for trademark infringement. The law is not so limited.

Long Bow erroneously supports its "commercial" transaction argument by citing § 43(c) of the Lanham Act (i.e., the dilution section). LB Br. at 17. That section, however, is not at issue in this case because Jenzabar dropped its federal law dilution claim. To bring a claim for trademark infringement, one need not show "commercial use," but merely "use in commerce." There is a difference. "Notwithstanding its jurisdictional 'in commerce' requirement, Section 1114

contains **no commercial activity requirement.**" *Planned Parenthood Federation of America, Inc. v. Bucci*, No. 97 Civ. 0629, 1997 WL 133313, at *4 (S.D.N.Y. March 24, 1997); see also *Browne v. McCain*, 611 F. Supp. 2d 1073, 1079 (C.D. Cal. 2009) ("courts have recognized that the Lanham Act applies to noncommercial (i.e., political) **and commercial speech**").⁵ As the Second Circuit has explained, "'use in commerce' denotes Congress's authority under the Commerce Clause rather than an intent to limit the Act's application to profitmaking activity." *United We Stand America, Inc.*, 128 F.3d at 92-93.⁶ Here, whether Long Bow's "use" of the JENZABAR mark is considered in connection with distributing information about Jenzabar or in connection with selling Long Bow's films, such use is plainly "in commerce" to satisfy the Lanham Act.

Furthermore, even if the Court imported a "commercial" transaction requirement into the trademark infringement standard, Long Bow's use is nevertheless

⁵ Jenzabar cited cases where non-commercial use of a mark was subject to a Lanham Act claim, and contrary to Long Bow's contentions, such non-commercial use is not limited to only "use of a rival's trademark." See, e.g., *SMJ Group, Inc.*, 439 F. Supp. 2d 281.

⁶ See also *Browne*, 611 F. Supp. at 1079 ("The interstate commerce jurisdictional predicate for the Lanham Act merely requires a party to show that the defendant's conduct affects interstate commerce, **such as through diminishing the plaintiff's ability to control use of the mark**, thereby affecting the mark and its relationship to interstate commerce.").

"commercial." To start, Long Bow uses the JENZABAR mark as an advertisement for its website (i.e., as the sole title tag and in the body of its site description in internet search results) and capitalizes on Jenzabar's goodwill to attract consumers to the Web Page. See *Soilworks, LLC v. Midwest Industrial Supply, Inc.*, 575 F. Supp. 2d 1118, 1129 (D. Az. 2008) (use of plaintiff's mark in metatags constitutes "commercial use" for purposes of the Lanham Act because "[defendant] capitalizes on [plaintiff's] trademark to attract clients to its websites"). Further, because the use leads to a website that includes links to purchase Long Bow films, the cases cited by Long Bow (LB Br. at 17) are immediately distinguishable.⁷

II. THE TRIAL COURT ERRED IN FINDING THAT JENZABAR CANNOT SHOW A LIKELIHOOD OF CONFUSION

A. The Trial Court Erred in Failing to Consider the Appearance of the Search Results

In its Principal Brief, Jenzabar noted that the Trial Court ignored the "**most important evidence** in determining whether consumers would be confused," namely the appearance of the title tag and description in Google search results. Jenzabar Br. at 15-16. Long Bow notably does not, and cannot, refute that the Trial Court did not

⁷ Cf. *Bosley Medical Institute, Inc. v. Kremer*, 403 F.3d 672, 678 (9th Cir. 2005) ("Kremer's website contains no commercial links . . ."); *Taubman v. WebFeats*, 319 F.3d 770, 774 (6th Cir. 2003) ("Mishkoff has no commercial links on either of his websites, . . .").

even consider the appearance of the search results in the Order.

Cases relied upon by Long Bow confirm that the appearance of the search results should have been considered. For example, Long Bow cites to *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137 (9th Cir. 2011) multiple times. See, e.g., LB Br. at 28, 33. There, Network Automation purchased Advanced Systems' trademark as a keyword such that a sponsored link from Network was shown when a consumer searched for Advanced Systems' mark. The court explained that such use of another's mark presents the potential for confusion:

The potential infringement in this context arises from the risk that while using Systems' mark to search for information about its product, a consumer might be confused by a results page that shows a competitor's advertisement on the same screen, **when that advertisement does not clearly identify the source or its product.**

Id. at 1149. This is particularly the case when the mark at issue is distinctive, such as Jenzabar's fanciful mark. *Id.* ("a user searching for a distinctive term is more likely to be looking for a particular product, and therefore could be more susceptible to confusion . . .").

Although the *Network Automation* court ultimately found that the particular sponsored advertisement at issue was not likely to cause confusion, the court gave insightful guidance on the likelihood of confusion analysis concerning search results:

In the keyword advertising context the **"likelihood of confusion will ultimately turn on what the consumer saw on the screen and reasonably believed, given the context."** *Hearts on Fire Co. v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 289 (D. Mass. 2009). . . . Given the nature of the alleged infringement here, the most relevant factors to the analysis of the likelihood of confusion are: (1) the strength of the mark; (2) the evidence of actual confusion; (3) the type of goods and degree of care likely to be exercised by the purchaser; and (4) **the labeling and appearance of the advertisements and the surrounding context on the screen displaying the results page.**

Id. at 1153-54 (emphasis added). Recent Massachusetts federal law, also cited by Long Bow, confirms that "The likelihood of confusion will ultimately turn on what the consumer saw on the screen and reasonably believed given the context." *Hearts on Fire*, 603 F. Supp. 2d at 289. This common-sense approach is well-established in trademark law. See, e.g., *Elvis Presley Enterprises, Inc. v. Capece*, 141 F.3d 188, 197 (5th Cir. 1998) ("the service mark cannot be isolated from the advertising in which it appears").

Jenzabar agrees with Long Bow that *Network Automation* and *Hearts on Fire* set forth the proper standard for the Trial Court to apply (i.e., to consider what the consumer "saw on the screen"). Yet it is undisputed that the Trial Court failed to consider "the appearance of the advertisements and the surrounding context on the . . . results pages." The Trial Court's admitted failure to apply the correct standard is alone sufficient error to require reversal of the Order and remand to the Trial Court.

B. The Trial Court Erred by Failing to Consider The Initial Interest Confusion Doctrine

Initial interest confusion ("IIC") is a well-established⁸ doctrine that plainly applies to situations of "pre-click" confusion as Long Bow caused here. Long Bow does not, and cannot, dispute that the Trial Court did not apply IIC to Long Bow's search results. This alone is reversible error.

Contrary to Long Bow's contentions, IIC plainly applies to this case. While Long Bow argues that some courts have been "skeptical" over whether to apply IIC in the internet context (LB Br. at 24), Long Bow noticeably does not address the several cases cited by Jenzabar specifically applying IIC in that context. See Jenzabar Br. at 17 (citing cases).

Second, although disputes between commercial competitors may be the most common situation where IIC arises, contrary to Long Bow's assertions (LB Br. at 25), the doctrine is not limited to "only when two commercial competitors sell similar goods to the same set of consumers." See *SMJ Group, Inc.*, 439 F. Supp. 2d at 289 ("[T]he cases simply reflect the unsurprising fact that the typical trademark infringement case involves

⁸ See McCarthy on Trademarks & Unfair Competition at §23:6 ("Most courts now recognize the initial interest confusion theory as a form of likelihood of confusion which can trigger a finding of infringement.").

commercial competitors. **The Lanham Act, however, does not only apply to typical cases.**)

SMJ -- a case cited by Jenzabar several times in its Principal Brief but not once mentioned in Long Bow's response brief -- is particularly instructive. There, the defendant (a non-profit group seeking to improve conditions for restaurant workers) distributed pamphlets outside of plaintiff's restaurant that depicted plaintiff's trademarked logo and the text "SPECIAL FOR YOU." Upon opening the pamphlet, however, the pamphlet asked, "DO YOU REALLY WANT TO EAT HERE?" next to text critical of plaintiff's restaurant. It was undisputed that "**as soon as** the individual opens the leaflet and reads the message inside, the individual will **immediately realize**, based on the critical nature of the message that the leaflet is not in fact associated with plaintiffs." *SMJ Group, Inc.*, 439 F. Supp. 2d at 288. The court nonetheless found that plaintiff was likely to succeed on its trademark infringement claim:

Despite defendants' lack of profit motivation, or **the lack of competition between the parties**, an individual who is handed one of defendants' pamphlets is, at least initially, confused about the source of the pamphlet. **Under the doctrine of initial interest confusion, that confusion is sufficient to trigger the protection of the Lanham Act.**

Id. at 290.

Third, the facts here are a far cry from those at issue in the metatag cases cited by Long Bow. *LB See Br.* at 29. Each of those cases are easily distinguishable as

cases in which the critical sites were clearly defined and therefore unlikely to cause any confusion:

- *Faegre & Benson v. Purdy*, 367 F. Supp. 2d 1238 (D. Minn. 2005): While noting that defendant could "legally use [plaintiff's] marks in his metatags in the descriptive sense," the court further stated that "[defendant] **is not permitted to use [plaintiff's] marks in his metatags in order to divert internet users from [plaintiff's] web site.**" *Id.* at 1247. Here, Long Bow used the subject mark as the only word in its title tag in connection with a vague description and other SEO techniques to divert internet users to its site. Such conduct creates actionable IIC.
- *J.K. Harris & Company v. Kassel*, 253 F. Supp. 2d 1120 (N.D. Cal. 2003): The court found nominative fair use where "web users who search for Plaintiff's trade name are simultaneously given an opportunity to visit Defendants' web site by clicking on a link that stated . . . **'Complaints about JK Harris Pile Up.'**" *Id.* at 1125. In contrast, Long Bow's title tag uses the trademark alone and the remainder of its search engine advertisement fails to use language to clarify that Jenzabar does not sponsor the website.
- *Bihari v. Gross*, 119 F. Supp. 2d 309 (S.D.N.Y. 2000): The court concluded that "users are unlikely to experience initial interest confusion" given that searches for the subject mark "revealed twelve websites, eight of which appear to be the Gross websites[, and] [o]f those eight, five bear the heading **'Manhattan Interior Design Scam - Bihari Interiors'** [and] [e]ach website with that heading contains the following description underneath the title: **'This site deals with the problems experienced when hiring a New York City (Manhattan) designer. It discusses Marianne Bihari[,] fraud and deceit and . . .'**" *Id.* at 320. Again, Long Bow failed to clarify the lack of sponsorship by Jenzabar.
- *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998): In a classic "sucks site" dispute, Bally Fitness challenged defendant's use of **"ballysucks.com."** Again, unlike here, the use of the mark in

Bally was clearly on its face not sponsored by the plaintiff.

Far from supporting Long Bow's position, cases like *J.K. Harris* and *Bihari* directly consider whether these *pre-click* links are likely to cause confusion -- that is IIC. The Trial Court actually recognized that consumers may be initially confused, but then went on to state -- without analysis or support -- that "this initial uncertainty does not qualify as confusion and is an inevitable part of web searching."² Order at p. 11. The Trial Court is simply wrong, and in that mistake commits reversible error. It is not relevant that confusion may be dispelled **after** the key moment that a user clicks on a deceptive search result that has been designed to look authentic or approved by Jenzabar. By then the damage is done. *Jenzabar Br.* at 21.

Had the Trial Court conducted the right analysis by imagining a consumer who had searched for "Jenzabar" in a search engine, then, at the moment in time when s/he was about to click on Long Bow's link, asked if there was a likelihood that the consumer believed the link was sponsored or authorized by Jenzabar, the outcome would have been different. The Trial Court failed to conduct

² Long Bow has effectively conceded a likelihood of IIC by noting that "the first result on every list is Jenzabar's own official web site, and several other pages that Jenzabar sponsors are also on the first page of results" (*i.e.*, in addition to the title tag and link to Long Bow's website). *LB Br.* at 31.

any such analysis, dooming its entire Order and mandating reversal.

Ultimately, while even Long Bow would apparently acknowledge that IIC is a developing area of the law (LB Br. at 26), unless this Court makes a radical departure from majority jurisprudence by making a blanket holding that IIC is *entirely inapplicable* in the internet context -- resulting in pre-click lawlessness -- then it was clear error for the Trial Court to not even consider IIC. On this basis alone, the Order must be reversed and at a minimum remanded for proper consideration of IIC.

C. Application of the Traditional Confusion Factors Confirms that Confusion is Likely

In response to Jenzabar's analysis showing a likelihood of confusion based on the traditional confusion factors (Jenzabar Br. at 22-34), Long Bow conducts its own analysis, including by relying heavily on the defense of parody. LB Br. at 32-37. Long Bow's analysis is flawed for several reasons.

To start, Long Bow's search engine link is simply not a parody. It is instead a straight-forward advertisement for a website pretending to be affiliated with something it is not. Even if one deems this misuse a "parody" *arguendo*, Long Bow still runs afoul of the Lanham Act. "Whether a customer is confused is the ultimate question. If the defendant employs a successful parody, the customer would not be confused, but amused." *Nike, Inc. v. "Just Did It" Enterprises*, 6 F.3d 1225,

1228 (7th Cir. 1993); see, also, *Anheuser-Busch, Inc.*, 28 F.3d at 776-77 (a poor parody is "**vulnerable under trademark law, since the customer will be confused**"). Thus, "[a] parody creating a likelihood of confusion may be subject to a trademark infringement action." *Id.* at 776; see also *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 32 n. 3 (1st Cir. 1987) (confusing parodies "implicate[] the legitimate commercial and consumer protection objectives of trademark law"), cert. denied and appeal dismissed, 483 U.S. 1013 (1987).¹⁰

Long Bow would not only discount the factors of similarity of the marks and the strength of the mark in a parody context, but, turning the law on its head, would argue that use of Jenzabar's identical fanciful mark actually **favours** there being **no likelihood of confusion** simply because Long Bow deems its use of the mark a parody. Thus, according to Long Bow, anytime a party asserts parody as a defense, the use of plaintiff's mark will always favor there being no likelihood of confusion. That is plainly not the law. Even cases that do relate

¹⁰ Long Bow's reliance on *L.L. Bean* is misplaced. There, defendant's use of the mark was expressly labeled as "humor" and "parody", the use was not featured on the front or back cover of defendant's magazine, and defendant never intended to market any products in connection with the parody. Here, on the other hand, Long Bow's use of the title tag is the equivalent of the front of a magazine and there is no explicit reference to its being a parody, commentary or criticism.

to parody acknowledge that similar marks are more likely to lead to consumer confusion. See, e.g., *Anheuser-Busch*, 28 F.3d at 774 (display of strong, identical marks “weigh[s] heavily in favor of [plaintiff].”).

Long Bow’s non-parody arguments fair no better. Its attempt to distance itself from the similarity of marketing channels on the basis that “almost every company uses the Internet for marketing” should be rejected. LB Br. at 34. Long Bow ignores that the very channel of trade in which Jenzabar claims Long Bow is causing confusion **is the internet**, and particularly in search results. Thus, the overlap of marketing channels favors a likelihood of confusion.

Long Bow further admits that there is an overlap of prospective purchasers, namely colleges and universities, but then tries to parse the specific administrators within a college or university making the purchasing decision and argues that the difference in specific purchasers favors an absence of confusion. LB Br. at 35. The Trial Court conducted no such analysis, and making that determination in view of the evidence presented -- and even acknowledged by the Trial Court (*i.e.*, “it is possible that at times that the prospective purchasers overlap”, Order at p. 7, n.3) -- violates the well-worn requirement that the evidence be construed in the light most favorable to the non-movant (*i.e.*, Jenzabar). A proper analysis would have concluded that overlap in

prospective purchasers favors a finding of a likelihood of confusion, or at a minimum, that factual issues exist.

Concerning intent, Long Bow does not, and cannot, dispute that the Trial Court's analysis was flawed, having erroneously found that it "need inquire no further into Long Bow's intent" because "proof of intent is not required for the [court's] analysis." Order at 8. Instead, Long Bow simply asserts that it had no bad faith intent in using the JENZABAR mark. LB Br. at 36. But Long Bow, like the Trial Court, fails to address Long Bow's use of the JENZABAR mark in the title tag and description and its SEO techniques to get its link placed immediately above and below authorized Jenzabar links in search results for the word "Jenzabar." See, e.g., *Anheuser-Busch, Inc.*, 28 F.3d at 774 (failing "to remind readers that they were viewing a parody and not an advertisement sponsored or approved by [plaintiff]" showed that defendant "had, if not an intent to confuse, at least an indifference to the possibility that some consumers might be misled by the parody"). Construed in the light most favorable to Jenzabar, this factor favors finding a likelihood of confusion, or at least raises triable issues of fact.

Long Bow's arguments concerning a lack of actual confusion ignore that "[i]t is black letter law that actual confusion need not be shown to prevail under the Lanham Act, since actual confusion is very difficult to

prove and the Act requires only a likelihood of confusion as to source." *Pfizer Inc.*, 652 F. Supp. 2d at 523 (quotation omitted); see also *Network Automation*, 638 F.3d at 1151. Nevertheless, here, Jenzabar did submit evidence of actual confusion, namely a report showing that even though Long Bow has no formal connection to Jenzabar, "Jenzabar" is one of the **top three** "search strings" that leads internet users to the Web Page. Long Bow's contention that this evidence cannot support finding a likelihood of confusion is contradicted by the law, see, e.g., *Storus Corp. v. Aroa Marketing, Inc.*, No. 06 Civ. 2454, 2008 WL 449835, *5 (N.D. Cal. Feb. 15, 2008), and the Trial Court's failure to consider it again violates the standard that evidence be viewed in the light most favorable to Jenzabar.

* * *

Ultimately, the Trial Court botched the multi-factor confusion test both by misapplying the law and by flat-out ignoring the most critical facts -- the search engine advertisements themselves. Proper application of the right law to the right facts merits reversal, and at a minimum a remand. As Professor McCarthy has said,

A trademark is itself a powerful symbol identifying a single person, corporation or commercial source. When it is used without permission as a vehicle for someone else's controversial message, **it will be a matter of fact whether the ordinary viewer is likely to believe that the owner of the trademark sponsors or approves of the content of the message.**

McCarthy on Trademark at § 31:145. The majority of factors either favor a likelihood of confusion or at least raise factual issues precluding a finding of no likelihood of confusion as a matter of law. The Order therefore must be reversed.

D. The Trial Court Erred in its Application of the Nominative Fair Use Doctrine

Long Bow's repeated and deceptive over-use of Jenzabar's unique trademark in search engine advertisements fell well outside the scope of nominative fair use. The law is well-established that use of "a mark cannot be nominative fair use if it suggests sponsorship or endorsement by the trademark holder." *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1779 (9th Cir. 2010); see also *Health Grades v. Robert Wood Johnson University Hospital*, 634 F. Supp. 2d 1226, 1240 (D. Colo. 2009); *Audi AG v. Shokan Coachworks, Inc.*, 592 F. Supp. 2d 246, 270 (N.D.N.Y. 2008).¹¹

¹¹ To the extent the Court finds that *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211 (3d Cir. 2005) (cited by Long Bow in LB Br. at 38) sets forth the proper standard for nominative fair use, Jenzabar notes that the Third Circuit adopted a test **different than** the Ninth Circuit's test in *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302 (9th Cir. 1992), as cited by the Trial Court (Order at 10). As such, if this Court adopts *Century 21* as the proper test, then just as the Third Circuit did in that case, this Court must reverse and remand for the Trial Court to apply the proper standard. See *Century 21*, 425 F.3d at 227. Jenzabar submits that *Century 21* is **not** the proper standard and notes that courts have criticized that standard. See, e.g., *Health Grades*, 634 F. Supp. 2d at 1242 (adopting dissenting view in *Century 21*);

(Footnote Continued on Next Page.)

Here, contrary to Long Bow's contention, the title tag and description do not "simply tell the truth" because the search engine advertisement is both written and titled in such a manner to falsely suggest that it is related to or endorsed by Jenzabar.¹² This is particularly true given that Long Bow went out of its way to use SEO to secure a top five ranking (out of over 60,000) among search results for "Jenzabar."

Cornered by these facts, Long Bow attempts to tell the "big lie" by contending that "there is no evidence that Long Bow, as opposed to Google, chose [the Web Page] description." LB Br. at 39. Long Bow further states that "it is a Google algorithm that defines the 'snippet'" in the description. LB Br. at 39, n.12. These critical claims are blatantly false.

(Footnote Continued from Previous Page.)

Audi AG, 592 F. Supp. 2d at 270 (rejecting *Century 21* test and applying Ninth Circuit's *New Kids* test).

¹² Long Bow's reliance on *Rogers v. Gimaldi*, 875 F.2d 994 (2d Cir. 1989) for the proposition that its website link is an "artistic" work comparable to the title of a book is misplaced. *Rogers* was not an internet website case. In a case that did involve the internet (*Bucci*, 1997 WL 133313), the court enjoined defendant's use of plaintiff's mark where defendant was intentionally using plaintiff's name to attract internet users. Further, even where the title of a book is at issue, the nominative fair use doctrine is still not applicable if it causes confusion as to source. See *Toho Co., Ltd. v. William Morrow and Co., Inc.*, 33 F. Supp. 2d 1206, 1212 (C.D. Cal. 1998) (plaintiff likely to prevail on trademark infringement claim based on defendant's use of "Godzilla" in title of book because likelihood of confusion outweighed First Amendment right to artistic expression).

To start, Long Bow **admitted in deposition** that it chose the title tag and metatags and wrote the code for the Web Page. J.A. 651, 955-958. Even more damning, that very code (the publicly available "page source" information for the Web Page attached as Ex. A hereto), shows that the selected title for the page is "Jenzabar" ("**<title>**Jenzabar**</title>**") and description (the so-called "snippet") was also expressly chosen by Long Bow ("**<meta name='description' content='Jenzabar has tried to censor this web page because it carries critical information about the software company that Chai Ling started with her husband.'**").¹³ Long Bow plainly controls this information. Its assertion otherwise demonstrates its awareness that its intentional selection of confusing content for its search engine advertisements confirms an intent to deceive, and should be flatly rejected.

These facts further mandate reversal, since the Court can and should consider what more Long Bow could have done to alleviate confusion. See *Century 21*, 425 F.3d at 231 ("On remand, the District Court should specifically determine . . . whether the portrayal of the relationship was accurate, and **what more the defendant could have done to prevent an improper inference**

¹³ Recall that the subject description previously read "The information on these pages about Ling Chai and **Jenzabar**, the software company she runs with her husband, Robert Maginn, contains excerpts from and links . . ."

regarding the relationship.”). The Trial Court failed in this regard.

Notably, DMLP gives insightful examples from Google searches where a credible claim of nominative fair use *could* be made. See DMLP Br. at 28, n.7. Of note, DMLP cites “PeopleofWalmart.com” appearing on the first page for a search of the trademark “Walmart.” DMLP, however, ignores that the title tag and description of PeopleofWalmart.com clearly distinguish that website from a sponsored Walmart page, as the title tag reads “People of Walmart” and the description reads “Check out thousands of funny pictures. Hilarious images of the People of Walmart. Viral site featured on Time.com and the Wall Street Journal.” See Ex. B (attached). The same is true for “Monsantosucks.com,” which appears on the first page of a search for “Monsanto.” Again, the link’s title tag and description clearly distinguish it from a sponsored Monsanto page, with the title “Monsanto Corporation Sucks” and the description “Monsanto: Bio-dictators and Gene Manipulators using biotechnology to genetically engineer our food and not label it - no traceability, how smart!” See Ex. C (attached).

Particularly when compared with these examples of actual nominative fair use, it is clear that Long Bow’s misleading and confusing search engine advertisements fail the nominative fair use test, and therefore the Order must be reversed.

III. THE TRIAL COURT ERRED IN AWARDING JUDGMENT TO LONG BOW ON JENZABAR'S CHAPTER 93A CLAIM

Both Long Bow's argument in support of affirming the dismissal of Jenzabar's c. 93A claim and the Trial Court's analysis fail to recognize that c. 93A is **broader than** the Lanham Act. Indeed, c. 93A was conceived to address those deceptive and unfair trade practices that may not squarely fall within already existing claims. *Doliner v. Brown*, 21 Mass. App. Ct. 692 (1986).

Here, Long Bow usurped and traded on Jenzabar's goodwill by manipulating search engine results to ensure that a link to the Web Page appeared among authorized Jenzabar links in search results for "jenzabar" and then used a deceptive and misleading title tag and site description to divert internet traffic. Whether or not such conduct constitutes trademark infringement -- Jenzabar submits that it plainly does -- it undoubtedly rises to "a level of rascality that would raise an eyebrow of someone inured to the rough and tumble world of commerce," *Quaker State Oil Ref. Corp., v. Garrity Oil Co.*, 884 F.2d 1510, 1513 (1st Cir. 1989), and has a "rancid flavor of unfairness," *Atkinson v. Rosenthal*, 33 Mass. App. Ct. 219, 225-26 (1992), such that it gives rise to an independent cause of action under c. 93A. Thus, the Trial Court erred in dismissing the c. 93A count on the grounds that it cannot constitute an independent cause of action. See Order at 12.

Long Bow's alternative argument (not considered by the Trial Court) that Jenzabar cannot show a "loss of money or property" is simply wrong. It is well settled that a plaintiff's trademark constitutes a property right which is entitled to protection from violation. See *Planned Parenthood*, 398 Mass. at 494 ("The plaintiff's trademark is in the nature of a property right . . . and as such it need not yield to the exercise of First Amendment rights").¹⁴ As recognized by Judge Learned Hand: "If another uses (someone's trademark), he borrows the owner's reputation, whose quality no longer lies within his control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use[.]" *Yale Electric Corp. v. Robertson*, 26 F. 2d 972,974 (2d Cir. 1928).¹⁵ This Court therefore cannot affirm judgment on the c. 93A claim on the basis that Jenzabar has not suffered a loss of property or goodwill.

¹⁴ See also *Hanover Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1915); *National Geographic Soc. V. Classified Geographic*, 27 F. Supp. 655, 661 (D. Mass. 1939) ("[I]t is nevertheless well settled that the right in the trademark with the goodwill symbolized by it are property rights which the court will protect against invasion.") (citations omitted).

¹⁵ See also *Fairbanks Capital Corp. v. Kenney*, 303 F. Supp. 2d 583, 590 (D. Md. 2003) ("Fairbanks' loss of control over its reputation, goodwill, and its "FAIRBANKS" mark through [defendant's] domain names and website inflicts irreparable injury on Fairbanks' legitimate proprietary rights).

In view of the Trial Court's fatally flawed analysis of the c. 93A claim noted above, the dismissal of the c. 93A claim was in error and should be reversed.

IV. JENZABAR'S LANHAM ACT CLAIMS ARE TIMELY

Long Bow has no credible basis to contend that Jenzabar's Lanham Act claims are untimely.¹⁶ Trademark infringement is a continuing tort. See *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 837 (9th Cir. 2002) (trademark infringement "is a continuing wrong, and the statute of limitations is no bar except as to damages beyond the statutory period.").¹⁷ Thus, "only the last infringing act need be within the statutory period" to bar a statute of limitations defense.¹⁸ *Hot Wax, Inc.*, 191 F.3d 813, 821 (7th Cir. 1999); see also *Hester Indust., Inc. v. Tyson Foods, Inc.*, No. 94 Civ. 391, 1995

¹⁶ Notably, Long Bow devoted only **two sentences** to this argument in its motion for summary judgment (see JA 232), and, the Trial Court did not consider the argument at all.

¹⁷ See also *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 526 (10th Cir. 1987) ("Trademark infringement is a continuous wrong and, as such, gives rise to a claim for relief so long as the infringement persists."); *Gaudreau v. Am. Promotional Events, Inc.*, 511 F. Supp. 2d 152, 156 (D.D.C. 2007) (citing cases).

¹⁸ Although the Lanham Act does not contain a statute of limitations, "courts are to presume that Congress intended for an analogous state limitations period to apply," and for Massachusetts, the analogous statute is c. 93A, which has a four year statute of limitations. *Kusek v. Family Circle*, 894 F. Supp. 522, 529-30 (D. Mass. 1995).

WL 113939, *5 (N.D.N.Y. Jan. 30, 1995) (plaintiffs have a "fresh cause of action so long as the wrong persists").

Long Bow's reliance on the "single publication rule" does nothing to further its argument. To start, the "single publication rule" is most commonly applied to defamation claims (see, e.g., *Keeton v. Hustler Magazine, Inc.* 465 U.S. 770 (1984)), and none of the "single publication rule" cases cited by Long Bow concern Lanham Act claims, let alone any claims concerning an allegedly infringing use of a trademark on the internet in connection with title tags and/or metatags. See LB Br. at 44 (citing cases).

Even if the "single publication rule" were somehow extended to infringing use of trademarks, Long Bow ignores that it made several modifications to the pages that relate to Jenzabar since 2007 (J.A. 373-374), with each "republishing" constituting a new and actionable infringement. See *Christoff v. Nestle, Inc.*, 47 Cal. 4th 468 (Cal. 2009) (even under single publication rule, "republishing" causes statute of limitations to begin anew).

Here, Long Bow continued to use the JENZABAR mark with every new search. Accordingly, Jenzabar's Lanham Act claims are clearly not time-barred. See, e.g., *Gaudreau*, 511 F. Supp. 2d at 156; *Novell, Inc. v. Unicom Sales, Inc.*, No. C-03-2785, 2004 WL 1839117, at *4 (N.D. Cal. Aug. 17, 2004).

V. LONG BOW HAS MOOTED ITS OWN CROSS APPEAL

Long Bow effectively moots its cross appeal by stating "Long Bow does **not** suggest that this Court should decide whether fees should be awarded under the Lanham Act's exceptional standard." Long Bow. Br. at 47-48. Instead, Long Bow asks that its motion be **remanded to the Trial Court**. That is precisely what the Trial Court's order already did.¹⁹ Thus, there now appears to be no dispute that the order denying Long Bow's fees motion **without prejudice** should be **affirmed**.

CONCLUSION

For the foregoing reasons, and those stated in Jenzabar's Principal Brief, Jenzabar respectfully requests that this Court reverse the Order, deny Long Bow's Motion for Summary Judgment, affirm the denial of Long Bow's Motion for Award of Fees, deny Long Bow's Motion for Award of fees, and grant such further relief as the Court may deem appropriate.

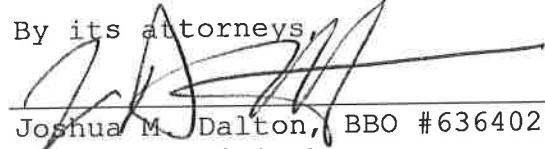
¹⁹ In denying Long Bow's motion "without prejudice and pending final resolution of [this] appeal," the Trial Court reasoned that "a decision from [this Court] will permit any future judge to decide this attorneys' fee question with a greater measure of finality, and that an appellate record can buttress such decision." JA 2715-16.

Respectfully Submitted,

Dated: March 2, 2012

JENZABAR, INC.,

By its attorneys,


Joshua M. Dalton, BBO #636402

josh.dalton@bingham.com

Lawrence T. Stanley, Jr., BBO# 657381

lawrence.stanley@bingham.com

Bingham McCutchen LLP

One Federal Street

Boston, MA 02110

617.951.8000

Lawrence R. Kulig, BBO# 544646

lkulig@eckertseamans.com

Eckert Seamans Cherin & Mellott, LLC

Two International Place, 16th Floor

Boston, MA 02110

617.342.6800

Jamison J. Barr, BBO# 639601

jbarr@jenzabar.net

Jenzabar, Inc.

101 Huntington Avenue

Suite 2205

Boston, MA 02199

617.492.9099

RULE 16(k) CERTIFICATION

The undersigned hereby certifies that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references in briefs to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules and regulations), Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (forms of briefs, appendices, and other papers).



Joshua M. Dalton

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, SS.

A.C. No. 2011-P-1533

JENZABAR, INC.,
Plaintiff - Appellant,
v.
LONG BOW GROUP, INC.,
Defendant - Appellee.

ON APPEAL FROM JUDGMENT
OF THE SUPERIOR COURT

CERTIFICATE OF SERVICE

I, Joshua M. Dalton, hereby certify that on March 1, 2012, I served the attached Reply Brief of Plaintiff-Appellant Jenzabar, Inc., by email and U.S. Mail to:

T. Christopher Donnelly, Esq.
Donnelly, Conroy and Gelhaar, LLP
One Beacon Street
33rd Floor
Boston, MA 02108

Paul Alan Levy, Esq.
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009


Christopher T. Bavitz, Esq.
Cyberlaw Clinic
Harvard Law School
23 Everett Street, 2nd Fl
Cambridge, MA 02138

Respectfully Submitted,

Dated: Mar. 2, 2012

JENZABAR, INC.,

By its attorneys,


Joshua M. Dalton, BBO #636402

josh.dalton@bingham.com

Lawrence T. Stanley, Jr., BBO# 657381

lawrence.stanley@bingham.com

Bingham McCutchen LLP

One Federal Street

Boston, MA 02110

617.951.8000

Lawrence R. Kulig, BBO# 544646

lkulig@eckertseamans.com

Eckert Seamans Cherin & Mellott, LLC

Two International Place, 16th Floor

Boston, MA 02110

617.342.6800

Jamison J. Barr, BBO# 639601

jbarr@jenzabar.net

Jenzabar, Inc.

101 Huntington Avenue

Suite 2205

Boston, MA 02199

617.492.9099

EXHIBIT A

```

<!DOCTYPE html PUBLIC "-//W3C//DTD XHTML 1.0 Transitional//EN"
"http://www.w3.org/TR/xhtml1/DTD/xhtml1-transitional.dtd"> <html
xmlns="http://www.w3.org/1999/xhtml" ><head> <meta name="generator" content="HTML Tidy for
Mac OS, see www.w3.org" /> <title>Jenzabar</title> <meta name="keywords" content="Chai
Ling, Ling Chai, Jenzabar, Jenzabar.com, Jenzabar.net, Gate of Heavenly Peace, Tiananmen
Square" /> <meta name="description" content="Jenzabar has tried to censor this web page
because it carries critical information about the software company that Chai Ling started
with her husband." />

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:link { color:#CC0000; }

:visited { color:#333333; }

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p.c166 { font-size:100%; }

</style> </head><body style="" > <p class="c166" ></p> <div class="c167" > <a href="." >
</a>
</div> <br/> <blockquote> <p>The information on these pages about Chai Ling and Jenzabar,
the software company she runs with her husband, Robert Maginn, contains excerpts from and
links to articles about Jenzabar in <em>The Boston Globe</em>, <em>Forbes</em>,
<em>Business Week</em>, and other publications, and is intended to provide the reader with
additional information about Chai Ling, one of the most well-known and controversial
figures from the Tiananmen Square protests of 1989. These web pages are the sole
responsibility of the Long Bow Group, and are in no way affiliated with or sponsored by
Jenzabar, Inc.</p> <hr noshade="noshade" size="7" width="5" /><br/> <div class="c167"
><strong>About Chai Ling and Jenzabar, Inc. | <a href="american dream.html" >News
Accounts</a></strong> <br/><br/><br/> <p align="center" ><strong>Massachusetts Court
Dismisses Jenzabar's Lawsuit and Affirms Free Speech Rights</strong></p> <div
style="text-align:left; " >Nearly twenty years after the events of 1989, Chai Ling and her
company, Jenzabar, tried to censor this website by filing a <a
href="jenzabar lawsuit.html" >lawsuit against the Long Bow Group</a>, claiming defamation
and trademark infringement. Specifically, their complaint cited the posting of articles
about Chai Ling and Jenzabar on this website and the use of the term "Jenzabar" in the
keywords or metatags used to index and describe the contents of certain pages of the site.
In August 2008, the court threw out the defamation claims, while allowing Jenzabar to
proceed with the trademark claims, even though "Jenzabar seems unlikely to prevail" (see
PDF of the <a href="05 Decision on Motion to Dismiss.pdf" target="_blank" >judge's
memorandum of decision</a>). In December 2010, the court dismissed the trademark claims as
well, finding that Jenzabar had "failed to allege any facts or evidence in the summary
judgment record to support a trademark claim" (see PDF of the <a
href="Opinion Granting Summary Judgment.pdf" target="_blank" >judge's decision</a>).
<br/><br/> Jenzabar is currently appealing the court's decision. As Public Citizen's Paul
Alan Levy writes in Long Bow's response to Jenzabar's appeal, "The superior court properly
recognized that truthful use of plaintiff's name to denote a web page about plaintiff did
not violate the trademark laws, and that plaintiff had no evidence that even a single
Internet user experienced confusion, or was likely to suffer confusion, about whether the
web page was affiliated with it. Because the suit's purpose was to suppress the truth, not
avoid confusion, the court granted summary judgment." The entire brief is available <a
href="http://www.citizen.org/documents/Jenzabar-v-LongBow-Court-Appeals-Opening-Brief.pdf"
target="_blank">here</a>. (Additional documents, including Jenzabar's appeal, may be found
on <a href="http://www.citmedialaw.org/threats/jenzabar-inc-v-long-bow-group-inc"
target="_blank">this page</a>.) See also counsel Paul Levy's comments about the appeal in

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his blog post, "<http://pubcit.typepad.com/clpblog/2012/01/jenzabar-persists-in-trademark-bullying.html>" **target="_blank">Jenzabar Persists in Trademark Bullying." **

In an **Amicus Curiae brief filed in support of Long Bow, the **Digital Media Law Project** (DMLP), a project of the **Berkman Center for Internet & Society** at Harvard Law School, stated that "Communicative uses of trademark are protected speech, and they are threatened by the misuse of trademark law to silence free expression." [p. 10] The entire brief is available **here**. The following are additional excerpts from the DMLP's **Amicus Curiae** brief [emphasis added]: **

<blockquote>In a free and open society, every individual, corporation, and government entity is and must be subject to comment and criticism for their public actions. The First Amendment and Article 16 of the Massachusetts Declaration of Rights ensure that open communication about civic affairs is protected by guaranteeing the right to speak on matters of public interest. An essential element of this right is the ability to identify people and entities involved in such matters by name. Without that right, freedom of expression would be meaningless; audiences would be unable to identify speech that is of interest or understand what the speaker is saying. **

**

This is exactly what Jenzabar seeks to achieve in this case: to force the removal of labels and tags that may enable the public to find speech by Long Bow about Jenzabar, so that any criticism by Long Bow of Jenzabar is lost in digital limbo. Having failed before the trial court in its direct challenge by means of a defamation claim to Long Bow's criticism, Jenzabar now attempts to use trademark law to block Long Bow's efforts to make its content locatable online. But, allowing a corporation to banish criticism to the hinterlands of the Internet because its name happens to be a trademark would grant that corporation -- without any conceivable or rational policy justification -- an exclusive ability to censor speech to which no one else in our society is entitled and which runs contrary to long-standing constitutional speech doctrines. **

**

****Allowing trademark law to be applied in such a manner would have a catastrophic effect on public speech -- particularly online speech -- about corporate affairs, at a time when corporate activity has never been more newsworthy and the Internet is the primary method by which citizens communicate with one another**…** ****[pp. 6-8]

**</blockquote>
The Boston PBS station, **WGBH/FRONTLINE, has also noted: **<blockquote>** FRONTLINE believes that Jenzabar's trademark claim poses first amendment issues and is a potential threat to all newsgathering, reportorial and academic sites. The metatagging of a company's name is necessarily an editorial decision and that decision will be chilled if Jenzabar were to prevail in court.**</blockquote>**

**
In **From Democracy Activist to Censor? (****The Guardian****, Nov. 17, 2009), Jeremy Goldkorn writes: **<blockquote>** Chai and her American husband and business partner Robert A Maginn Jr are CEO and president respectively of Jenzabar, a company founded in 1998 that sells educational software and technology services. They sue the filmmakers for defamation and trademark infringements. The defamation case hinges on the filmmakers' website linking to mainstream media reports about Chai and Jenzabar, and it was thrown out of court. **

** The trademark infringement case ... claims that Long Bow's use of the word "Jenzabar" as a keyword or meta tag on its website will confuse and divert potential customers of Jenzabar. One quick look at the websites of Long Bow and Jenzabar will tell you that this is patently ridiculous... In a country that calls itself free, money should not be able to buy silence or the alteration of historical records. Intellectual property laws should not be used to suppress free speech**</blockquote>**

In ****

[a victory for free speech/" target="_blank" >A Victory for Free Speech \(*The Boston Globe*, December 19, 2010\), Yvonne Abraham writes: **With her husband, Chai now runs a Boston software company called Jenzabar Inc. And for three years, she has been trying to use the courts to go after two local filmmakers because she doesn't like some material cited on their website... The suit is a transparent attempt to shut down negative publicity. Jenzabar hasn't disputed the facts in the stories. It's merely trying to make it more difficult to find them. It's no fun to have people write negative things about you, and to have those things live forever online. That's a downside of the First Amendment. But free expression is vital to democracy, and it shouldn't be vulnerable to endless legal maneuverings.** For additional independent news coverage of Jenzabar's lawsuit, see the *Boston Globe*, June 7, 2009: \[Times of London, May 4, 2009: \\[New Yorker, May 7, 2009: \\\[South China Morning Post on June 9, 2010: \\\\[Boston Globe article,\\\\]\\\\(http://www.pjmooney.com/en/Most_Recent_Articles/Entries/2010/6/9_June_4_Leader_Drops_Film_Lawsuit.html\\\\)\\\]\\\(http://www.newyorker.com/online/blogs/evanosnos/2009/05/the-american-dream-the-lawsuit.html\\\)\\]\\(http://www.timesonline.co.uk/tol/news/world/asia/article6221258.ece\\)\]\(http://www.boston.com/news/local/massachusetts/articles/2009/06/07/beijing_lesson_unlearned/\)](#)

I'm a Chinese who demonstrated at Tiananmen. Even then Chai Ling was acting like little dictator. Only Chai Ling can say what is truth. Facts don't matter. If you argue with her you must be communist. You can say Chai Ling was a kid then and didn't know enough but she has lived in America for 20 years now. No excuses. Chai Ling married a rich man and now she uses money to get her way. Chai Ling has learned little about democracy values and free speech. Chai Ling says that Tiananmen film gave her a bad translation. She only says this to Westerners. We Chinese don't need translation! We hear those words she said. She hates that film because it shows many smarter student leaders who disagree with her like Liu Xiaobo. It is sad that Chai Ling stays a bully.

Comments to the Boston Globe, Dec. 19, 2010

Additional links about the lawsuit are available [here](#). More information about Chai Ling, her company, and her public image, is presented below.

Chai Ling founded [The Chronicle of Higher Education, "plays up the past celebrity of its founder, Chai Ling. ...Company press releases, which invariably note that Ms. Chai was 'twice nominated for the Nobel Peace Prize,' breathlessly describe Jenzabar as a tool to 'create another kind of revolution,' fueled by communications technology." \(Sept. 3, 1999, \[Chai Ling has also actively cultivated her public image and openly expressed her desire to use her connection to Tiananmen Square to promote her current activities. As stated in the *South China Morning Post* \\("Seizing the Day All for Herself", written on the 10th anniversary of the June 4 massacre\\):

Ms Chai's publicist has been reminding the world that Ms Chai's job prior to being smuggled out of China to the United States was "leading thousands of students against a communist government more ruthless than Microsoft".

She also suggested that June 4 would be a good opportunity to write about Ms Chai's\]\(http://chronicle.com/free/v46/i02/02a04501.htm\)](http://www.jenzabar.net/)

Internet start-up which runs a site called jenzabar.com. **

** "Ling is a dynamic personality who has found many similarities between running a revolution and an Internet start up," journalists have been told. "Ling used the techniques and charisma of a true revolutionary to impress the CEOs of Reebok, WebTV/Microsoft and Bain to back Jenzabar." **</p> </blockquote>** **<p>**As a public persona, Chai Ling has attracted attention from multiple media sources. A number of stories published about Jenzabar begin with the saga of the student leader from China who became a successful entrepreneur in America. For example, a **Business Week** (June 23, 1999) headline reads, "Chai Ling: From Tiananmen Leader to Netpreneur." **Computerworld **(May 6, 1999) leads with: "Tiananmen activist turns software entrepreneur." Or as **Forbes** (May 10, 1999) puts it, "From Starting a Revolution to Starting a Company."**

** ****Other articles from the international press**** present different perspectives on Chai Ling and her relationship with the 1989 Tiananmen Square protests. See, for example, **<i>**American Dream**</i>** (**The Boston Globe**, Aug. 8, 2003, byline: Steve Bailey), which concludes: **</p> <blockquote>** After Tiananmen, Chai detractors said her hero's image did not square with her hardball tactics. Now her critics are saying much the same again, this time about her corporate life. Meanwhile, Chai continues to sell her story of the Tiananmen heroine-turned-American-entrepreneur. "Today, I am living the American dream," Chai told Parade magazine in June.**

** With Ling Chai, distinguishing the dream from the reality has always been the hardest part of all. **</blockquote>** Daniel Lyons, in Forbes.com (****Great Story, Bad Business****, Forbes.com, Feb. 17, 2003, byline: Daniel Lyons), notes: **<blockquote>** **<p>**Chai Ling would like total control over her biography. In her version, she risks her life leading student protests in Tiananmen Square in 1989, escapes China stowed in a crate and is twice nominated for the Nobel Peace Prize. Then she moves to America and marries a millionaire venture capitalist who bankrolls her promising internet startup. Alas, the market crashes before the company can go public, and it is unfairly besieged by lawsuits from former executives.... **

** "You're not going to write about that, are you?" Chai says, when asked about the suits. "Do you really have to mention those things?" Chai's seeming naivete is a little out of character. She has frequently scored points in the press by recalling her glory days as onetime 'commander-in-chief' of rebel students in Beijing.**</p> </blockquote>** **<p>**Lyons may have been referring to an article written about Jenzabar by Chai Ling herself, which is headlined: "****Revolution Has Its Price: In Tiananmen Square, she was a student leader who stood up to tanks. In the U.S., she became a software executive who had to deal with venture capitalists. Guess which one was the tougher opponent.****" In the article, Chai Ling wrote: **</p> <blockquote>**For me, the longest hour and the longest night I ever lived was in Tiananmen Square, in 1989, when the student movement tried to demand democracy of our nation's unyielding governors. My role was to lead a hunger strike for seven days and nights. We tried to be peaceful. We tried to be rational. But the end result was tanks, bloodshed and the massacre of innocent people. **

** Here, at least, power in Washington can change hands without bloodshed, according to the expressed will of the people. And economic revolution, even a minor one such as that fostered by Jenzabar, occurs without bloodshed. Even in the dot com bust, no one had to die. **

** But the creation of a company is no less stressful than running a hunger strike in Tiananmen Square. **

** ... But I am happy, because I am the leader of another student movement. I have been given the chance, by fate, to help the youth of America prepare for the next century. **

** ... As we found in China, even the most determined authority can't put technology back in the bottle. **

** Which makes its dispersion the greatest revolution any student, faculty member or administrator who cares about freedom of thought can be involved in. **</blockquote>** **<p>**In other contexts, Chai Ling has appeared more reluctant to discuss her role in the 1989 events. In "****Anatomy of a Massacre****" (**Village Voice**, June 4, 1996), Richard Woodward made multiple attempts to interview Chai Ling for a cover story about **The Gate of Heavenly Peace** and her role in the student protest movement. "At first she was 'too busy.' When I offered to call at another time, she said with fatigue, 'It's over. I don't want to get involved.'" **</p>** Similarly, in his book ****Bad Elements: Chinese Rebels from Los Angeles to Beijing****, Ian Buruma describes a meeting he had with Chai Ling in 1999: **<blockquote>** **<p>**We met for a cappuccino in a nice outdoor cafe; in Cambridge, Massachusetts... Chai handed me a folder with promotional material. It contained references to her career at the Harvard Business School and her "leadership skills" on Tiananmen Square. She spoke to me about her plans to

liberate China via the Internet. She joked that she wanted to be rich enough to buy China, so she could "fix it." But although she was not shy to use her celebrity to promote her business, she was oddly reluctant to discuss the past. When I asked her to go over some of the events in 1989, she asked why I wanted to know "about all that old stuff, all that garbage." What was needed was to "find some space and build a beautiful new life." What was wanted was "closure" for Tiananmen. I felt the chilly presence of Henry Ford's ghost hovering over our cappuccinos in that nice outdoor cafe;. From being an icon of history, Chai had moved into a world where all history is bunk.

 [Ian Buruma, Bad Elements: Chinese Rebels from Los Angeles to Beijing (New York: Random House, 2001), pp. 9-10.]</p> </blockquote> <p>Because of her status as a public figure, future media coverage will continue to throw light on Chai Ling for those who are interested in following her story.

 </p> </blockquote> <hr class="c170" /> <div class="c171" > Home | Film/Media | Tour | Themes | Chronology | Readings/Links | Site Map | Chinese
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The World According to ... - Monsanto Canada Inc. v. ...

Organic Consumers Association: Millions Against Monsanto

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