

April 28, 2003

VIA FACSIMILE & U.S. MAIL
918-662-1105

Maria Dunn, Esq.
ConocoPhillips Company
Senior Counsel
1264 Adams Building
Bartlesville, OK 74004

Re: fuckconocophillips.com

Dear Ms. Dunn:

I am in receipt of your letter of April 3, 2003 in which you allege i) trademark infringement; ii) dilution; and iii) a claim under the Anticybersquatting Consumer Protection Act of 1999, all in connection with my registration of the Internet domain name *fuckconocophillips.com*. As set forth below, your allegations are so wholly without basis in law or fact that one must question your motives for writing the letter.

1. Trademark Infringement

As you are presumably aware, a plaintiff in a trademark infringement action has the burden of proving that defendant's use of the mark has created a likelihood of confusion about the origin of the defendant's goods or services. In order to make this showing, a plaintiff must establish that it has developed a protectable trademark right, that the defendant is using a confusingly similar mark, and that the defendant's use of the mark creates a likelihood of confusion, mistake and/or deception with the consuming public. Thus, in order to prevail on a claim of trademark infringement in connection with my registration of *fuckconocophillips.com*, ConocoPhillips Company ("ConocoPhillips") would have the burden of proving (among other things) that "fuckconocophillips" is confusingly similar to "ConocoPhillips," and that consumers are likely to confuse the two. ConocoPhillips plainly would not be able to do so.

In *America Online, Inc. v. Johuathan Investments, Inc., and AOLLNEWS.COM*, WIPO Case No. D 2001-0918 (2001), America Online sought to cancel registration of the domain name *fucknetscape.com* in an arbitration proceeding brought pursuant to the Uniform Domain Name Dispute Policy. The administrative panel held that *fucknetscape.com* was not confusingly similar to America Online's trademark NETSCAPE:

In the trademark context the term "confusingly similar" refers to confusion as to trade origin. Is it likely therefore that, because of the similarity between the Domain Name on the one hand and the Complainant's trade mark on the other hand, people will believe that the Domain name is associated in some way with the Complainant?

The Panel regards it as inconceivable that anyone looking at this Domain Name will believe that it has anything to do with a company of such high repute as the Complainant. It is manifestly, on its face, a name, which can have nothing whatever to do with the Complainant. It is a name, which, by its very nature, declares that it is hostile to Netscape. The Panel notes that in support of the bad faith claim the Complainant contends that the Respondent has registered this Domain Name in violation of paragraph 4(b) (ii) of the Policy on the basis that it has been done to prevent the Complainant registering the name. The Panel simply does not understand why on earth the Complainant would ever wish to register this Domain Name. There is no evidence before the Panel to support the contention. The Panel is aware that some companies seek to acquire such names, but only to forestall and/or impede the more obvious protest sites, not because they believe people will believe that the domain name in question or any site to which it is connected belongs to or is licensed or endorsed by the trademark owner.

The Panel finds that the Complainant has failed to prove that this Domain Name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights.

Id. at p. 4. Similarly, in Bally Total Fitness Holding Corp. v. Faber, 29 F. Supp. 2d 1161 (Central Dist. Cal. 1998), the United States District Court for the Central District of California granted summary judgment for the defendant in an action for trademark infringement, dilution and unfair competition brought by Bally Total Fitness Holding Corp. based on the defendant's operation of a Web site entitled "Bally Sucks," finding no likelihood of consumer confusion as a matter of law. In reaching its decision, the court noted that "no reasonably prudent Internet user would believe that *Ballysucks.com* is the official Bally site or is sponsored by Bally." Id. at 1165 fn. 2. In Ford Motor Co. v. 2600 Enters., 177 F. Supp. 2d 661 (E. Dist. Mich. 2001) the District Court for the Eastern District of Michigan denied Ford Motor Co.'s motion for a preliminary injunction against the registrant of *fuckgeneralmotors.com*, holding that there was *no chance* that Ford would succeed on the merits on its claims for trademark infringement, dilution and unfair competition.

Because consumers are not likely to confuse "fuckconocophillips" with ConocoPhillips' marks CONOCO and/or PHILLIPS, ConocoPhillips' assertion that *fuckconocophillips.com* infringes those marks is without merit.

2. Dilution

The elements of a dilution claim are that:

- (1) The plaintiff is the owner of a mark which qualifies as a "famous" mark as measured by the totality of the eight factors listed in § 43(c) (1),
- (2) The defendant is making commercial use,
- (3) In interstate commerce,
- (4) Of a mark or trade name,

- (5) And defendant's use began after the plaintiff's mark became famous,
- (6) And defendant's use causes dilution by lessening the capacity of the plaintiff's mark to identify and distinguish goods or services.

3 Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 24:89 at 24-137-38 (1997) (footnote omitted). Thus, in order to prevail on a claim for dilution, ConocoPhillips would bear the burden of establishing that I am making commercial use of its trademarks. It should be obvious that ConocoPhillips would not be able to do so. There is not now, nor has there ever been (while I have been the registrant), any commercial activity whatsoever associated with *fuckconocophillips.com*. In fact, the domain name resolves (via IP redirect) to www.anti-corporate.org, the content of which has always been overtly political.

Courts have held that trademark owners may not quash unauthorized use of the mark by a person expressing a point of view. See *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir.), cert denied, 483 U.S. 1013 (1987) citing *Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931, 933-35 (D.D.C. 1985). In *L.L. Bean*, the First Circuit held that a sexually oriented parody of L.L. Bean's catalog in a commercial adult-oriented magazine was non-commercial use of the trademark. See id. The court stated:

If the anti-dilution statute were construed as permitting a trademark owner to enjoin the use of his mark in a noncommercial context found to be negative or offensive, then a corporation could shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct. The legitimate aim of the anti-dilution statute is to prohibit the unauthorized use of another's trademark in order to market incompatible products or services. The Constitution does not, however, permit the range of the anti-dilution statute to encompass the unauthorized use of a trademark in a noncommercial setting such as an editorial or artistic context.

Id. Because *fuckconocophillips.com* is not a commercial use of ConocoPhillips' marks, ConocoPhillips' allegation that I have diluted its marks is without merit.

3. Anticybersquatting Act

President Clinton signed the Anticybersquatting Consumer Protection Act into law on November 29, 1999. The bill was signed into law as P.L. 106-113 and codified at 15 U.S.C. § 1125(d), and is designed to "protect consumers and promote electronic commerce by amending certain trademark infringement, dilution, and counterfeiting laws," creating a new cause of action for trademark owners against cyber squatters as well as providing protection against the unauthorized registration of personal names as domain names. However, contrary to your assertion, "registering a domain name that is confusingly similar or dilutive of a famous mark" is *not*, by itself, a violation of the Act. Rather, the Act provides (among others) remedies against anyone who, with a *bad faith intent to profit*, registers, traffics or uses a domain name that is identical, confusingly similar, or dilutive of a famous mark. Factors that show bad faith include the registrant's intent to divert customers, the registrant's offer to sell the domain name, the warehousing of multiple domain names owned by others and the intent to tarnish or disparage a

brand. A court can also consider factors that may establish the absence of bad faith, including the registrant's valid noncommercial or fair use of the domain name.

As noted above, I have never made commercial use of *fuckconocophillips.com*. I have never offered to sell the domain name, to ConocoPhillips or anyone else. My registration and use of *fuckconocophillips.com* does not violate the Act, and is speech protected by the First Amendment. See Bally Total Fitness Holding Corp., *supra*, 29 F. Supp. 2d at 1167 (use of a mark in connection with consumer commentary is "speech protected by the First Amendment"), citing L.L. Bean, *supra*, 811 F.2d at 29.

I hope that it has been made perfectly clear that not only are you not entitled to *fuckconocophillips.com*, but you also have no basis in law or in fact to assert a claim for damages based on my registration and use of the same. I hope this letter will suffice to put an end to this matter and that you will cease and desist from any further action in connection therewith. Please be advised that should ConocoPhillips commence litigation against me in connection with *fuckconocophillips.com* as threatened, I will move to strike ConocoPhillips' complaint pursuant to California's Anti-SLAPP statute, Code Civ. Procedure § 425.16, and will seek to recover my attorney's fees and costs as provided by that section. Please be further advised that your allegations of infringement are serious and could result in a suit against you (individually) and ConocoPhillips for defamation.

Please contact me if you have any questions regarding the foregoing. In the interim, please note that nothing contained herein, or omitted herefrom, is intended as a waiver of any of my rights, remedies, or assertions of fact in this matter, each of which is hereby expressly reserved.

Very truly yours,

Jeffrey G. Winter

562-243-3799