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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 INTEL CORPORATION,
15
16 Plaintiff,
17 v.
18 AMERICAS NEWS INTEL PUBLISHING,
LLC,
19 Defendant.

CASE NO. C09-5085 (PVT)
**AMERICAS NEWS INTEL
PUBLISHING, LLC'S NOTICE OF
MOTION AND MOTION TO
DISMISS INTEL CORPORATION'S
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES**
Date: February 9, 2010
Time: 10:00 a.m.

20
21 Defendant hereby gives notice of its Motion to Dismiss Plaintiff's Complaint, set for
22 hearing on February 9, 2010 at 10:00 a.m., or as soon thereafter as counsel may be heard.

23 Defendant hereby moves the Court to dismiss plaintiff's Complaint in its entirety for failure
24 to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), for the reasons more fully set
25 forth in defendants' accompanying memorandum of points and authorities.
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Dated: December 31, 2009

CARR & FERRELL *LLP*

By: /s/ Colby B. Springer

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION AND FACTUAL OVERVIEW**

3 The Complaint by Intel Corporation is a massive work that sets forth an immense number of
4 trademark-based claims. These claims center on the allegation that the defendant, America News
5 Intel Publishing, has infringed Intel Corporation's INTEL trademarks through the use of the marks
6 AMERICAS NEWS INTEL PUBLISHING, LATIN INTEL, and LATIN INTEL TRADE
7 CENTER in association with "consulting services and newsletter subscriptions on business,
8 economics, travel and politics in Mexico." Complaint ¶ 20. Intel Corporation is, of course, the
9 well-known computer chip giant whose INTEL trademark is one of the world's best known for
10 technology. Complaint ¶ 8-11. Nowhere in the Complaint, however, is it alleged that Intel
11 Corporation uses its trademarks, intends to use them, or is likely to use them in connection with
12 consulting services and newsletter subscriptions on business, economics, travel, and politics in
13 Mexico.

14 No allegation is made in the Complaint that defendant is offering consulting services and
15 newsletters respecting technology, computers, or anything having to do with Intel Corporation or
16 for what its INTEL brand is known. The Complaint omits, however, the explanation as to why
17 defendant might "use" a trademark associated with computer chips and related goods and services
18 in connection with consulting services and newsletter subscriptions on business, economics, travel
19 and politics in, of all places, Mexico. The reason for this is that Intel Corporation chooses to ignore
20 a very significant fact: That the word "intel" used in defendant's marks has nothing to do with
21 INTEL chips, Intel Corporation, or its business. Rather, "intel" is a word in the English language—
22 albeit via slang—for "intelligence," usually used in the sense of reconnaissance and analysis
23 regarding areas of special interest. It's not all about Intel Corporation.

24 As set forth below, once the Court takes—as the law provides that it should—judicial notice
25 of the universe of dictionary and other reference and popular media definitions for the word "intel,"
26 the meritless nature of the Complaint becomes painfully clear. Thus Merriam-Webster's online
27 dictionary reports a single, solitary definition for the word "intel": "Function: *abbreviation*
28 [Definition:] intelligence." SPRINGER DECLARATION, EXHIBIT A. Journalists, analysts, and others

1 in a position to write or talk about “intel” do so with the full understanding of how the public
2 understands the word. Thus, no less a standard-setter than the Associated Press has, in the last few
3 days alone, repeatedly used the word to report the news, including once in a headline reading “**Intel**
4 report: Iran seeking to smuggle raw uranium.” SPRINGER DECLARATION, EXHIBIT B (emphasis
5 added). Another Associated Press use of “intel” was on December 29, 2009 in the body of a news
6 article that ran in the online and print versions of *Investor’s Business Daily*—among countless other
7 publications—and that read, “[m]eanwhile, diplomats are concerned about an **intel** report that Iran
8 is trying to import 1,350 tons of imported uranium from Kazakhstan.” SPRINGER DECLARATION,
9 EXHIBIT C (emphasis added).

10 Further examples of such usage abound. Earlier this week, CNN foreign affairs
11 correspondent Mohammed Jamjoom explained news developments on a network program by
12 saying, “[t]he Yemenis maintained that they’re doing this all on their own, but they’re getting
13 money from the U.S. and they’re getting **intel** information from the U.S.” SPRINGER
14 DECLARATION, EXHIBIT D (emphasis added). Similarly, in a *National Review* article entitled “Deep
15 in the Shallows” and reviewing the recent film “Avatar,” the author writes:

16 Thus equipped, and supervised by an ornery scientist named Grace
17 (Sigourney Weaver, having fun), he sets out to infiltrate the local alien clan
18 in the hopes of making peace—or, failing that, in the hopes of bringing
19 useful military **intel** back to his superiors.

20 SPRINGER DECLARATION, EXHIBIT E (emphasis added). On the opposite end of the political
21 spectrum—and merely utilizing a small fraction of publicly-recorded uses of the term “intel” in just
22 the few days prior to this filing—the following usage comes via television commentator Chris
23 Matthews:

24 MATTHEWS: Yes. Well, how would you possibly pick up **intel** on a few
25 guys get together with a kid like this? They recruit him or he joins them.
26 They give him what he needs in terms much weaponry. He is already
27 indoctrinated, or self-indoctrinated. He already has a point of view. How
28 could a big intelligence worldwide network pick up on such a small situation
like that, Tyler and then Bob?

1 SPRINGER DECLARATION, EXHIBIT F (emphasis added). Finally, only two days ago, no less a
 2 competent source than the press secretary of the President of the United States engaged in this
 3 exchange at a press conference:

4 Q Was there any discussion or consideration of the possibility of returning to
 5 Washington and cutting the vacation short?

6 MR. McDONOUGH: I'm not aware of any such discussion. I mean, the
 7 President has got a full team here, we're very close. Interagency is stood up
 8 back in Washington, working all agencies, all **intel**, law enforcement,
 military, homeland security and others are working regularly, aggressively.

9 SPRINGER DECLARATION, EXHIBIT G (emphasis added).

10 The indisputably standard definition of the word “intel” provides a completely logical basis
 11 for understanding defendant’s choices of terminology. Such a definition likewise provides a far
 12 more plausible basis than the conclusory allegations set forth in the Complaint and that defendants
 13 would conceivably have anything to gain by using the name of a computer chip manufacturer to
 14 describe their business of disseminating information about and advising clients and readers with
 15 respect to Mexico.

16 For this reason, and for many others—including the fact that plaintiffs cannot plausibly,
 17 even by dint of the allegations of the Complaint, be regarded as competitors; and that plaintiff’s
 18 dilution claims fail to state a cognizable claim on multiple grounds as well—the Court should
 19 swiftly end this adventure in gross intellectual property overreaching and dismiss the Complaint of
 20 Intel Corporation as a matter of law.

21 LEGAL ARGUMENT

22 I. PLAINTIFF’S ALLEGATIONS SOUNDING IN TRADEMARK INFRINGEMENT 23 FAIL TO STATE CLAIMS FOR WHICH RELIEF CAN BE GRANTED

24 A. Legal standard for dismissal under Fed. R. Civ. P. 12(b)(6)

25 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the “legal
 26 sufficiency” of the claims alleged in the complaint. *In re Graphics Processing Units Antitrust*
 27 *Litig.*, 527 F. Supp. 2d 1011, 1018 (N.D. Cal. 2007). A motion to dismiss is properly granted under
 28

1 Fed. R. Civ. P. 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted.
2 The complaint is construed in the light most favorable to the non-moving party and all material
3 allegations in the complaint are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir.
4 1986). The court is not, however, required to accept legal conclusions cast in the form of factual
5 allegations if those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult*
6 *Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265,
7 286 (1986)). Mere “conclusory allegations of law and unwarranted inferences are insufficient to
8 defeat a motion to dismiss for failure to state a claim.” *In re Graphics Processing Units, supra*, 527
9 F. Supp. 2d at 1018 (citing *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.1996)).
10 Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), a plaintiff must
11 do more than recite the elements of the claim and must “provide the grounds of [its] entitlement to
12 relief.” *Bell Atlantic v. Twombly*, 127 S. Ct. 1555, 1569 (2007) (citations omitted). In addition, the
13 pleading must not merely allege conduct that is conceivable; the allegations must also be plausible.
14 *Id.* at 1974. To dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), the court
15 must ultimately determine that “the complaint lacks a cognizable legal theory or sufficient facts to
16 support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104
17 (9th Cir. 2008).

18 **B. The Court should take judicial notice of dictionary definitions of the word “intel”**

19 Fed. R. Evid. 201 (b)(2) permits the Court to take judicial notice of facts that are “not
20 subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by
21 resort to sources whose accuracy cannot be reasonably questioned.” It is proper to take judicial
22 notice of dictionary definitions. *Wilshire Westwood Assoc. v. Atlantic Richfield Corp.*, 881 F.2d
23 801, 803 (9th Cir. 1989); *Cose v. Getty Oil Co.*, 4 F.3d 700, 705 (9th Cir. 1993). “To that end,
24 dictionaries and encyclopedias may be consulted” in determining trademark issues and, in
25 particular, in assessing genericness. *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d
26 727, 728 (Fed. Cir. 1988); *Team Cent. Inc. v. Xerox Corp.*, 606 F. Supp. 1408, 1413 (D.C. Minn.
27 1985) (citing *Miller Brewing Co. v. G. Heileman Brewing Co.*, 561 F.2d 75, 80-81 (7th Cir.), *cert.*
28 *denied*, 434 U.S. 1025 (1978) (relying heavily on dictionary to find that “light” or “lite” was

1 generic term for low-calorie beer and noting propriety of judicial notice of common usage of the
2 English language to determine whether a use is generic)); see also *Road Dawgs Motorcycle Club of*
3 *U.S., Inc. v. Cuse Road Dawgs, Inc.*, 2009 WL 3790183, 16 at n. 64 ((N.D.N.Y. 2009) (reference to
4 online dictionary).

5 In all these cases, the question of genericness was resolved by reference to standard
6 reference works proffered by parties in competition with the senior mark holder. In contrast to the
7 present case, the alleged trademark “use” of the generic term “intel” is completely non-competitive.
8 The parties, even upon a plain reading of the facts alleged in the Complaint, do not compete or
9 operate in the same marketing channels. The use of dictionary and other standard or reference-
10 work definitions to ascertain that the word being used by the defendant is not the same word that
11 constitutes plaintiff’s trademark is particularly appropriate.

12 Having established the legal basis for the Court to consider such definitions, consideration
13 of the extensive body of references set forth in the Statement of Facts to use of the word “intel” in
14 the manner used by defendants, and completely unrelated to plaintiff’s trademarks or its business,
15 easily demonstrates the meritless nature of the Complaint.

16 **C. Defendant’s of the word “intel” in its plain English sense is not use of the INTEL**
17 **trademark**

18 Plaintiff has pleaded a number of claims sounding in trademark infringement but based on
19 different legal theories, which are all alternative conceptual approaches to capturing—in a legally
20 cognizable way—a person's wrongful use of another's trademark and either confusing the public, or
21 undermining, by dilution, the trademark holder's ability to benefit from his mark. All are premised
22 on wrongful use of the trademark in question. Not only are defendant's actions not even remotely
23 likely to cause confusion or mislead consumers—as will be discussed in the following section—
24 but, even more fundamentally, the INTEL **trademark** has never been used by the defendant, even
25 though it has used the *unrelated* English word “intel.”

26 All these legal theories ultimately reflect the policy embodied in the federal Lanham Act,
27 which imposes liability upon any person who (1) uses an infringing mark in interstate commerce,
28 (2) in connection with the sale or advertising of goods or services, and (3) such use is likely to

1 cause confusion or mislead consumers. 15 U.S.C. § 1114(1)(a). The first and most fundamental
2 prong of a claim for trademark infringement or trademark dilution, therefore, is that a plaintiff must
3 allege that the defendant actually used its trademark. *See Academy of Motion Picture Arts and*
4 *Sciences v. Network Solutions*, 989 F. Supp. 1276, 1279-81 (C.D. Cal. 1997) (federal trademark
5 infringement and dilution claims and state law unfair competition claims require that defendant
6 “used” another’s mark without permission in connection with its own goods and services); *Toho*
7 *Co. v. Sears, Roebuck & Co.*, 645 F.2d 788, 793 (9th Cir. 1981) (dilution doctrine codified in
8 Business and Professions Code protects trademark holder from harm due to defendant’s “use” of its
9 mark); *Sunset House Distributing Corp. v. Coffee Dan’s Inc.*, 240 Cal. App. 2d 748, 753 (1966)
10 (state law trademark infringement and unfair competition claims require defendant’s “use of a
11 confusingly similar tradename” to tradename used by plaintiff); 15 U.S.C. § 1125(a)(1) (false
12 representation actionable under Lanham Act if party “uses in commerce” a “false or misleading
13 representation of fact”).

14 But the courts have long made it clear that not all “uses” of a trademark are actionable.
15 Trademarks “identify and distinguish” goods “from those manufactured or sold by others” and
16 “indicate the source of the goods.” 15 U.S.C. § 1127; *New Kids on the Block v. News America*
17 *Publ’g, Inc.*, 971 F.2d 302, 305 (9th Cir. 1992). Trademark rights—as was perhaps best stated by
18 Justice Holmes—only enable their owner to prohibit the use of that trademark “so far as to protect
19 the owner’s good will against the sale of another’s product as his.” *Prestonettes, Inc. v. Coty*, 264
20 U.S. 359, 368 (1924) (Holmes, J.). In contrast, “[i]f defendants are only using [plaintiff’s]
21 trademark in a ‘non-trademark’ way—that is, in a way that does not identify the source of a
22 product—then trademark infringement and false designation of origin laws do not apply.”
23 *Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 695 (6th Cir. 2003); *see*
24 *also Academy of Motion Picture Arts and Sciences*, 989 F. Supp. 1276 at 1279 (“commercial use”
25 under Lanham Act requires that defendant attach marks to goods or services that it sells); *Pirone v.*
26 *MacMillan, Inc.*, 894 F.2d 579, 583 (2d Cir. 1990) (a defendant “can infringe [a trademark
27 owner’s] rights only if [the defendant’s] use was a ‘trademark use,’ that is, one indicating source or
28 origin”).

1 In the present matter, it is beyond dispute that defendants are using the word “intel,” which
2 is spelled and pronounced exactly as the INTEL trademark. Furthermore, defendant is making, in
3 the strict sense, trademark use of the word “intel” as part of the three word combinations used to
4 describe their offerings. But defendant is not making use of the **trademark INTEL** which, while
5 the complaint attempts to distract matters by claims that it is “ubiquitous” (Complaint ¶ 10) and in
6 use “with virtually every product and service it sells” (Complaint ¶ 11), is ultimately associated
7 only with the famous, wealthy company that “develops, manufactures and sells a wide variety of
8 computer, communications and Internet-related products and services”—but not news and
9 information. Not “intelligence.” Not “intel.” This is **not** trademark use.

10 **D. Any use by defendant’s of plaintiff’s mark is an example of a non-actionable**
11 **generic meaning in different contexts**

12 Despite the deference afforded registered trademarks, much less incontestable and famous
13 ones, the cases have not hesitated to give short shrift to plaintiffs, such as Intel, that seek to control
14 the development of language and culture merely because they own a bona fide stake in a particular
15 combination of letters in the Latin alphabet. Indeed, the Ninth Circuit has ruled this way even
16 when the association—even the genesis of the junior user—is in fact obvious, yet consumer
17 associations are not:

18 The First Amendment may offer little protection for a competitor who labels
19 its commercial good with a confusingly similar mark, but “[t]rademark rights
20 do not entitle the owner to quash an unauthorized use of the mark by another
21 who is communicating ideas or expressing points of view.” *L.L. Bean, Inc. v.*
22 *Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir.1987). Were we to ignore
23 the expressive value that some marks assume, trademark rights would grow
24 to encroach upon the zone protected by the First Amendment. *See Yankee*
25 *Publ’g, Inc. v. News Am. Publ’g, Inc.*, 809 F.Supp. 267, 276 (S.D.N.Y.1992)
26 (“[W]hen unauthorized use of another’s mark is part of a communicative
27 message and not a source identifier, the First Amendment is implicated in
28 opposition to the trademark right.”). Simply put, the trademark owner does
not have the right to control public discourse whenever the public imbues his
mark with a meaning beyond its source-identifying function. *See Anti-*
Monopoly, Inc. v. Gen. Mills Fun Group, 611 F.2d 296, 301 (9th Cir.1979)
 (“It is the source-denoting function which trademark laws protect, and
nothing more.”).

1 *Mattel, Inc. v. MCA Records, Inc.* 296 F.3d 894, 900-901 (9th Cir. 2002) (no trademark
2 infringement in BARBIE trademark for dolls arising from performance of “Barbie Girl” song).

3 Professor McCarthy, in his definitive treatise, addresses this topic under the rubric of
4 “generic meanings in different contexts.” His analysis of the black-letter law on this topic is
5 precisely on point. And while the following excerpt is somewhat extended, defendant respectfully
6 submits that the Court indulge its inclusion, for in this passage McCarthy comprehensively and
7 authoritatively addresses—and demolishes—the specious trademark / unfair competition issue in
8 this litigation:

9 Sometimes a word used as a trademark comes to have an entirely new
10 “generic” meaning or usage apart from its function as a trademark. This
11 occurrence has been described as “the parallel development of new
12 dictionary meanings in the everyday give and take of human discourse.” In
13 one such case, a federal court refused to enjoin public interest groups from
14 referring to the “Strategic Defense Initiative” as the “Star Wars Program” in
15 television media, over the objection of the owner of the STAR WARS
16 motion picture trademark. The court reasoned that:

14 [T]he use of star wars in political propaganda, newspapers or
15 noncommercial, non-trade references will not undermine plaintiff's
16 exclusive property right to use in connection with goods and services.
17 ... Now the phrase star wars has acquired a double meaning ... The
18 new meaning of the phrase in the political context or scientific
19 context does not affect the distinct, and still strong secondary
20 meaning of STAR WARS in trade and entertainment.

19 This policy of allowing parallel “generic” use of a trademark in a different
20 context acknowledges the dynamic nature of modern language: the meaning
21 of a word or symbol is not necessarily fixed for all time as it is first used, or
22 as it is defined in the dictionary, but may grow and develop new meaning and
23 nuances according to its use. Although a word may have developed a new,
24 generic meaning in a non-commercial, non-trade context, as long as it still
25 functions in the commercial context to identify the good will of its source, it
26 has meaning as a trademark and that meaning will be judicially protected
27 against confusingly similar commercial use. Thus, while the terms “Mickey
28 Mouse” or “Teflon” president may have acquired new, “generic” meanings
in the language, that does not impugn their original status as strong
trademarks in the commercial context. Similarly, the trademark SPAM for
canned meat took on a new and parallel meaning in the language as denoting
unwanted or “junk” advertising e-mail. “[T]he trademark owner does not
have the right to control public discourse whenever the public imbues his
mark with a meaning beyond its source-identifying function.”

1 Somewhat similar is the case where the Illinois High School Association for
2 several decades named the state high school basketball tournament “March
3 Madness,” and, years later, television sports broadcasters began calling the
4 N.C.A.A.’s national college basketball tournament “March Madness.” The
5 court refused the high school association's plea to enjoin the N.C.A.A.’s use
6 of the term “March Madness” and its licensing of the term for computer
7 games. The court said that principles of free speech prevent a court from
8 prohibiting the media from calling the N.C.A.A. tournament “March
9 Madness” and a court could not stop the public from affixing the name to
10 something other than the Illinois high school tournament. To centralize
11 ownership, the two parties then assigned their trademarks to a new entity
12 which licensed back both of the parties to use the term to identify their
13 basketball tournaments. The new entity then prevailed in asserting
14 infringement against a third party user.

10 A term may be the generic name of one product, but not of another. For
11 example, while DIESEL is not the generic name of wearing apparel, the
12 owner of that mark for wearing apparel cannot prevent a maker of diesel
13 engines from using the word to name its products. Thus, some cases can be
14 decided on the ground that the defendant's use is permitted because the
15 contested term is a generic name of the *defendant's* goods, without the court
16 having to pass on the validity of the mark and its genericness as to the
17 *plaintiff's* goods. . . .

15 McCarthy § 12:3 (citing *Lucasfilm, Ltd. v. High Frontier*, 622 F. Supp. 931, 969 (D.D.C. 1985);
16 *Viacom International Inc. v. Komm*, 46 U.S.P.Q.2d 1233, 1998 WL 177472 (T.T.A.B. 1998) (MY-
17 T-MOUSE software not an infringement of MIGHTY MOUSE cartoon character even though
18 merchandised for use on toys, which could include computer toys and games); 56 *INTA Bulletin*,
19 no. 14 p.1 (Aug. 1, 2001) (Hormel Foods “spam” litigation); *Mattel, Inc. v. MCA Records, Inc.*, 296
20 F.3d 894, (9th Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003) (“Some trademarks enter our public
21 discourse and become an integral part of our vocabulary.”); *Illinois High School Ass'n v. GTE*
22 *Vantage, Inc.*, 99 F.3d 244 (7th Cir. 1996) (“[A] court could not, without violating the free speech
23 clause of the First Amendment, have enjoined (or used other legal remedies to prevent or deter) the
24 media from calling the NCAA tournament ‘March Madness’ . . . [W]e think that for the sake of
25 protecting effective communication [the issue] should be resolved against trademark protection,
26 thus assimilating dual use of multiple use terms to generic terms.”); *March Madness Athletic Ass'n,*
27 *L.L.C. v. Netfire, Inc.*, 310 F. Supp. 2d 786 (N.D. Tex. 2003), *judgment entered*, 2003 WL
28 22173299 (N.D. Tex. 2003) and *aff'd*, 120 Fed. Appx. 540 (5th Cir. 2005)).

1 Every one of these cases involved a junior use whose “inspiration” or allusion to the
2 trademark in question was beyond cavil, but was still found to be permissible as a generic meaning
3 in a different context. The trademark rights did not follow, as they cannot, the change in meaning.

4 In contrast, the defendant's position is far stronger than in the aforementioned cases, where
5 the infringement claims still failed. In contrast, there has been no change or “genericization” of the
6 trademark. The generic word used by the defendant—“intel”—bears no conceptual, commercial, or
7 semantic relationship to the trademark INTEL besides a common root in the word “intelligence.”
8 The government officials, journalists and pundits quoted using the English term “intel” for
9 “intelligence information” were obviously not referring to, much less using, the INTEL trademark.
10 And neither can the same use of the same term in the same way by defendant plausibly be alleged
11 to constitute trademark infringement.

12 **E. Plaintiff has failed adequately to plead facts amounting to a plausible claim of**
13 **likelihood of confusion**

14 As the Trademark Trial and Appeal Board (TTAB) wrote in *Viacom International Inc. v.*
15 *Komm*, 46 U.S.P.Q.2d 1233 (T.T.A.B. February 05, 1998), “[t]his brings us to the issue of
16 likelihood of confusion.” In determining whether confusion between related goods is likely, the
17 Ninth Circuit considers eight factors: (1) strength of the mark; (2) relatedness of the goods and
18 services; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channel used;
19 (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) the defendant's
20 intent in selecting the mark; and (8) likelihood of expansion of the product lines. *AMF, Inc. v.*
21 *Sleekcraft Boats*, 599 F.3d 341, 349 (9th Cir.1979). The Complaint fails, here, on multiple scores.

22 First, there is no plausible relation between the goods and services of plaintiff and
23 defendant. Second, the uses of the word “intel” by defendant, even if those uses are construed by
24 the Court as legally cognizable uses of the INTEL mark, and even if they are not deemed fair uses,
25 they are not confusingly similar to the INTEL trademarks because they are not similar to the
26 INTEL trademark; rather, they are embedded in longer, multi-word phrases of which “intel” is only
27 a component of the phrase. Third, there is no allegation of actual confusion. Fourth, the types of
28 goods and the marketing channels for these goods are entirely disparate—there is no plausible

1 allegation here that a prospective customer interested in any service provided by plaintiff would
 2 choose or even consider defendant's offerings instead. Fifth, there is not even a plausible allegation
 3 that plaintiff is going into the business of publishing area-related policy analysis and "intel" in any
 4 form. Most of these facts are self-evident; defendant analyzes some of the relevant legal principles
 5 below.

6
 7 **i. Defendant's of the word "intel" as part of various longer phrases is not likely to
 be confused with the INTEL trademark**

8 According to the "anti-dissection" rule, "[t]he commercial impression of a trademark is
 9 derived from it as a whole, not from its elements separated and considered in detail." *Estate of*
 10 *P.D. Beckwith, Inc. v. Comm'r of Patents*, 252 U.S. 538, 545-46, 40 S.Ct. 414, 64 L.Ed. 705 (1920);
 11 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:41 (4th ed.2004)
 12 ("McCarthy"). As the Ninth Circuit has taught:

13 [When a] mark is a composite term . . . its validity is not judged by an
 14 examination of its parts. Rather, the validity of a trademark is to be
 15 determined by viewing the trademark as a whole. *See Union Carbide Corp.*
 16 *v. Ever-Ready Inc.*, 531 F.2d 366, 379 (7th Cir.), *cert. denied*, 429 U.S. 830,
 17 97 S.Ct. 91, 50 L.Ed.2d 94 (1976). "Words which could not individually
 18 become a trademark may become one when taken together." *Id.* "A
 composite geographical mark should not be dissected into its parts . . . It is
 the likely reaction of customers to the total mark that is at issue." 1 J.
 McCarthy, *supra*, § 14:6, at 496 . . .

19 *California Cooler, Inc. v. Loretto Winery, Ltd.*, 774 F.2d 1451, 1455 (9th Cir. 1985).

20 Plaintiff's trademark claim is based on the use by defendant of the word "intel" in the
 21 phrases AMERICAS NEWS INTEL PUBLISHING, LATIN INTEL and LATIN INTEL TRADE
 22 CENTER. None of these phrases, however, is confusingly similar either to the INTEL mark itself,
 23 nor to any of the multi-word marks alleged by plaintiff but which cannot plausibly be as likely to
 24 be confused with defendant's marks.

25
 26 **ii. Defendant's of the word "intel" is not likely to be confused with the INTEL
 trademark because each is used with completely different goods and services.**

27 "Even where there is precise identity of a complainant's and an alleged infringer's mark,
 28 there may be no consumer confusion—and thus no trademark infringement—if the alleged infringer

1 is in a different geographic area or in a wholly different industry.” *Brookfield Communications,*
2 *Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1054-56 (9th Cir. 1999) (“If, on the other
3 hand, Brookfield and West Coast did not compete to any extent whatsoever, the likelihood of
4 confusion would probably be remote”). Here geography is irrelevant, but surely the disconnection
5 between the parties’ different businesses is more than sufficient to deem the Complaint’s claim of a
6 likelihood of confusion implausible.

7 In *Viacom*, for example, the TTAB was easily able to distinguish between the rights of
8 Viacom in the MIGHTY MOUSE trademarks and the software at issue in that opposition
9 proceeding based on a record indicating that despite the virtual identity of the trademarks in
10 question as a matter of law—MIGHTY MOUSE and MY-T-MOUSE—consumers simply would
11 not confuse the animated rodent superhero with software to enhance the performance of a computer
12 mouse, even where (unlike here) it was obvious that former was meant as an allusion to the latter.
13 Where, as here, the Complaint itself makes it clear that there is no coherent connection between the
14 goods and services offered by the plaintiff and those of the defendant, it is entirely proper for a
15 court to dismiss trademark claims for failure to plead a plausible case of likelihood of confusion at
16 the pleadings stage:

17 A likelihood of confusion exists when a consumer viewing a service mark is
18 likely to purchase the services under a mistaken belief that the services are,
19 or associated with, the services of another provider. *Rodeo Collection, Ltd. v.*
20 *West Seventh*, 812 F.2d 1215, 1217 (9th Cir.1987). The confusion must “be
21 probable, not simply a possibility.” *Id.* If goods or services are totally
unrelated, there is no infringement because confusion is unlikely. *AMF v.*
Sleekcraft Boats, 599 F.2d 341, 348 (9th Cir.1979).

22 *Murray v. Cable Nat. Broadcasting Co.*, 86 F.3d 858, 861 (9th Cir. 1996) (rejecting suggestion that
23 12(b)(6) relief unavailable in Lanham Act cases on likelihood of confusion grounds). Similarly, no
24 plausible likelihood of confusion has been pleaded. And while *Viacom* was procedurally
25 distinguishable from this case, the TTAB’s argument for rejecting a claim of likelihood of
26 confusion is completely applicable here; all the Court needs to know perform the same analysis is
27 indeed contained in the Complaint.

28

1 The defendant here publishes—or, until plaintiff destroyed its business by its legal threats,
2 did publish—a newsletter and blog offering “intel,” or intelligence information, about world affairs,
3 and in particular about Mexico. On the other hand, plaintiff sells computer chips and related goods
4 and services. Indeed, as paragraph 8 of the Complaint states, plaintiff, in part asserts infringement
5 on the ground that it is used the INTEL mark in “a wide variety of computer, communications and
6 Internet-related products and services.” Computers . . . communications . . . Internet . . . exactly the
7 business of defendant! But any suggestion by Intel Corporation that it in competes with defendant
8 at all is preposterous, and falls far short of the plausibility standard of Rule 12(b)(6). INTEL is not,
9 and cannot be, alleged to be a trademark used in connection with foreign-affairs blogging, even
10 though blogs or websites such as those of defendants are communicated via the Internet from
11 computer to computer.¹ This would, after all, apply to virtually all modern commerce,
12 communication, and human intercourse in almost the whole world. Indeed, as an initial matter, the
13 TTAB was not at all impressed, as this Court should not be, with broad claims by a trademark
14 owner that its mark is all about “the Internet,” and that “the Internet” is all about absolutely
15 anything:

16 The mere fact that computer accessories and computer toys and games
17 involve the use of computers or software, and that applicants' goods are also
18 computer software, does not, in and of itself, demonstrate that the computer
19 software on which applicants use their mark is within the natural scope of
20 expansion of the use of opposer's mark. As we have said in the context of
21 determining whether products are related, “Given the ubiquitous use of
22 computers in all aspects of business in the United States today, this Board
23 and its reviewing Court have rejected the view that a relationship exists
24 between goods and services simply because each involves the use of
25 computers.” *Electronic Data Systems Corp. v. EDSA Micro Corp.*, 23
26 USPQ2d 1460, 1463 (TTAB 1992). See also *Octocom Systems, Inc. v.*
27 *Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir.
28 1990); *Information Resources Inc. v. X*Press Information Services*, 6
USPQ2d 1034 (TTAB 1988). . . .

¹ Intel’s throwaway invocation of its “design center in Guadalajara” (Complaint ¶ 10) suggests both its desperation and cynicism on this point. It also ignores the fact that, as the Complaint itself states, the target audience of defendant’s publications was not in Mexico at all, but “nationwide”—in the United States (Complaint ¶ 7).

1 *Id.* Plaintiff's "wide variety of computer, communications and Internet-related products and
2 services" allegation proves too much, and helps the Court focus on the paucity of allegations that
3 could amount to a substantive basis to find that likelihood of confusion had been pleaded here.

4 Indeed, and again in *Viacom*, after brushing away the "Internet and computers" distractions,
5 the TTAB relied, in finding that there was no likelihood of confusion, on a far more fundamental
6 fact. In short, the two trademarks existed in completely different conceptual "spaces"—just as the
7 INTEL trademark associated with computer chips are plainly not be likely, and cannot plausibly be
8 alleged as likely, to be confused with regional or strategic "intel" delivered via a newsletter or blog:

9
10 Moreover, the marks have different connotations, in that applicants' mark is
11 actually used in connection with the computer peripheral known as a
12 "mouse," and this meaning is further emphasized by the informational
13 language in the mark, THE SOFTWARE THAT MAKES YOUR MOUSE A
14 MOUSE THAT TYPES. Thus, it is the connotation of the computer
15 accessory, rather than of the cartoon animal associated with opposer's mark,
16 that consumers will perceive.

17
18 *Viacom*, 46 U.S.P.Q.2d 1233, 1998 WL 177472. Computer mice are not cartoon mice, just as
19 INTEL chips and their "related goods and services" could never, in the mind of a consumer,
20 plausibly be alleged to connote publishing about overseas affairs.

21
22 **F. The fame of defendant's mark does not enhance the plausibility of its allegations of
23 a likelihood of confusion because defendant's use of the word "intel" is not a
24 "competing mark"**

25 Finally, there is the matter of fame, which, while not the same as "strength" in trademark
26 terms, is an issue in a trademark case such as this one. Indeed "a mark's fame creates an incentive
27 for competitors "to tread closely on the heels of a very successful trademark," and "[a] strong mark
28 . . . casts a long shadow which competitors must avoid." *Kenner Parker Toys Inc. v. Rose Art
Industries, Inc.*, 963 F.2d 350, 353 (Fed. Cir. 1992). For this reason, "the Lanham Act's tolerance
for similarity between competing marks varies inversely with the fame of the prior mark. As a
mark's fame increases, the Act's tolerance for similarities in competing marks falls." *Id.* But these
considerations are relevant only to competing goods and services, which it cannot plausibly alleged
are implicated by this Complaint. In *Viacom*, the TTAB set out an important lesson for those who

1 are unduly impressed with the fame of a trademark and who assert, or believe, that the owner of a
 2 famous trademark is entitled, per se, to own or control every manifestation of some version of it
 3 that might occur in common parlance:

4 We acknowledge that applicants' mark MY-T-MOUSE and design might
 5 bring to mind the cartoon MIGHTY MOUSE. However, this does not
 6 necessarily mean that consumers will be confused into believing that the two
 7 marks indicate the same source of origin. See *Jacobs v. International*
 8 *Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982) (the fact
 9 that one mark may bring another to mind does not in itself establish
 10 likelihood of confusion as to source). See also, *Original Appalachian*
 11 *Artworks Inc. v. Streeter*, 3 USPQ2d 1717 (TTAB 1987) As the Court stated
 12 in *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*,
 13 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983):

14 likely * * * to cause confusion means more than the likelihood that
 15 the public will recall a famous mark on seeing the same mark used by
 16 another. It must also be established that there is a reasonable basis for
 17 the public to attribute the particular product or service of another to
 18 the source of the goods or services associated with the famous mark.
 19 To hold otherwise would result in recognizing a right in gross, which
 20 is contrary to principles of trademark law and to concept embodied in
 21 15 USC Section 1052(d).

22 Thus, even in the case of a famous mark (and, as we have stated, on this
 23 record MIGHTY MOUSE does not rise to the level of a famous mark), the
 24 mere fact that the junior user's mark may remind the public of the famous
 25 mark does not mean that the use of the junior mark is likely to cause
 26 confusion. For the reasons given above, we find that consumers will
 27 distinguish between the parties' marks, and are not likely to believe that
 28 applicants' identified software, sold under the MY-T-MOUSE and design
 mark, emanates from or is sponsored by the same source as the MIGHTY
 MOUSE cartoon character.

Here, too, it cannot plausibly be alleged that consumers encountering newsletters, blogs or
 consulting services utilizing the marks AMERICAS NEWS INTEL PUBLISHING, LATIN INTEL
 and LATIN INTEL TRADE CENTER would possibly think they emanate from or are sponsored by
 computer-chip maker Intel Corporation.

G. Plaintiff has failed to state a claim that defendant's use of the word "intel" is likely to dilute its INTEL mark

To prevail on its dilution by blurring claim (Complaint ¶¶ 36-40), plaintiff has the burden of
 proving by a preponderance of evidence: (a) that it is the owner of a trademark that is famous; (b)

1 that the famous mark is distinctive, either inherently or through acquired distinctiveness; (c) that
2 defendant is making or has made use in commerce of an identical or nearly identical trademark; (d)
3 that defendant's use of the INTEL mark began after it became famous; and (e) that defendant's use
4 of the word "intel" as part of its AMERICAS NEWS INTEL PUBLISHING, LATIN INTEL and
5 LATIN INTEL TRADE CENTER marks is likely to cause dilution by blurring of the INTEL
6 trademark. 15 U.S.C. § 1125(c); *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 634 (9th Cir. 2007).

7 As set forth above, plaintiff cannot establish all these elements. The first two elements as
8 well as the fourth are not at issue, but it is clear that defendant is not making and has not made use
9 in commerce of an identical or nearly identical trademark to INTEL by its own use of the English
10 word "intel" in the marks AMERICAS NEWS INTEL PUBLISHING, LATIN INTEL and LATIN
11 INTEL TRADE CENTER. These are simply not identical, or nearly identical, trademark uses.

12 The Complaint similarly fails as to the likelihood of causing dilution by blurring. "Dilution
13 by blurring" is association arising from the similarity between a mark or trade name and a famous
14 mark that impairs the distinctiveness of the famous mark. 15 U.S.C. § 1125(c)(2)(B). But while
15 the INTEL mark remains distinctive in its own right, the word "intel" has its own meaning, is in
16 widespread—indeed, nearly universal—use that has no connection to Intel Corporation or its
17 business, and is either properly considered a separate word or "mark" from the plaintiff's INTEL
18 mark or, by virtue of its use as a word, a clear indication that the distinctiveness that plaintiff claims
19 for its mark is long gone, and that defendant's actions have nothing at all to do with that.

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CONCLUSION

Accordingly, for all of the foregoing reasons, this Court should grant defendants' Motion to Dismiss the Complaint. As no amount of re-pleading can overcome the fact that defendants are utilizing the term 'intel' in a non-actionable and generic meaning, said dismissal should be with prejudice.

Respectfully submitted,

Dated: December 31, 2009

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