



## Foundation for Individual Rights in Education

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January 31, 2005

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As you can see from our Directors and Board of Advisors, FIRE unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, due process, legal equality, voluntary association, freedom of speech, and religious liberty on America's college campuses. Our web page, [www.thefire.org](http://www.thefire.org), will give you a greater sense of our identity and activities.

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We are gravely concerned about a recent incident at the University of California at Santa Barbara that severely infringes upon the free speech rights not only of its students and faculty, but also of any citizen who wishes to criticize UCSB. UCSB has requested that an independently hosted website, "[www.thedarksideofucsb.com](http://www.thedarksideofucsb.com)," remove the letters "ucsb" from its website URL address and associated tags, and has alleged that website owner James Baron is "guilty of a misdemeanor" for using the letters. As a state institution, UCSB should understand that no federal, state, local, or university statute, policy, or regulation can trump the exercise of First Amendment rights guaranteed by the United States Constitution. To forbid students, faculty members, or anyone else from using the letters "ucsb" when criticizing the university unlawfully and immorally tramples their rights to free speech.

The following is our understanding of the facts based on reports and documents from editors of *The Dark Side of UCSB* and articles published in the *Daily Nexus* and the *Pacific Coast Business Times*. Please correct any errors, if they exist. James Baron, a parent of a former UCSB student, launched a website, "[www.thedarksideofucsb.com](http://www.thedarksideofucsb.com)," in the fall of 2004 to "provide resources for students experiencing problems at UCSB; help students understand and avoid the dark side of campus life; and substantially mitigate or eliminate the negative impact of the dark side of UCSB." The website is designed to draw public attention to serious matters like campus security and what Mr. Baron sees as

violations of law and ethics. Mr. Baron's expression lies at the very heart of constitutionally protected speech.

On November 10, 2004, Margaret Clow, UCSB's campus policy and records management coordinator, sent a notice to Mr. Baron and to the website's host, NitroTek Internet Services, stating that "the name and initials of the University of California, Santa Barbara (UCSB) are protected by Section 92000 of the Education Code of the State of California," and that anyone using the name or initials without "written permission" of UCSB is "guilty of a misdemeanor."

Clow then requested that Baron and NitroTek "immediately remove the designation 'ucsb' from the address...and from any associated tags." In the e-mail notice to NitroTek, the Nova Scotia, Canada-based company that hosts the website, Clow added, "If you are hosting or maintaining any other sites in which our name or initials appear in the designation, I request that you remove our name or initials from those, as well."

On November 11, Baron wrote the Office of the Secretary of the Regents of the University of California to request permission to use the name "thedarksideofucsb.com," and stated that the website "has always contained the following disclaimer: 'This site was created by parents of UCSB students. It is not sponsored or endorsed by UCSB.'" Baron received no response from the Regents regarding his request. On November 19, Baron received a second notice from UCSB, again alleging that he was guilty of a misdemeanor for violating Section 92000 and requesting that the letters "ucsb" be removed from the web address and associated tags.

In a January 7, 2005, article in the *Daily Nexus*, UCSB's primary campus newspaper, Clow stated, "The university is not trying to shut the site down.... We believe that Mr. Baron has freedom to express his views. We only asked him to take the 'UCSB' name out of the address. We don't want the public misled. If you did a search on UCSB, his site would pop up, since UCSB's name appears. Our concern is people will believe they are coming to a UCSB site. If they scroll down to the bottom, they'll see the disclaimer – but if they don't, they may think it's a university website."

UCSB's position that Mr. Baron may be prohibited from using the letters "ucsb" in his website URL lacks any legal or moral justification. As a public university and an agency of the government of the State of California, UCSB may not infringe upon the First Amendment rights of Mr. Baron to speak out about what he sees as a destructive culture for students at UCSB. The facts in this case indicate an effort by the university to squelch criticism of UCSB's campus environment by threatening criminal proceedings against Mr. Baron if he continues to exercise his constitutional rights.

First, UCSB's claim that the public might be "misled" by the letters "ucsb" in the URL of Mr. Baron's website lacks any credibility. The very name of the website makes this apparent. It would be obvious to the average person that the university would not officially sponsor a website called "thedarksideofucsb.com." Is UCSB prepared to argue that a reasonable person would believe that a website called "thedarksideofpresidentbush.com" would be an official website of President Bush, or that "thedarksideofmicrosoft.com" would be a site supported by Microsoft? If the Bush administration or Microsoft were to assert that either of these theoretical websites

were likely to mislead the public, no thinking person would take such an argument seriously. Yet Ms. Clow made exactly this kind of statement to the Daily Nexus about “thedarksideofucsb.com.”

Ms. Clow’s concern that a person searching for UCSB on a search engine would be likely to find “thedarksideofucsb.com” and confuse it for the official site is only slightly less absurd. A search on Google and Yahoo, the two most popular Internet search engines, for the term “UCSB” would quickly dispel Ms. Clow’s fears. Mr. Baron’s website does not appear at all among the first 400 entries on Google and is the 288<sup>th</sup> entry on Yahoo. Those searching for UCSB would have to sift through dozens of pages of search results before happening across Mr. Baron’s website. However, even if “thedarksideofucsb.com” immediately followed the official site on a search engine, readers would constantly see signs that it is not an official university website. For instance, most Internet users know official university websites have the “.edu” designation, while Mr. Baron’s website uses “.com.”

Ms. Clow also downplays the importance of the content contained on “thedarksideofucsb.com,” saying, “If [Internet users] scroll down to the bottom, they’ll see the disclaimer – but if they don’t, they may think it’s a university website.” Mr. Baron’s website looks nothing like a typical college website. The top of the page features graphics of police cars, a street sign, and a bottle of rum, along with the words “The Dark Side of UCSB” in plain block text. It does not contain the UCSB logo, nor does it purport to offer any of the functions of a college website. The text under the “Welcome” message makes it clear that the website owner is concerned about problems at UCSB. A disclaimer at the bottom of every page reads:

This site was created by and is supported by UCSB students, former students, parents, community members, and others interested in improving life in and around UCSB. This website is definitely not supported or endorsed in anyway by The University of California or UCSB. UCSB and the University of California have been trying to shut this website down.

It would be extremely unusual that a person, faced with all these signals, would confuse “thedarksideofucsb.com” with the official UCSB website. A more plausible explanation for UCSB’s actions is that the university’s stated rationale for attempting to force Mr. Baron to remove the letters “ucsb” from his website serves as subterfuge for its effort to squelch Mr. Baron’s expression.

UCSB’s efforts to prevent Mr. Baron from using the letters “ucsb” in his website’s URL are not only logically and morally unjustified, they are also unconstitutional. UCSB may not forbid someone from using the name or initials of UCSB either to criticize the university or to identify a website that is critical of the university. In the case of *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161 (C.D. Cal. 1998), a federal court ruled that Bally Total Fitness (Bally) could not stop a man from operating a website called “Bally Sucks,” which included a modified Bally logo on the front page and used the term “ballysucks” in the URL of the website. In that case, Bally, like UCSB, argued (among other things) that allowing a critic to use its mark was likely to cause confusion among those who were searching for its official website. The court found against Bally, ruling that there was no likelihood of consumer confusion and that

“[a]pplying Bally’s argument would extend trademark protection to eclipse First Amendment rights. The courts...have rejected this approach by holding that trademark rights may be limited by First Amendment concerns.” 29 F. Supp. 2d at 1166, *citing L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1<sup>st</sup> Cir. 1987), *cert denied*, 483 U.S. 1013 (1987).

Courts have also determined that so-called “cybergripping” websites, which are generally dedicated to harsh criticism of a business and which often use the business’s marks, are usually considered constitutionally protected speech. In *Taubman Co. v. Webfeats*, 319 F.3d 770, 775 (6<sup>th</sup> Cir. 2003), the court determined that “any expression embodying the use of a mark not ‘in connection with the sale...or advertising of any goods or services,’ and not likely to cause confusion, is...necessarily protected by the First Amendment.” In that case, the defendant had established not one but *five* different websites, such as *taubmansucks.com* and *willowbendmall sucks.com*, that criticized plaintiff Taubman and his business “The Shops at Willow Bend” with the purpose of hurting his business and reputation. *Id.* at 772.

Mr. Baron’s website, “*thedarksideofucsb.com*,” is similar to the “cybergripping” websites discussed in *Bally* and *Taubman*. It has no commercial purpose and does not tend to confuse or mislead website visitors into believing that it is an official UCSB website. If anything, it is significantly less insulting and potentially misleading than either of the websites in *Bally* or *Taubman*.

FIRE requests that the University of California at Santa Barbara immediately cease attempting to squelch Mr. Baron’s expression by threatening him with criminal action for using the letters “ucsb” in the name of his website, and that no further action be taken to prevent him from exercising his rights under the First Amendment. FIRE is committed to using all of its media, legal, and other resources to protect Mr. Baron’s right of free expression. **Because of the severity of the sanctions with which Mr. Baron is threatened, we request a reply to this letter by February 10, 2005.**

Sincerely,



Robert L. Shibley  
Program Officer

cc:

Gene Lucas, Executive Vice Chancellor, University of California at Santa Barbara  
Donna Carpenter, Acting Vice Chancellor, University of California at Santa Barbara  
Yonie Harris, Dean of Students, University of California at Santa Barbara  
Margaret Clow, Campus Policy & Records Management, University of California at Santa Barbara  
David Birnbaum, University Counsel, University of California at Santa Barbara  
James Baron