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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91194679
Party	Defendant DeMarcus J. Freemon
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Date	03/27/2012
Attachments	Response Brief to Summary Judgment.pdf (11 pages)(51097 bytes) Declaration In Response to Opposers Motion for Summary Judgment.pdf (2 pages)(19020 bytes) Exhibit A.pdf (2 pages)(246567 bytes) Exhibit B.pdf (1 page)(131638 bytes) Exhibit C.pdf (2 pages)(103338 bytes) Exhibit D.pdf (1 page)(187002 bytes) Exhibit E.pdf (2 pages)(150294 bytes)

with the publication of Opposer's book entitled "*Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS*" and the website independentnation.org.

Opposer served discovery on Applicant around November 23, 2011. Applicant responded to the discovery requests January 11, 2012 believing that the discovery period was extended to the end of March 2012. However, although Applicant missed the period to serve responses to Opposer's discovery requests, Applicant in no way admits that the marks are identical or that the parties' services are highly related. In fact, it is Applicant's understanding that the marks are different and that the parties' services are not related.

FACTUAL BACKGROUND

Applicant filed a trademark application for registration of Applicant's mark on July 3, 2008, in International Class 41, for the publication of electronic magazines, blogs, articles, and interactive literary forums. Applicant successfully defended their claim for a trademark registration by addressing all issues raised during the application process. Applicant's trademark application was published for opposition on December 29, 2009.

Opposer filed a Notice of Opposition April 28, 2010. Prior to Opposer filing the Notice of Opposition, Applicant attempted, without success, to come to a settlement agreement with Opposer. Over the course of a year after filing for this Opposition proceeding, Opposer filed at least four extensions of time in addition to filing a stipulation to suspend the opposition proceeding pending settlement negotiations. However, no substantive settlement negotiations ever transpired. On February 27, 2012, Opposer filed for summary judgment to end this matter.

ARGUMENT

I. There is No Genuine of Issue Fact that Applicant was the Prior User of the Mark

Applicant filed a trademark application for Applicant's mark on July 3, 2008. Applicant's

mark is described as follows:

consists of three feathers which are shaded at the tips and coupled together at their base and below the three feathers is the wording “INDEPENDENT NATION.”

In great contrast, Opposer’s mark is as follows:

Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS.

Although Opposer claims (*See, e.g.*, Opposer’s Motion for Summary Judgment, p. 1) prior use of the mark INDEPENDENT NATION in connection with the publication of Opposer’s book titled “*INDEPENDENT NATION*” (2004) and website independentnation.org, Opposer’s book as shown by a copy of the jacket cover of the book provided by Opposer (*See, e.g.*, Declaration of Opposer John Phillips Avlon In Support of Motion for Summary Judgment, Exhibit A) contradicts Opposer’s claim. In particular, Opposer’s Exhibit A clearly shows the mark used by Opposer: Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS.

Moreover, Opposer’s website independentnation.org in 2004 corroborates Opposer’s exhibit (Opposer’s Exhibit A) that Opposer’s mark is in fact “Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS.” In addition, Applicant provides in Exhibit D a true and correct copy of Opposer’s independentnation.org website in 2004. Exhibit D illustrates Opposer’s mark “Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS” clearly and conspicuously on Opposer’s homepage. In fact, the homepage is a close replica (similar design, color scheme, and text) of the jacket cover of Opposer’s book as embodied in Opposer’s Exhibit A.

As such, Opposer’s mark as embodied in Opposer’s book and website is “Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS” and not

“INDEPENDENT NATION” as Opposer claims as a basis for this Opposition proceeding and in particular in his Motion for Summary Judgment.

It is Applicant’s contention that Opposer attempts to divorce the “HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS” portion from the mark by claiming that the textual portion of the mark to the right of “Independent Nation” is merely a tagline (*See, e.g.*, Opposer’s Motion for Summary Judgment, Factual Background, 1st paragraph; also, see Declaration of Opposer John Phillips Avlon in Support of Motion for Summary Judgment). For example, Opposer claims that the book was entitled “*INDEPENDENT NATION*” with the tagline “How Centrists Can Change American Politics.”

OPPOSER’S EXHIBIT C CONTRADICTS OPPOSER’S DECLARATION

Opposer’s Exhibit C submitted in the Declaration of Opposer John Phillips Avlon in Support of Motion for Summary Judgment illustrates that the latter portion of the title of Opposer’s book is in fact “HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS” as opposed to “How Centrists Can Change American Politics” as falsely alleged by Opposer in Paragraph 2 of Declaration of Opposer John Phillips Avlon in Support of Motion for Summary Judgment and in Opposer’s Motion for Summary Judgment, Factual Background, 1st paragraph.

Opposer’s false statement is significant because taken at face value Opposer’s mark, shown in Opposer’s 2004 website evidenced in Exhibit D, would not be consistent with the title of Opposer’s book “Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS.” However, the mark shown in Opposer’s website (Exhibit D) corroborates the mark shown on the cover jacket of Opposer’s book (Opposer’s Exhibit A) such

that it is clear that Opposer's mark is indeed "Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS."

Moreover, Opposer's book title and website further illustrate that the "Independent Nation" portion of Opposer's mark included an uppercase letter "I" in the first word and uppercase letter "N" in the second word. Opposer, however, claims that his mark includes INDEPENDENT NATION in all uppercase letters which is contradicted both by Opposer's book and website. Opposer's false claim is significant because in Applicant's trademark application, Applicant describes his mark as having the wording "INDEPENDENT NATION" shown in all uppercase letters. As such, it appears that Opposer's false claim is to intentionally show a greater similarity between Applicant and Opposer's mark (Note: Applicant's description of mark includes "INDEPENDENT NATION" in all uppercase letters). However, neither the mark shown on the jacket cover of Opposer's book (Opposer's Exhibit A) nor on Opposer's website in 2004 (Applicant's Exhibit D) illustrate the words "Independent Nation" in all uppercase letters.

Moving forward, Opposer's statement in Opposer's Motion for Summary Judgment (Factual Background, p. 2) that "How Centrists Can Change American Politics" was a tagline of Opposer's February 2004 book gives insight that Opposer likely contends that the mark portion "HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS" is simply a tagline. Applicant respectfully disagrees. In fact, it is Applicant's position that Opposer can not rely upon common law trademark rights to divorce the HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS portion of Applicant's mark from the former portion—Independent Nation out of convenience in this Opposition proceeding.

However, assuming *arguendo* that the mark portion "HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS" is simply a tagline, Opposer's claim that there is a

likelihood of confusion between Applicant and Opposer's mark is without merit. Applicant provides Exhibits A-C which offer definitions for the term "tagline" by Merriam Webster, Dictionary.com, and Wikipedia. The definitions from the aforementioned sources are below:

Tagline: a reiterated phrase identified with an individual, group, or product: slogan

Tagline: a phrase or catchword that becomes identified or associated with a person, group, product, etc., through repetition.

Tagline: ...to create a memorable phrase that will sum up the tone and premise of a brand or product...or to reinforce the audience's memory of a product.

Applicant submits that because taglines are typically repeated, reiterated terms which create memorable phrases ... to reinforce the audience's memory of [source of goods], the tagline "HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS" limits the scope of Opposer's goods and services to political discourse and commentary (e.g. American Politics). Note, one feature of a mark may be more significant in creating a commercial impression. *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A 1976).

Furthermore, because Opposer is a political commentator and pundit, regularly appearing on reputable news outlets (such as Cable News Network or "CNN" and The Daily Show with John Stewart) commenting on political matters and most importantly having promoted his book on these outlets, one would likely presume that Opposer's services would derive from a source that provides mainly political related goods and services. It should be noted that Exhibit D illustrates Opposer's 2004 website featured pictures of past US Presidents and other political leaders. As such, even assuming *arguendo* that "HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS" is simply a "tagline" as contended by Opposer, said tagline would create such an impression in the marketplace that no likelihood of confusion to the source of goods and services would exist.

Note *TMEP §1207.01(a)(i)* states that "if the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that

would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely." Likelihood of confusion is determined on the basis of the goods and/or services as they are identified in the application and registration. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267-68.

A TITLE OF A SINGLE BOOK CAN NOT ESTABLISH TRADEMARK RIGHTS

Opposer relies upon the title of his book, "*Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS*," to establish trademark rights. However, the law is clear that a title of a single book can not establish trademark rights. In fact, *Herbko International Inc. v. Kappa Books Inc.*, 308 F.3d 1156 and T.M.E.P. § 1202.08 clearly settles this issue that even a large number of sales of a single work cannot create a source identifying association in the public mind. *Cooper*, 254 F.2d at 614-15. Accordingly, Opposer's single book entitled "*Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS*" fails to provide a proper basis of "actual use" and therefore also fails to provide a legal basis of priority for his mark "Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS" much less in "INDEPENDENT NATION."

REGISTERING A DOMAIN NAME, ALONE, DOES NOT ESTABLISH TRADEMARK RIGHTS

Applicant further contends that registering a domain name, alone, does not establish trademark rights. "[N]either merely reserving a domain name nor use of a domain name solely to indicate a site on the Internet, in and of itself, constitutes [trademark use]. Rather, one must consider the content of the site identified by the domain name." See *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, 50 USPQ2d 1545 (9th Cir. Apr. 1999).

As discussed previously, the homepage of Opposer's website, independentionation.org, conspicuously illustrates Opposer's mark "Independent Nation: HOW THE VITAL CENTER IS

CHANGING AMERICAN POLITICS” which is consistent with the title of Opposer’s book. Therefore, Opposer is barred from claiming that his independentnation.org website provides a basis of priority to the mark “INDEPENDENT NATION.”

IT IS UNCLEAR TO WHAT TERRITORIAL SCOPE THE WEBSITE,
INDEPENDENTNATION.ORG, COVERS

Since Opposer does not have a registered trademark for the mark INDEPENDENT NATION, Opposer must claim common law trademark rights to this mark. However, trademark common law rights are limited to the territory of where they have been used.

It is our position, that Opposer incorrectly claims priority of the entire Internet or cyberspace, simply because the independentnation.org website has been in operation since 2004. Applicant respectfully disagree with this notion. In fact, Applicant contends, however, that creating a website does not allow one to claim the entire Internet as its territory of use without a showing of considerable and extensive web presence.

According to www.alexa.com, the website independentnation.org has very limited web traffic. See Exhibit E. The exhibit clearly shows that Opposer’s website is ranked below 100,000 which indicates that web traffic for the site is marginal, at best. Accordingly, Opposer has not established the territorial scope of his alleged common law rights in his mark “Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS” much less in “INDEPENDENT NATION.”

Moreover, simply registering a domain name, alone, does not establish trademark rights and at best, Opposer’s common law rights may extend to Opposer’s true mark, “Independent Nation: HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS” and not “INDEPENDENT NATION,” as Opposer claims.

II. There is No Genuine Issue of Fact as to the Likelihood of Confusion between the Marks

The pertinent factors in determining the likelihood of confusion set forth in *E.I. DuPont DeNemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973), 177 USPQ 563 (CCPA 1973) to which the Board often refers include:

1. Similarity of marks
2. Similarity of goods and services

A. The Marks are Different

There is no genuine issue of material fact as to the similarity of the marks, as Applicant and Opposer's marks are different. As previously stated, Applicant's applied-for-mark is described as follows:

consists of three feathers which are shaded at the tips and coupled together at their base and below the three feathers is the wording "INDEPENDENT NATION."

Alternatively, Opposer's mark is as follows:

Independent Nation: HOW THE VITAL CENTER IS CHANGING
AMERICAN POLITICS.

When it is the entirety of the marks that is perceived by the public, it is the entirety of the marks that must be compared. *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ.2d 1471 (Fed. Cir. 1992). Because marks tend to be perceived in their *entireties* all components must be given appropriate weight, *In Re Hearst Corporation*, 25 USPQ.2d 1238 (Fed. Cir. 1992), and it is therefore improper to dissect the mark under consideration. *In Re Lowe's Theaters, Inc.*, 218 USPQ 956(TTAB 1983), affirmed, 226 USPQ 865 (Fed. Cir. 1985).

B. The Services Provided Pursuant to the Marks are Remotely Similar

Applicant's trademark application seeks to register Applicant's mark for publication of electronic magazines, blogs, articles, and interactive literary forums whereas Opposer's application is to register Opposer's mark for providing a website featuring information and articles in the field of current event news and entertainment; providing an on-line journal, namely, a blog featuring information in the field of news, politics, media, social issues, public affairs and entertainment; providing an internet news portal featuring links to news stories and articles in the field of current events (emphasis added).

It is clear from Opposer's mark that Opposer's goods and services are geared mainly towards politics, current affairs, and other related topics. In contrast, Applicant's services are not limited thereto and include a platform for literary forums, articles, etc. Furthermore, even if overlap could occur in some limited circumstance (e.g., discourse on current events), the Board should not be concerned with mere theoretical possibilities of confusion, deception, or mistake or with *de minimis* situations. *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992).

III. Summary Judgment in favor of Applicant is Appropriate

Given that Applicant's mark and Opposer's mark are not the same but are substantially different and that the services provided by Opposer is so focused in political discourse and commentary and other related topics whereas Applicant's goods and services are much broader in scope, Applicant is entitled to a grant of summary judgment such that Opposer's opposition is dismissed with prejudice such that Applicant's mark registers.

CONCLUSION

For all the foregoing reasons, Applicant DeMarcus Freemon respectfully requests that the Board denies Opposer's Motion for Summary Judgment but in turn grants Summary Judgment in favor of Applicant.

DATED this 26th day of March, 2012

Respectfully submitted,

DEMARCUS FREEMON

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6. Pursuant to the November 22, 2011 Order of the Board, I conferred with counsel for Opposer on the submission of a Joint Status Report, which the parties submitted to the Board on December 12, 2011. Docket No. 20. Paragraph of the Joint Status Report provided that the parties were in agreement that written discovery and oral depositions could be concluded by the end of March 2012.

7. The Board then issued a December 14, 2011 order expressly stating that, despite the indication of the parties of a willingness to extend discovery though March 2012, the current schedule, including the schedule for discovery, would remain as previously set. The Board noted that the parties “have not made a motion to extend and the Board generally does not consider ‘embedded’ motions.”

8. In addition, attached to this Declaration as Exhibit D is a true and correct copy of Opposer’s www.independentnation.org website in 2004.

9. Lastly, attached to this Declaration as Exhibit E is a true and correct copy of a www.alexa.com (Alexa) traffic report for Opposer’s website independentnation.org.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 26th day of March 2012.

Respectfully submitted,

DEMARCUS FREEMON

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tagline *noun* \ˈtɑːɡ-,līn\
 Definition of TAGLINE

1 : a final line (as in a play or joke); *especially* : one that serves to clarify a point or create a dramatic effect

2 : a reiterated phrase identified with an individual, group, or product : **SLOGAN**

See [tagline](#) defined for English-language learners »

Examples of TAGLINE

- <the *tagline* from the drug company's ad campaign backfired and quickly became fodder for late-night comedians>

First Known Use of TAGLINE

1926

Related to TAGLINE

Synonyms: banner, catchphrase, cry, shibboleth, slogan, watchword

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tag line

noun

1. the last line of a play, story, speech, etc., used to clarify or dramatize a point.
2. a phrase or catchword that becomes identified or associated with a person, group, product, etc., through repetition:
Entertainers often develop tag lines, like Ted Lewis's "Is everybody happy?"
3. *Machinery* . (on a crane) a cable for steadying a suspended bucket at the rear.

Also, **tag-line** .

Origin:

1935-40

Dictionary.com Unabridged
Based on the Random House Dictionary, © Random House, Inc. 2012.
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Matching Quote

"This is London."

-Edmund H. North

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Tagline is always a great word to know. So is lollapalooza. Does it mean:

- a calculus or concretion found in the stomach or intestines of certain animals, esp. ruminants, formerly reputed to be an effective remedy for poison.
- an extraordinary or unusual thing, person, or event; an exceptional example or instance.

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Tagline

From Wikipedia, the free encyclopedia



This article **appears to contradict the article [Advertising slogan](#)**. Please see discussion on the linked [talk page](#). Please do not remove this message until the contradictions are resolved.
(November 2011)

"Tag line" redirects here; for use of a rope to control the load on a crane, see [guy-wire](#).

A **tagline** is a variant of a [branding slogan](#) typically used in [marketing](#) materials and [advertising](#). The idea behind the concept is to create a memorable phrase that will sum up the tone and premise of a [brand](#) or product (like a film), or to reinforce the audience's [memory](#) of a product. Some taglines are successful enough to warrant inclusion in [popular culture](#).

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Nomenclature

[\[edit\]](#)

Taglines, *tag lines*, or *tags* are American terms. In the U.K. they are called *end lines*, *endlines*, or *straplines*. In Belgium they are called *baselines*. In France they are *signatures*. In Germany they are *claims*. In the Netherlands and Italy, they are *pay offs* or *pay-offs*.^[1]

Famous film and television taglines

[\[edit\]](#)

- "Garbo talks!" – *Anna Christie*, and the follow-up "Garbo laughs!" – *Ninotchka*^[2]
- "Be afraid. Be very afraid." – *The Fly*^[3]
- "In space, no one can hear you scream." – *Alien*^{[4][5]}
- "Just when you thought it was safe to go back in the water..." – *Jaws 2*^[3]
- "There can be only one" – *Highlander*^[6]
- "One ring to rule them all." – *The Lord of the Rings*^[7]
- "A long time ago, in a galaxy far, far away..." – *Star Wars*^[8]
- "Love means never having to say you're sorry" – *Love Story*^{[9][10][11]}
- "To boldly go where no man has gone before" – *Star Trek*^[12]
- "The truth is out there." – *The X-Files*^[13]

See also

[\[edit\]](#)

- Advertising slogan
- Byline
- Hook (music)
- Jingle
- Subliminal stimuli
- Subtext
- Subtitle

References

[\[edit\]](#)

- ↑ http://www.adslogans.co.uk/ans/nomenclature.html
- ↑ Foshee, Andrea. "Ninotchka" . Turner Classic Movies. Retrieved 2010-09-27. "[]Garbo Laughs!" was the famous catchphrase on which this film was marketed during its release in 1939, recalling the "Garbo Talks!" campaign for Greta Garbo's initiation into talking pictures with Anna Christie in 1930."
- ↑ Mboallem, Jon (2004-02-29). "How movie taglines are born" . *Boston Globe*. Retrieved 2008-02-17. "the seminal tagline for The Fly ("Be Afraid. Be Very Afraid.") [...] "Just when you thought it was safe to go back in the water . . ." (Who remembers that the line promoted "Jaws 2," not the original?)"
- ↑ "Sands of Oblivion: Some Secrets Should Never be Unearthed!" . *Horror Year Book*. 2008-02-07. Retrieved 2008-02-17. "That may be the second most over used tagline after "In space no one can hear you scream.""
- ↑ Muir, Hazel (2006-03-14). "In space no one can hear you scream" . *New Scientist*, issue 2542. Retrieved 2008-02-17.
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- ↑ "Taglines for Star Wars (1977)" . IMDb. Retrieved 2008-02-17.
- ↑ Erickson, Hal. "Love Story: MTV movies" . *Allmovie*. Retrieved 2008-02-20. "The movie's tagline "Love means never having to say you're sorry" became an iconic American catchphrase"
- ↑ Sir, Paul (2007-04-21). "It's heart warming to hear Dr Mahathir saying 'I'm sorry'" . *The Borneo Post*. Retrieved 2008-02-20.
- ↑ Abbott, Jerry (2008-02-13). "The meaning of true love" . *The Torrington Telegram*. Retrieved 2008-02-20. "In 1970 the movie "Love Story" with Ali McGraw and Ryan O'Neal coined the phrase: "Love means never having to say you're sorry,""
- ↑ "Taglines for "Star Trek" (1966)" . IMDb. Retrieved 2008-02-17.
- ↑ "Taglines for "The X-Files" (1993)" . IMDb. Retrieved 2008-02-17.

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HOW THE VITAL CENTER IS CHANGING AMERICAN POLITICS

Extremists on the left tend to be just as critical of pragmatism as extremists on the right.
—Richard Nixon



Author, John P. Avlon



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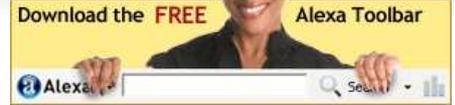
Independent Nation
How the Vital Center is Changing American Politics

by John P. Avlon

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Independent Nation: How the Vital Center is Changing American Politics, by John P. Avlon

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Independentionation.org has been online for more than eight years. This site is located in the US.

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Last Month Stats (Estimated)

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Last Month Clicks	
Avg. Ad Position	0
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Query Impact Factor Query Popularity QCI

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Ads for independentionation.org have appeared on major search engines when people performed the queries below. Click on the queries below to discover more information.

Query	SEM Activity	Query	SEM Activity
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2 nfl power rankings	Medium		Medium
3 iphone	Medium		Medium
4 yankees	Medium		Medium
5 affiliate	High	10 iklan gratis	High

Search Engine Marketing (SEM) Opportunities for independentionation.org

Queries that provide opportunities for this site to advertise through Search Engine Marketing (SEM) to get more traffic. They are popular queries that are relevant to the site, and have low competition in search engine marketing. [Learn More](#)

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