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## Intellectual Property - Brookfield Communications, Inc. v. West Coast Entertainment Corp.

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## INTELLECTUAL PROPERTY

### *BROOKFIELD COMMUNICATIONS, INC. v. WEST COAST ENTERTAINMENT CORP.*

174 F.3D 1036 (9TH CIR. 1999)

#### I. INTRODUCTION

In *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*,<sup>1</sup> the United States Court of Appeals for the Ninth Circuit discusses whether trademark or unfair competition laws prohibit the use of another's trademark in its web site's domain name and metatag.<sup>2</sup> The court concluded there was a likelihood of confusion between the marks.<sup>3</sup> Therefore, using the mark in the web site's domain name constitutes trademark infringement.<sup>4</sup> In addition, using the mark in the site's metatag created initial interest confusion.<sup>5</sup>

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<sup>1</sup> *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir. 1999). The appeal from the United States District Court for the Central District of California was argued and submitted on March 10, 1999 before Circuit Judges William C. Canby, Jr., Diarmuid F. O'Scannlain, and Kim M. Wardlaw. The decision was filed on April 22, 1999. O'Scannlain authored the opinion.

<sup>2</sup> See *Brookfield Communications*, 174 F.3d at 1041. "Domain names are the Internet addresses used by individuals and organizations." George B. Delta & Jeffrey H. Matsuura, *Law of the Internet* §5.04[B][1] (Supp. 1998). "Metatags are...HTML programming code instructions given to on-line search engines by the Web files." See *id.* at §5.04[B][2].

<sup>3</sup> See *Brookfield Communications*, 174 F.3d at 1066.

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

## II. FACTS AND PROCEDURAL HISTORY

Brookfield Communications, Inc., (“Brookfield”) creates software for professionals in the entertainment industry.<sup>6</sup> In 1993, Brookfield created software named “MovieBuff,” which features a searchable database on information related to the entertainment industry.<sup>7</sup> In 1996, Brookfield attempted to register the domain name “moviebuff.com” with Network Solutions Inc., only to discover that the name was registered to West Coast Entertainment Corp. (“West Coast”).<sup>8</sup> Subsequently, Brookfield registered “moviebuffonline.com.”<sup>9</sup> In 1997, Brookfield began to sell the “MovieBuff” software to consumers through the Internet.<sup>10</sup>

In October 1998, Brookfield learned of West Coast’s plan to launch a website called “moviebuff.com” which included a searchable database comparable to Brookfield’s “MovieBuff” software.<sup>11</sup> Thereafter, on November 10, 1998, Brookfield sent a cease and desist letter to West Coast, asserting that the use of “moviebuff.com” infringes Brookfield’s “MovieBuff” mark.<sup>12</sup> West Coast, did not respond to the cease and desist letter, and subsequently issued a press release announcing the launch of the “moviebuff.com” website.<sup>13</sup>

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<sup>6</sup> See *id.* at 1041.

<sup>7</sup> See *id.* at 1041. The information in the database includes “movie credits, box office receipts, films in development, film release schedules, entertainment news, and listing of executives, agents, actors, and directors.” See *id.* Brookfield obtained federal trademark registrations, for its “MovieBuff” mark on goods and services, on September 29, 1998. See *id.* at 1042. A trademark registration covering computer software, for the mark “MovieBuff,” was granted in California in 1994. See *id.*

<sup>8</sup> See *Brookfield Communications*, 174 F.3d at 1042.

<sup>9</sup> See *id.* Brookfield also registered “brookfieldcomm.com.” See *id.*

<sup>10</sup> See *id.* The software “MovieBuff” was offered for sale on “brookfieldcomm.com” and “moviebuffonline.com.” See *id.* Online subscriptions to the database were offered at another Brookfield site at “inhollywood.com.” See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *Brookfield Communications*, 174 F.3d at 1042.

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On November 18, 1998, Brookfield filed a complaint against West Coast in the United States District Court for the Central District of California.<sup>14</sup> On November 30, 1998, the district court denied Brookfield's motion for a preliminary injunction concluding that West Coast is the senior user of the "moviebuff" mark.<sup>15</sup> Thus, West Coast's use of the "moviebuff" mark will not infringe Brookfield's trademark.<sup>16</sup> Subsequently, Brookfield filed a motion for an injunction pending an appeal to prevent West Coast from using the "moviebuff" mark.<sup>17</sup> The district court denied the motion.<sup>18</sup>

Within a few days after West Coast launched "moviebuff.com" Brookfield filed an emergency motion for an injunction with the United States Court of Appeals for the Ninth Circuit to prevent West Coast from using the "moviebuff" mark.<sup>19</sup> The Ninth Circuit ordered the injunction to remain in effect pending the decision of the appeal.<sup>20</sup> On April 22, 1999, the Ninth Circuit reversed and remanded the district court's decision with directions to issue a preliminary injunction against West Coast.<sup>21</sup>

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<sup>14</sup> *See id.* at 1043. Brookfield sought a preliminary injunction against West Coast's use of the mark "MovieBuff" in its domain name and metatags on their web pages. *See id.*

<sup>15</sup> *See id.* A senior user is the first party to use the mark in interstate commerce. *See id.* at 1047, (citing *Union Nat'l Bank of Tex., Laredo, Tex. v. Union Nat'l Bank of Tex., Austin, Tex.*, 909 F.2d 839, 842-43 (5th Cir. 1990), *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1023 (11th Cir. 1990), *New West Corp. v. NYM Co. of Cal.*, 595 F.2d 1194, 1200-01 (9th Cir. 1979)). By establishing oneself as the senior user to a mark, one can enjoin other from using the same or similar marks within the senior user's "natural zone of expansion." *See id.*

<sup>16</sup> *See Brookfield Communications*, 174 F.3d at 1043.

<sup>17</sup> *See id.*

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.* at 1044.

<sup>21</sup> *See Brookfield Communications*, 174 F.3d at 1066.

## III. THE NINTH CIRCUIT'S ANALYSIS

## A. DOMAIN NAME

To prove trademark infringement,<sup>22</sup> a trademark owner must demonstrate two elements.<sup>23</sup> First, the trademark owner must establish that it was the senior user of the mark.<sup>24</sup> Secondly, the trademark owner must show that a third party was "using a mark confusingly similar" to the trademark.<sup>25</sup>

## 1. Seniority

Initially, the Ninth Circuit must first determine whether Brookfield had a valid trademark.<sup>26</sup> The court noted that Brookfield's federal registration of "MovieBuff" constitutes prima facie evidence of the validity of the mark.<sup>27</sup> However, this presumption of validity can be rebutted by West Coast establishing priority, thereby being the senior user of "MovieBuff."<sup>28</sup> A senior user is the first party to use the mark in interstate commerce.<sup>29</sup> Establishing priority is key, because a senior user may enjoin a junior user from using the same or similar mark within the senior user's "natural zone of expansion."<sup>30</sup>

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<sup>22</sup> See *id.* at 1046. Brookfield based its trademark infringement claim under section 32(1)(a) of the Lanham Act which states: "Any person...without the consent of the registrant (a) use...of a registered mark... in connection with which such use is likely to cause confusion...shall be liable." 15 U.S.C.S. § 1114(1)(a).

<sup>23</sup> See *Brookfield Communications*, 174 F.3d at 1046.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.* at 1046-47.

<sup>27</sup> See *id.* at 1047.

<sup>28</sup> See *Brookfield Communications*, 174 F.3d at 1047.

<sup>29</sup> See *id.* (citing *Union Nat'l Bank of Tex., Laredo, Tex. v. Union Nat'l Bank of Tex., Austin, Tex.*, 909 F.2d 839, 842-43 (5th Cir. 1990), *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1023 (11th Cir. 1990), *New West Corp. v. NYM Co. of Cal.*, 595 F.2d 1194, 1200-01 (9th Cir. 1979)).

<sup>30</sup> See *id.*

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West Coast alleged that its use of “The Movie Buff’s Movie Store” predated Brookfield’s use of “MovieBuff.”<sup>31</sup> Thus, West Coast asserts that it is the senior user of “moviebuff” and therefore, has the right to use the mark.<sup>32</sup> The theory used by West Coast, called “tacking,” allows a trademark owner to maintain priority in a subsequent mark that is similar to the first if the subsequent mark is “the legal equivalent of the mark in question. . . such that consumers consider both as the same mark.”<sup>33</sup>

The Ninth Circuit concluded that “The Movie Buff’s Movie Store” was not the legal equivalent of “moviebuff.com.”<sup>34</sup> Further, consumers would not regard them as the same mark.<sup>35</sup> Thus, West Coast could not tack the date of first use for “The Movie Buff’s Movie Store” to “moviebuff.com” to carry priority over Brookfield.<sup>36</sup> Therefore, the Ninth Circuit concluded that Brookfield was the senior user of the “MovieBuff” mark.<sup>37</sup>

Subsequently, West Coast alleged that the date of first use should be determined by when the “MovieBuff” and “moviebuff.com” marks were used on the Internet, and not by comparing when Brookfield marketed “MovieBuff” against West Coast’s registration of “moviebuff.com.”<sup>38</sup> The Ninth Circuit held that West Coast must show that they had used the “moviebuff” mark before Brookfield.<sup>39</sup> West Coast registered “moviebuff.com” in February 1996, but did not “use” the mark

<sup>31</sup> See *Brookfield Communications*, 174 F.3d at 1047.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.* at 1047-48 (citing *Data Concepts, Inc. v. Digital Consulting, Inc.*, 150 F.3d 620, 623 (6th Cir. 1998) (quoting *Van Dyne-Crotty, Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 1159 (Fed. Cir. 1991)). Tacking is where one “seeks to “tack” his first date in the earlier mark onto the subsequent mark.” See *id.* (citing 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 17:25-27 (4th ed. 1998)).

<sup>34</sup> See *Brookfield Communications*, 174 F.3d at 1049.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* at 1050.

<sup>39</sup> See *Brookfield Communications*, 174 F.3d at 1051.

until 1998.<sup>40</sup> A mark cannot serve its purpose of identifying a product unless the public has seen the mark and can associate that mark with its owner.<sup>41</sup> Therefore, the Ninth Circuit concluded that West Coast could not claim a date of first use prior to 1998.<sup>42</sup>

West Coast further argued that a date of first use should be based on correspondence with customers and attorneys in 1996.<sup>43</sup> Thus, to establish use of the “moviebuff.com” mark, West Coast must show that the correspondence was “sufficient to create an association among the public between the mark and West Coast.”<sup>44</sup> The Ninth Circuit held that e-mail correspondence with a limited number of customers and attorneys did not establish use.<sup>45</sup> Therefore, the court concluded that West Coast did not use “moviebuff.com” until the press release announcing the launch of its website in November 1998. Since Brookfield registered the trademark “MovieBuff” in 1997, Brookfield was therefore the senior user.<sup>46</sup>

## 2. Infringement

Since Brookfield was found to be the senior user, the Ninth Circuit next determined whether West Coast’s “moviebuff.com” infringed Brookfield’s “MovieBuff” mark.<sup>47</sup> The court consid-

<sup>40</sup> See *id.* Under the Lanham Act, trademark rights can be conveyed if there is a “bona fide use of a mark in the ordinary course of trade and not...merely to reserve a mark.” 15 U.S.C. § 1127. In this case, West Coast did not use “moviebuff.com” until it wanted to launch its website in 1998. See *Brookfield Communications*, 174 F.3d at 1053.

<sup>41</sup> See *Brookfield Communications*, 174 F.3d at 1051. Trademark rights are conveyed through the “bona fide use of a mark in the ordinary course of trade and not...merely to reserve a mark.” 15 U.S.C. § 1127.

<sup>42</sup> See *Brookfield Communications*, 174 F.3d at 1051-53.

<sup>43</sup> See *id.* at 1052.

<sup>44</sup> See *id.*

<sup>45</sup> See *id.* West Coast’s use of the mark in limited correspondence is not public enough to make the public identify the “moviebuff” mark with West Coast’s product. See *id.*

<sup>46</sup> See *id.* at 1053.

<sup>47</sup> See *Brookfield Communications*, 174 F.3d at 1053.

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ered an eight-factor (likelihood of confusion) test to determine whether West Coast's "moviebuff.com" was likely to confuse the public.<sup>48</sup> However, the court stressed that the first three factors have more weight in the Internet context.<sup>49</sup> If the factors were satisfied, West Coast could be liable for infringing Brookfield's mark.<sup>50</sup>

First, the Ninth Circuit compared the similarity of the Brookfield and West Coast mark.<sup>51</sup> The more similar the marks are the more likelihood of confusion.<sup>52</sup> The Ninth Circuit compared the marks focusing on the trademark "MovieBuff."<sup>53</sup> The Ninth Circuit noted that since domain names are not case-sensitive and ".com" simply indicates the commercial nature of the site, "MovieBuff" and moviebuff.com were essentially identical.<sup>54</sup> The Ninth Circuit also dispelled the notion that the marks sounded different with the addition of "dot com" because ".com" is used so frequently in company domain names.<sup>55</sup> Thus, ".com" is of little significance.<sup>56</sup>

Second, the Ninth Circuit analyzed the relatedness of the goods and services offered by West Coast and Brookfield.<sup>57</sup> Consumers are more likely to confuse producers of related

<sup>48</sup> See *id.* at 1053-54. The likelihood of confusion test considers the following factors: 1) similarity of the marks, 2) relatedness of the goods and services offered, 3) overlap in marketing and advertising facilities, 4) the strength of the registered trademark, 5) intent, 6) evidence of actual confusion, 7) likelihood of expansion in product lines, and 8) purchaser care. See *id.* (citing *Dr. Seuss Enters v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1404 (9th Cir. 1997), *petition for cert. denied*, 118 S. Ct. 27 (1997); *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979)).

<sup>49</sup> See *Brookfield Communications*, 174 F.3d at 1054 n.16.

<sup>50</sup> See *id.* at 1053.

<sup>51</sup> See *id.* at 1054.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* at 1055.

<sup>54</sup> See *Brookfield Communications*, 174 F.3d at 1055.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See *id.* at 1054.

goods than those that are unrelated.<sup>58</sup> Thus, the Ninth Circuit considered whether a consumer was likely to associate West Coast's products with Brookfield.<sup>59</sup> The Ninth Circuit noted that at first glance, one would not think a video store could be associated with a computer software company, but both deal in the entertainment industry and West Coast plans to launch a website that includes a searchable database which is similar to Brookfield's product.<sup>60</sup> When two different companies use similar marks for similar products, consumers are likely to be confused.<sup>61</sup>

Third, the Ninth Circuit analyzed the overlap in marketing and advertising facilities.<sup>62</sup> The Ninth Circuit held that West Coast and Brookfield utilize the same marketing and advertising facility – the World Wide Web.<sup>63</sup> A consumer may confuse the searchable database at “moviebuff.com” with Brookfield's product “MovieBuff”.<sup>64</sup> The consumer may believe that West Coast has licensed “MovieBuff” or that Brookfield has been “bought out” by West Coast.<sup>65</sup> Moreover, consumers may wrongly believe that Brookfield's “MovieBuff” software is no longer available.<sup>66</sup> Therefore, the concurrent use of the Web as their marketing and advertising facility would only intensify the likelihood of confusion.<sup>67</sup>

Fourth, the Ninth Circuit analyzed the distinctiveness (“strength”) of Brookfield's mark.<sup>68</sup> The more likely a consumer

<sup>58</sup> See *id.* at 1055.

<sup>59</sup> See *Brookfield Communications*, 174 F.3d at 1056.

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

<sup>62</sup> See *id.* at 1057.

<sup>63</sup> See *Brookfield Communications*, 174 F.3d at 1057.

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> See *Brookfield Communications*, 174 F.3d at 1058.

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is to associate a trademark with its owner, “the greater the protection it is accorded by the trademark laws.”<sup>69</sup> Brookfield was unable to show widespread recognition of the “moviebuff” mark.<sup>70</sup> However, the Ninth Circuit afforded protection because “MovieBuff” required a consumer to make a “mental leap” from the mark to the source of the product.<sup>71</sup> Nevertheless, the Ninth Circuit held that the strength of the mark was not as critical as the first three factors discussed above.<sup>72</sup>

Fifth, the Ninth Circuit examined the intent of West Coast.<sup>73</sup> An inference of confusion is found when one uses a mark in order to deceive the consumer.<sup>74</sup> Further, intentionally registering a domain name with knowledge that the name is someone else’s trademark has been recognized as adding to the confusion.<sup>75</sup> The Ninth Circuit noted that the record did not provide any evidence that West Coast intentionally meant to confuse consumers.<sup>76</sup> Moreover, there was some debate as to whether West Coast knew of Brookfield’s trademark rights.<sup>77</sup> Therefore, this factor was declared indeterminate.<sup>78</sup>

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<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.* Brookfield’s “MovieBuff” mark is a suggestive mark because it does not give the consumer a description of what the product is or what its purpose is. *See id.* Therefore, the consumer would have to make the connection between the “MovieBuff” mark and its product. *See id.*

<sup>72</sup> *See Brookfield Communications*, 174 F.3d at 1058-59. The strength of the mark was not critical because of the similarity between the products and similarity between West Coast’s domain name and Brookfield’s trademark. *See id.*

<sup>73</sup> *See id.* at 1059.

<sup>74</sup> *See id.*

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See Brookfield Communications*, 174 F.3d at 1059. When West Coast registered its domain name, it did not know of Brookfield’s mark “MovieBuff”, but when it planned to launch the website West Coast had knowledge of Brookfield’s rights. *See id.*

<sup>78</sup> *See id.*

The Ninth Circuit did not consider the last three factors, concluding that would not affect the likelihood of confusion analysis.<sup>79</sup> Balancing the first five factors, the Ninth Circuit concluded that West Coast's use of "moviebuff.com" would create a likelihood of confusion amongst consumers.<sup>80</sup>

## B. METATAGS

Upon finding that West Coast could not use the "moviebuff" mark in its domain name, the Ninth Circuit then considered whether West Coast could use the mark in a metatag.<sup>81</sup> Analyzing the same "likelihood of confusion" test, the Ninth Circuit concluded that West Coast could not use the "moviebuff" mark in a metatag of its "moviebuff.com" or "westcoastvideo.com" websites.<sup>82</sup> However, the Ninth Circuit noted that consumer confusion is not as great as if West Coast used the "moviebuff" mark in its domain name.<sup>83</sup>

The Ninth Circuit noted that if West Coast were allowed to include the "moviebuff" mark in a metatag, entering "moviebuff" into a search engine would produce the West Coast and Brookfield sites on the same list.<sup>84</sup> However, the Ninth Circuit noted that the consumer would then be able to distinguish "westcoastvideo.com" from Brookfield's "MovieBuff" site.<sup>85</sup> A

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<sup>79</sup> See *id.* at 1060. Actual confusion is irrelevant because this suit began before West Coast had a chance to launch its site. See *id.* The likelihood of expansion did not apply because West Coast and Brookfield compete already. See *id.* The court had difficulty in deciding the degree of care exercised by a purchaser, but the court stated that even if found favorable to West Coast it could not overcome the other factors. See *id.*

<sup>80</sup> See *id.* at 1061. The Ninth Circuit reversed the district court's determination that the likelihood for confusion was slim. See *id.*

<sup>81</sup> See *id.* Metatags are HTML code, on a web page not seen by viewers, which usually includes a description of the site and keywords to aid search engines rank the site according to the keywords entered by the viewer. Delta & Matsuura, *supra* note 2, §5.04[B][2].

<sup>82</sup> See *Brookfield Communications*, 174 F.3d at 1061-62.

<sup>83</sup> See *id.* at 1062.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

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scenario that the Ninth Circuit felt would create initial interest confusion.<sup>86</sup> Although consumers would become aware with whom they were conducting business, those looking for Brookfield's products might take advantage of West Coast's offer instead.<sup>87</sup> Therefore, by placing Brookfield's trademark in a metatag for "westcoastvideo.com," West Coast is essentially diverting consumers to its site.<sup>88</sup>

In conclusion, the Ninth Circuit held that West Coast could not use Brookfield's mark in a metatag.<sup>89</sup> However, the Ninth Circuit did allow West Coast to use "moviebuff" when referring to Brookfield's product on a West Coast website.<sup>90</sup> Also, West Coast may use a descriptive term commonly used to describe movie enthusiasts, in a metatag.<sup>91</sup> IV. Implications of the Decision

The Ninth Circuit based its decision on "long established principles of trademark law" and merely applied those principles to a fairly new area of the law the Internet.<sup>92</sup> The decision reinforced the view that one cannot use another's trademark in one web site's domain name or in one site's metatag.<sup>93</sup> Thus, those seeking to use a domain name must not only register first, but must also be aware of a potential trademark infringement. Once a domain name has been secured, the owner must make "use" of it or lose trademark protection.

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<sup>86</sup> See *id.* Initial interest confusion occurs when consumers are initially misled to a competitor because of the competitor's use of a similar mark. See *id.* at 1064.

<sup>87</sup> See *Brookfield Communications*, 174 F.3d at 1062.

<sup>88</sup> See *id.* The court likened this use of metatags to "posting a sign with another's trademark in front of one's store." See *id.*

<sup>89</sup> See *id.* at 1065.

<sup>90</sup> See *id.*

<sup>91</sup> See *id.* at 1066. The court made the distinction that "movie buff" was a descriptive term whereas "MovieBuff" was not a descriptive term and thus off limits for West Coast's use in its metatags. See *id.*

<sup>92</sup> See *Brookfield Communications*, 174 F.3d at 1066.

<sup>93</sup> See *id.*

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\* Golden Gate University, School of Law, Class of 2001; B.S. Environmental Studies & B.A. Biology, San Jose State University, 1998. To those I hold dear to my heart, thank you. I would not be here today if not for your support, encouragement, and unconditional love.