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Political trademarks: Intellectual property in politics and government

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Confusion, deception, and mistake are generally unlawful in marketing campaigns. 14 USC § 1125 (a) [Lanham Act § 43(a)]. Yet confusion, deception, and mistake are typically lawful in political campaigns. US Const. Amend. I[2]; US Const. Amend. XIV[3]. At the other end of the spectrum, confusion is unneeded for enforcement actions involving Olympic symbols, Smokey the Bear, and other specially protected species.

Pervasive Branding

In an information overloaded society, brands are shortcuts to consumer/citizen attention and shortcuts to citizen/consumer decision-making[4]. As Thomas Davenport and John Beck have written in *The Attention Economy*, in today's information-flooded world, the scarcest resource is attention[5]. The Brand Names Education Foundation seeks to educate the public to the significance of brand names. (www.bnef.org/about/about.html). Branding has become as commonplace in politics as baby kissing.[6]

"Political advertising and promotion is political speech, and therefore not encompassed by the term 'commercial.' This is true whether what is being promoted is an individual candidacy for public office, or a particular political issue or point of view." 134 Cong. Rec. H 1297 (daily ed. April 13, 1989) cited in *MasterCard International, Inc. v. Nader 2000*, 70 USPQ2d 1046 (SD NY 2004) (Candidates use of "priceless" ad parody was political speech, thus categorically exempt from coverage by the Federal Trademark Dilution Act).

DuPont, owner of the TEFLON trademark, would have difficulty preventing public use of its trademark to describe Ronald Reagan as the Teflon President. ® 418,698 (8Jan1946); <www.alternet.org/story/18898>. It just wouldn't work the same to use the generic equivalent and call him the "synthetic resinous fluorine-containing polymers in the form of molding and extruding compositions" president. Nor could George Lucas prevent the public from describing Ronald Reagan's Strategic Defense Initiative as a Star Wars defense. *Lucas Films v. High Frontier*, 622 F. Supp. 93, 227 USPQ 967 (DC Cir.1985).

The Todd M Beamer Memorial Foundation, Inc. has obtained a federal trademark registration for LET'S ROLL for charitable fundraising services. ® 2,691,610, filed 26Sept01, two weeks after Todd's utterance of those words was recorded on September 11th on United Air Lines flight 93. Many others, not the Foundation, have applied to register LET'S ROLL for diverse goods and services.

The First Amendment, as most rights, is not absolute. Falsely shouting fire in a crowded theater is actionable, as is intentional, malicious defamation. *New York Times Co. v. Sullivan*, 376 US 254, 94 Sup. Ct. 2997 (1964); *Gertz v. Robert Welch, Inc.*, 418 US 323 (1974) (defamation of private citizen in the public media).[7]

Intentional Falsification

Whether the press may intentionally distort the news is not settled. When Fox TV news reporters sued for being fired, protesting deceptive editing of their investigative report on Monsanto's synthetic bovine growth hormone (BGH) in the dairy industry, the District Court of Appeals of Florida, Second District, held for Fox. *New World Communications of Tampa, Inc. dba WTVT-TV v. Jane Akre* (2D01-529, Feb 14, 2003); also see "The Corporation," film by Mark Achbar, Jennifer Abbott & Joel Bakan; <www.thecorporation.com>.

Akre and her husband and investigative partner Steve Wilson complained that WTVT management had illegally edited the unfinished BGH report in violation of an FCC policy against federally licensed broadcasters deliberately distorting the news. Akre and Wilson sued WTVT, under a whistle-blower's statute, claiming their employment terminations were in retaliation for resisting WTVT's attempts to distort or suppress the BGH story and for threatening to report the alleged news distortion to the FCC. The whistle-blower statute prohibits retaliation against employees who have "[d]isclosed, or threatened to disclose," employer conduct that "is in violation of" a law, rule, or regulation. § 448.102(1)(3)m Fla. Stat. (1997). The

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statute defines a "law, rule or regulation" as "includ[ing] any statute or ... any rule or regulation adopted pursuant to any federal, state, or local statute or ordinance applicable to the employer and pertaining to the business." § 448.101(4), Fla. Stat. (1997). The appellate court found that the FCC's policy against the intentional falsification of the news, which the FCC called its 'news distortion policy,' does not qualify as the required 'law, rule, or regulation' under section 448.102. *New World v. Akre*, (2003 WL 327505, 28 Fla. L. Weekly D460):

> The FCC has never published its news distortion policy as a regulation with definitive elements and defenses. Instead, the FCC has developed the policy through the adjudicatory process in decisions resolving challenges to broadcasters' licenses. The policy's roots can be traced to 1949 when the FCC first expressed its concern regarding deceptive news in very general terms stating that "[a] licensee would be abusing his position as a public trustee of these important means of mass communications were he to withhold from expression over his facilities relevant news of facts concerning a controversy or to slant or distort the news." See Chad Raphael, "The FCC's Broadcast News Distortion Rules: Regulation by Drooping Eyelid," 6 Comm. L. & Policy 485, 494 (2001) (quoting Editorializing by Broadcast Licensees, 13 FCC 1246, 1246 (1949)). The policy did not begin to take shape, however, until 1969 when the FCC was called upon to investigate complaints regarding news distortion. Raphael at 494. Notably, the FCC did not take the initiative to investigate these complaints, but rather acted only after Congress referred complaints it had received to the FCC. In a series of opinions issued in licensing proceedings between 1969 and 1973, the FCC stated that when considering the status of a broadcaster's license, it would take into consideration proven instances of "deliberate news distortion," also called "intentional falsification of the news" or "rigging or slanting the news." *In re CBS Program "Hunger in America,"* 20 FCC 2d 143, 150-51 (1969). This series of FCC opinions has come to be known as the FCC's news distortion policy.

Predicate Innuendo

In the courtroom, one should have an evidentiary predicate for witness questions. In food labeling, the Food and Drug Administration (FDA) regulations deem it deceptive to label a food "low fat" when the food is naturally low fat--for example, low fat water, watermelon, or broccoli. (21 CFR 101.13(e)(1)). However, in politics, implied falsehoods flourish.[8]

U.S. Representative Dennis Hastert (R-IL) during an interview with Chris Wallace on Fox News Sunday suggested: "You know, I don't know where George Soros gets his money. I don't know where—if it comes overseas or from drug groups or where it comes from." (August 29, 2004; www.inthesetimes.com/site/main/ittlist/1044/). As a commentator later analyzed, he had no evidence Representative Hastert was "involved in the trafficking of underaged Eastern European prostitutes to work in the deadly tomato mines of [a] ketchup company, " but the journalist decided not to pursue that inquiry.

The Lanham Act prohibits federal registration of certain trademarks, including those which may disparage persons or institutions, which comprise a name identifying a particular living individual except by written consent, and those which consist of the name of a deceased President of the United States during the life of his widow.[9] Opposing 2004 presidential candidate John Kerry, who is married to Teresa Heinz, a Republican supporter is marketing W Ketchup. (www.wketchup.com). George Walker Bush is frequently referred to as W, partly to distinguish him from his father, George H.W. Bush. Thus, federal trademark registration may be denied to W Ketchup, unless George W. Bush were to consent in writing. Although a federal trademark registration provides significant procedural advantages, trademark rights in the United States derive primarily from use, not registration.

Whether a mark disparages is both a difficult substantive question, as well as one that may be barred by laches.[10] *Pro-Football, Inc. v. Harjo*, 284 FSupp2d 96, 68 USPQ2d 1225 (DC Cir. 2003) (Cancellation of football REDSKINS trademark registrations barred by laches; agency decision based on paucity of factual findings that were linked through inferential arguments with no basis in the record; no evidence that mark used with the entertainment services 'may disparage' a substantial composite of Native Americans at the time the marks were registered, starting 1967).

Direct, explicit commercial statements are increasingly being replaced by indirect, implicit, and sometimes subliminal and subconscious marketing messages.[11] Using stealth strategies, such as peer-to-peer or viral marketing, actors are hired to promote products while posing as consumers—in Internet chat rooms and on city streets. Street musicians in San Francisco substituted AT&T Wireless pitches for Beatles lyrics. "Tourists" in Manhattan and Seattle asked passersby to photograph them with their new Sony Ericsson camera phones. Id. Some advertisers believe that advertising will so effectively impersonate the ideas we use to define ourselves that we won't even consider it selling. Id. Selling products and people might reflect what George Burns said of acting, "The most important thing is sincerity. Once you learn how to fake that, you have it made." Id.

Marketed images have often become the means we use "to connect to one another, weaving emotion and entertainment so masterfully into the sales pitch, that we'll use ads—not art or music or literature—to interpret our world." Id. "Where's the beef?"; "Can you hear me now?"; and "A mind's a terrible thing to waste," are only a few of the top-ranked advertising slogans that creep into conventional conservations.[12] The extra national exposure of a consumer brand being used for political discourse may not please the trademark owner.

Bob Woodward's book, *Plan of Attack*, reported that before the 2003 US-Iraq war, Secretary of State Colin Powell sought to impress President George W. Bush with the long-term dangers of invading Iraq, and cited the "Pottery Barn rule: You break it, you own it." After Woodward's book, and especially Powell's Pottery Barn rule, were widely reported, the Pottery Barn sought to clarify that it had no such rule. However, as often happens with clarifications, many more people likely heard the original report of the Powell to Bush Pottery Barn rule than noticed the corporation's later denials of such a corporate policy.[13]

Negative Advertising

Millions of dollars each election year support negative ads, which are sometimes believed to be more influential than positive information.[14] However, negative ads may have pernicious effects of disenfranchising voters and leading to lower voter turnout and involvement.

Recent research indicates that the negativity effect is not universal across voters, but appears to be a robust effect primarily for voters who dislike the candidate. Thus, negative ads may not have special impact on undecided and swing voters, who by definition do not have strong candidate preferences.

Jill G. Klein and Rohini Ahluwalia recently reported on their analysis of the National Election Studies database, which consists of interviews conducted before and after each presidential election by the Center for Political Studies of the Institute for Social Research at the University of Michigan. They found only those voters who prefer the opponent weigh a candidate's weaknesses more than his or her strengths. thus negative information about a candidate is given more weight only when it is preference-consistent. Negative information is perceptually more salient and therefore is likely to garner more attention. However, the manner in which it gets processed (e.g., discounted or supported), and how much weight it receives in overall impressions, depends upon the motivation of the perceiver.

Most of the negative campaigning in the marketplace comprises 'mud-slinging' attacks that focus on a 'small corner' of a candidate's career and deal with trivial issues. Only when the content of negative information is of an extreme or compelling nature, is it likely to be more effective than positive information in changing preferences of the most malleable swing voters. The disparagement communicated in negative ads will be music to the ears of those who already dislike the candidate, but preaching to the choir is not the optimal objective of campaign spending.

Voting contexts are different from brand judgments. Voters are faced with a choice (instead of judgment), the target is a person (instead of product) and data are collected in naturalistic settings where salience advantages of negative information are magnified (instead of lab contexts where subjects are directed to process all provided information, attenuating the salience advantage).

These research results have implications for forensic intellectual property surveys.[15] A proper understanding of the size and passion of segments representing different loyalty levels may be essential not only in the battle for market share but also in measuring the empirical likelihood of confusion, deception, or mistake. In particular, the impact of unfair competition and deceptive advertising may be missed in gross analyses of broad purchasing publics.

Commercial marketing and political marketing have become more sophisticated than simply taking a straw poll and guessing which way the wind is blowing. The deceptiveness of an unfair commercial campaign may require attention to particular market segments.

Ownership

Should a public office holder use public funds to register a trademark for a official service that includes the office holder's personal name? Assuming the government program extends beyond the incumbency of the named official, registration amendment, if deemed non-material, will be required. If the amendment is deemed material, the registration would lapse. (See CASH DASH Judy Baar Topika State Treasurer the Great State Lost and Found Illinois A Free Public Service, ® 2,812,391).

Slogans are often used in political campaigns, some may be highly protectable trademarks.[16] But who should own the trademark? If personally owned by the political candidate, unauthorized use by an independent campaign group would be improper, while candidate-authorized use might jeopardize the independence required under finance campaign laws.[17] Federal Election Commission, 11 CFR 1 et seq. (www.fec.gov/). If a trademark slogan is owned by the independent campaign group, the candidate loses control. Moreover, if elected, a separate campaign group, for the next election or office, may need formal assignment. I LIKE IKE can be complex.

Political campaigns often adopt campaign songs. Beyond compliance with copyright laws, 17 USC 101 et seq, songs and sounds may become trademarks. United Air Lines adopted George Gershwin's Rhapsody in Blue. (www.unitedrhapsody.com). Whether United or the Gershwin successor owns the trademark rights likely depends on the agreement between them.

The Lanham Act governs trademark use in commerce, but is not limited to profit-making activities. *Planned Parenthood Federation of America v. Bucci*, 42 USPQ2d 1430 (SD NY, 1997) aff'd by Summary Order, 152 F3d 920 (2nd Cir. 1998), cert. denied, 525 US 834 (1998); *Bally Total Fitness Holding Corporation v. Faber*, 29 F.Supp 2d 1161, 50 USPQ2d 1840 (CD CA, 1998) (<BallySucks.com> Web site protected non-commercial speech).

Some government works may still retain some proprietary protections. Increasingly, government entities are seeking federal trademark registrations for their names, officer badges, slogans, collateral merchandise, and profitable services.[18] With continuing need to deliver services and decreasing tax revenues, governments increasingly are exploring selling naming rights.[19] Gordon Smith & Russell Parr, Valuation of Intellectual property and Intangible Assets, 3rd edn, "The Valuation of Naming Rights," (2003). The State of Illinois is considering licensing its name for an official state beverage.[20]

Sometimes governments may overreach in their claim of proprietary rights. *Barcelona.com Incorporated v. Excelentisimo Ayuntamiento de Barcelona* (The City Council of Barcelona, Spain) 330 F3d 617; 67 USPQ2d 1025 (4th Cir. 2003) (Spanish law improperly applied, Spanish City Council subject to USA jurisdiction due to its initiation of the UDRP proceeding; plaintiff's reverse domain name hijacking claim for <barcelona.com> valid).

Cities may adopt code language from private organizations. *Veeck v. Southern Building Code Congress International, Inc.*, 293 F3d 791; 63 USPQ2d 1225 (5th Cir. 2002) (As law, the model codes enter the public domain and are not subject to the copyright holder's exclusive prerogatives; as model codes, however, the organization's works retain their protected status).

Sometimes apparently public domain works are proprietary property. *King v Mister Maestro, Inc.*, 224 FSupp. 101 (SD NY 1963); *Estate of Martin Luther King, Jr., Inc. v CBS, Inc.* 194 F3d 1211 (11th Cir. 1999). And sometimes overzealous attempts to protect a slogan and quiet criticism may backfire, providing massive publicity to the critique and endangering the initial plaintiff's trademark. *Fox News Network, LLC v. Penguine Group & Al Franken*, (SD NY) ("There is no likelihood of confusion as to the origin and sponsorship of the book…or that consumers will be misled that Fox or Mr. O'Reilly are sponsors of the book," Judge Denny Chin). *Independent Media Institute v Fox News Network, LLC*, Cancellation 92,042,790 (TTAB, filed Dec 22, 2003, FAIR & BALANCED, ® 2,213,427).

Copyright infringement charges have sometimes been used to chill criticism. The Internet has partially enabled small voices to reache large audiences. However, the Digital Millennium Copyright Act permits a copyright claimant to demand that Internet Service

Providers (ISP) take down alleged infringing material, if the ISP is to gain the statute's safe harbor. 17 USC 512. Although bona fide take down requests are lawful, knowingly materially misrepresenting that posted material is an infringement subjects the copyright claimant to damages and legal costs. *Online Policy Group v. Diebold, Inc.* (C 03-04913 JF, ND CA Sept 30, 2004, Judge Fogel) (Two Swarthmore College students posted copies and links to internal Diebold memos that an anonymous source had leaked to Wired News; memos suggested Diebold was aware of security flaws in its electronic voting systems when it sold them to states, and discussed how to resolve or obfuscate problems; discussion of electronic voting machines in the public interest and quintessential fair use); 17 USC (f). Seeking to suppress publication of content that is not subject to copyright protection is unlawful. *Online Policy Group v. Diebold, Inc.* (Sept. 30, 2004). The DMCA safe harbor provisions were designed as a shield to protect ISPs, not a sword for copyright holders to suppress publication of embarrassing content. Id.

Sovereign Immunity

Enforcing intellectual property rights against a governmental body entails additional difficulties. Under the Eleventh Amendment, federal court suits against the states are limited.[21]

The United States Supreme Court held in two cases, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 US 627 (1999), 148 F3d 1343, 51 USPQ2d 1081 (Patent and Plant Variety Protection Remedy Clarification Act's abrogation of states' sovereign immunity invalid because was not enacted to enforce the guarantees of the Fourteenth Amendment's Due Process Clause) and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 US 666, 131 F3d 353, 51 USPQ2d 1065 (1999) (No federal jurisdiction because Florida's sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act nor voluntarily waived), that states' Eleventh Amendment immunity from patent and trademark infringement suits was not waived or properly abrogated by Congress.

The Supreme Court has held that states are immune from suits invoking the Patent Remedy Act, the Trademark Remedy Clarification Act, the Religious Freedom Restoration Act, the Indian Gaming Regulatory Act, and the Age Discrimination in Employment Act, since Congress did not properly abrogate the states' rights.

The Fifth Circuit noted that a "state's immunity from suit in federal court has a turbulent past, an enigmatic present and an uncertain future." *Chavez v. Arte Publico*, 59 F3d 539, 35 USPQ2d 1609, 1611 (5th Cir. 1995), vacated by Florida Prepaid, 204 F3d 601, 53 USPQ2d 2009 (5th Cir. 2000).

While both the Copyright and the Lanham Acts specifically abrogate states' immunity from suit in a Federal court, Texas asserted those enactments violated recent Supreme Court Eleventh Amendment jurisdiction and were ineffective. However, the Fifth Circuit concluded that until the Supreme Court determines otherwise, when the states opt to conduct business for profit in areas where Congress conditions participation upon waiver of immunity, there is waiver of immunity.

State sovereign immunity for patent issues was discussed in a declaratory judgment action. *Genetech, Inc. v. Regents of the University of California*, 143 F3d 1446, 46 USPQ2d 1586 (Fed Cir. 1998). The Court found that "although University ownership of federal patents is not of itself a waiver of federal immunity, neither are the University's actions of enforcing its patents immunized against waiver by the California Education Code." By its acts the University voluntarily created a case in controversy under Article III, that could only be resolved by federal judicial authority, and has manifested its consent to Article III judicial power.

A state may have waived its sovereign immunity, but often with limitations and special procedures and courts. Eg., *Peters v. Board of Trustees of Southern Illinois University* (IL 5th Dist, 5-03-0025, Sept 1, 2004) (Because defendant is an arm of the State and there is no statutory authority for administrative review of its decision, circuit court lacked subject matter jurisdiction to transfer case to Court of Claims, where review properly belongs). Illinois Court of Claims Act, 705 ILCS 505/8.[22]

Federal Trademark Applications

The Trademark Manual of Examining Procedure (TMEP) recognizes limitations in political trademarks.[23] Various federal statutes and regulations prohibit or restrict the use of certain words, names, symbols, terms, initials, marks, emblems, seals, insignia, badges, decorations, medals and characters adopted by the United States government or particular national and international organizations. These designations are reserved for the specific purposes prescribed in the relevant statute and must be free for use in the prescribed manner. (In addition, there are other statutes which affect marks. See TMEP Chapter 1900, and its citations to sections of the United States Code and the Code of Federal Regulations).

For example, Congress has created about 70 statutes through which exclu-

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sive rights to use certain designations are granted to federally created private corporations and organizations. Violation of some of these statutes may be a criminal offense, e.g., 18 USC §§705 (regarding badges, medals, emblems or other insignia of veterans' organizations); 706 (Red Cross); 707 (4-H Club); 708 (coat of arms of the Swiss Confederation); 711 ('Smokey Bear'); and 711a ('Woodsy Owl' and slogan, 'Give a Hoot, Don't Pollute'). Other statutes provide for civil enforcement, e.g., 36 USC §§18c (Daughters of the American Revolution); 27 (Boy Scouts); 36 (Girl Scouts); 1086 (Little League); and 3305 (The American National Theater and Academy). TMEP §1205.01.

By statute, use of the OLYMPIC word trademark and the Rings design trademark is reserved to the US Olympic Committee, with some grandfathered provisions for use before Sept 21, 1950 or geographic regional name before Feb 6, 1998.[24] "The protection granted to the USOC's use of the Olympic words and symbols differs from the normal trademark protection in two respects: the USOC need not prove that a contested use is likely to cause confusion, and an unauthorized user of the word does not have available the normal statutory defenses. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 US 522, 531, 107 SCt 2971 (1987), cited in *United States Olympic Committee v. Toy Truck Lines, Inc.*, 237 F3d 1331 (Fed Cir 2001); accord. *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 US 545 (1987). However, the First Amendment still trumps even a special statute. *Stop the Olympic Prison v. United States Olympic Committee*, 489 F.Supp 1112 (SD NY 1980).

Use of the Greek red cross other than by the American National Red Cross is proscribed by statute. 18 USC §706. Use of the coat of arms of the Swiss Confederation for trade or commercial purposes is proscribed by statute. 18 USC §708. See *In re Health Maintenance Organizations, Inc.*, 188 USPQ 473 (TTAB 1975) (mark comprising a dark cross with legs of equal length on which a caduceus is symmetrically imposed (representation of caduceus disclaimed) held registerable, the Board finding the mark readily distinguishable from the Greek red cross (on white background) and the Swiss confederation coat of arms (white cross on red background)). TMEP 1205.01.

False advertising or misuse of names to indicate a federal agency is proscribed by 18 USC §709. For example, this provision prohibits knowing use, without written permission of the Director of the Federal Bureau of Investigation, of the words 'Federal Bureau of Investigation,' the initials 'F.B.I.' or any colorable imitation, in various formats 'in a manner reasonably calculated to convey the impression that such advertisement, ... publication, ... broadcast, telecast, or other production, is approved, endorsed, or authorized by the Federal Bureau of Investigation.' Thus, an examining attorney must refuse to register such matter, pursuant to 18 USC §709, if its use is reasonably calculated to convey an approval, endorsement or authorization by the Federal Bureau of Investigation. TMEP 1205.01.

Although there may be statutory protection for particular trademarks, sometimes the statute may be strictly construed. *Blinded Veterans Association v. Blinded American Veterans Foundation*, 872 F.2d 1035, 10 USPQ2d 1432 (D.C. App. 1989) (chartering the Blinded Veterans Association, Congress granted it the sole right to use its name and such seals, emblems and badges as it may lawfully adopt, 36 USC §867, but this protection does not extend to the generic term 'blinded veterans').

Globalization

In addition to special statutes, globalization also has limited trademark rights. Beginning with the 1883 Paris Convention for the Protection of Industrial Property, nations have sought, within limits, to recognize intellectual property rights of other jurisdictions. As a treaty made under the authority of the United States, the Paris Convention is the law of the United States pursuant to Article 6 of the United States Constitution.

Under Article 6*ter* of the Paris Convention, the contracting countries have agreed to refuse or to invalidate the registration, and to prohibit the unauthorized use, as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems of the member countries, official signs and hallmarks indicating control and warranty adopted by member countries, and any imitation from a heraldic point of view. The provision applies equally to armorial bearings, flags, other emblems, abbreviations and names of international intergovernmental organizations of which one or more countries of the Union are members, except for those that are already the subject of international agreements in force, intended to ensure their protection (e.g., 'Red Cross' and emblems protected by the Geneva Convention of August 12, 1949). TMEP § 1205.02.

Article 6*ter* of the Paris Convention provides for each member country to communicate the list of emblems, official signs and hallmarks which it wishes to protect, and all subsequent modifications of its list, to the International Bureau of Intellectual Property (the International Bureau), which will transmit the communications to the member countries. Within 12 months from receipt of such notification, a member country may transmit its objections, through the International Bureau. Id.

International bodies other than nations may influence trademark enforcement in the United States. The Olympic Charter governs the organization, action and operation of the Olympic Movement and sets forth the conditions for the celebration of the Olympic Games. (Olympic Charter, Sept 1, 2004, <www.olympic.org/uk/organisation/missions/charter_uk.asp>). The International Olympic Committee (IOC) Executive Board determines the principles and conditions under which any form of advertising or other publicity may be authorized. (Olympic Charter R 53.1). However, "[n]o kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas." Id. Each National Olympic Committee (NOC) is responsible to the IOC for the observance, in its country, of R7-14 and BLR7-14. It shall take steps to prohibit any use of any Olympic properties which would be contrary to such Rules or their Bye-laws. It shall also endeavour to obtain, fror the benefit of the IOC, protection of the Olympic properties of the IOC. (Olympic Charter BLR7-14).[26]

Conclusion

A basic trademark rule is to avoid the likelihood of confusion as to affiliation, connection, association, origin, sponsorship, nature, characteristics, qualities, or geographic origin of goods, services, or commercial activities.[27] 15 USC 1125 (a). Yet in some political discourse, intentional deception and falsehoods are not unlawful. As with most rules, there are exceptions, and exceptions to the exceptions. The law adjusts to context and society. Benjamin Cardozo, "The Growth of the Law," Yale 1924. Whether our political process ennobles or demeans our nation is a test repeatedly given to our citizens, with test sheet submitted to the ballot box.

1. This article continues the author's series of academic and admiralty intellectual property. "Academia at risk: antiquated IP policy," 40 ISBA *Intellectual Property*, 1, p. 1 (Nov 2000); "Admiralty Trademarks," 39 ISBA *Intellectual Property* 1, March 2000. Daniel Kegan focuses on intellectual property and computer law matters, and serves as counsel to counsel for second opinion and firm management issues. <daniel@keganlaw.com>.

2. Congress shall make no law...abridging the freedom of speech, or of the press.

3. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. For a dramatic perspective of the influence of commercial jingles on human sensibility, see Peter Shaffer's Equus; Sidney Lumet 1977 film with Richard Burton.

5. Thomas H Davenport & John C Beck. The Attention Economy: Understanding the New Currency of Business, Harvard University Press, 2001.

6. A simple "brand politics" Google search discloses many hits, including The Pennsylvania Brand Name Game (politics.fandm.edu/may82001.htm); Politics is Dead, Long Live Branding: Why George W. Bush is President (www.penfield-gill.com/presentations/politics_is_dead.htm); What role should branding play in politics (www.brandchannel.com/forum.asp?bd_id=5); Westhill partners & brand politics (www.westhillpartners.com/default2.asp): "It boils down to the promise. Open a box of cereal or cast a vote—you're acting on a promise. Of health, or flavor, of certain values. If experience matches expectation, the promise is fulfilled. But if the world ever were a simple place, it isn't now. It's noisier than ever. Business and politics are volatile. It's either the worst time to make promises—to market yourself—or the best. Which is it? Depends. Not on traditional advertising, campaigning, PR, etc., but on how you handle the action at the edge of your brand. Where promises don't work thanks to situations, attitudes or markets not predisposed to accept or believe in them. Brand politics is the communications discipline of finding opportunity among obstacles—in real time. It's steering into the skid: a Westhill Partners specialty for clients pressured by the collision of policy, business and culture."

7. Although this article focuses on political trademarks, related areas, such as defamation, copyright, and food labeling, are touched upon.

8. George Orwell noted these tendencies decades ago. George Orwell, *Review of The Civil War in Spain* by Frank Jellinek, in Sonia Orwell & Ian Angus (eds.), *The Collected Essays, Journalism and Letters of George Orwell*, v 1, p 340, Harcourt Brace Jovanovich, 1968; *William Steinhoff, George Orwell and the Origins of 1984*, University of Michigan Press, 1975.

9. §2 (15 U.S.C. §1052). Trademarks registrable on the principal register; concurrent registration.

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 2(9) of the Uruguay Round Agreements Act) enters into force with respect to the United States.

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.

(c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.

10. Moral judgments are not universal, but vary within differing communities. Richard A Shweder, George W. Bush & the missionary position, 133 Daedalus numb 3, p 26 at 31; Sakiko Fukuda-Parr, Cultural freedom & human development today, 133 Daedalus numb 3, p 37 at 38 (Despite the wish of all people to choose a cultural identity freely and to live in dignity, suppression of cultural freedom is widespread around the world. According to the Minorities at Risk data set [www.cidcm.umd.edu/inscr/mar/index.asp], about nine hundred million people, or one in seven, belong to groups that face some form of exclusion based on their ethnicity, religion, or language.)

11. Gina Piccalo, "Have you heard? Stealth advertising puts products and pitches everywhere...and you may never know," *Chicago Tribune*, V, 1, Sept. 21, 2004.

12. M&Ms voted top ad character, CNNMoney, Sept 20, 2004, <money.cnn.com/2004/09/20/news/fortune500/ad_icon/>.

13. Al Kamen, "Pottery Barn Gets a Break," Washington Post, A19, Apr 28, 2004. *New York Times* columnist Thomas L. Freedman reportedly initiated the analogy between military invasion consequences and the Pottery Barn. Id.

14. This section on Negative Advertising is based on Jill G Klein & Rohini Ahluwalia, "Negativity in the Evaluation of Political Candidates," Journal of Marketing (Jan 2005, in press).

15. For an overview of traditional trademark survey methods and reliable extensions in methods and subject areas, such as to copyright matters, see Daniel L. Kegan, "Survey Evidence in Copyright Litigation," 32 J Copyright Society of the USA 283 (June-Aug 1985).

16. Sabra Chartrand, "Patents: Taste is not a criterion for a trademark. In an election year, that may help some applicants." *New York Times*, C9, Sept 20, 2004. Contrary to the article and title's implication, the Lanham Act does prohibit federal registration of "immoral, deceptive, or scandalous matter," although administrative decision-making has not produced an objective, bright-line test. 15 USC § 1052(a) [Lanham § 2(a)].

17. Campaign finance rules are complex and unsettled, reflecting the underlying turbulent social preferences and beliefs. Sears, others indicted in Texas PAC probe, *Crain's Chicago Business*, Sept 21, 2004. *McConnell v Federal Election Commission*, 124 SCt 619 (2003); *Shays v. Federal Election Commission*, Civil 02-1984 (D DC, September 18, 2004).

18. State of Illinois, LAND OF LINCOLN for metal license plates, Sn 78-332,847; Illinois State Police, ILLINOIS STATE POLICE INTEGRITY SERVICE PRIDE & Design (Eagle, Illinois), for organizational membership, Sn 76-319,282; Chicago Park District, SOLDIER FIELD for jewelry, paper goods and printed matter, housewares and glass, clothing, and plush dolls and footballs, Sn 78-290,518; Trustees of the University of Illinois, RISC for computer software, Sn 76-469,300; County of Los Angeles Sheriff's Department, LOS ANGELES COUNTY SHERIFF & Design (Bear in Star in Patch) for police and civil protection services, Sn 76-530,615; County of Los Angeles Sheriff's Department, Design (Flag with Bear on Badge), for clothing, toys, entertainment services namely films and television shows, police and civil protection services, Sn 76-549,019, Sn 76-549,020, Sn 76-549,021, Sn 76-549,022; Tennessee Education Lottery Corp, LOTTERY TENNESSEE & Design (T & stars) for Lottery services, Sn 76-556,076 (filed Nov 2003, first use Jan 2004, published Aug 2004, application under 15 USC § 1052(f) [2(f) acquired distinctiveness]), and for clothing and lottery cards and tickets, Sn 76-556,075; City of San Antonio THE TOWER RESTAURANT for restaurant services, Sn 78-306,435; Department of the Army, BASIC TRAINING for clothing, Sn 78-192,261; Department of the Army, U.S.ARMY & Design (Star in Rectangle) for games and toys, Sn 78-318,574; Department of the Army, GREEN BERETS for games and toys, Sn 78-270,021, and for clothing, Sn 78-270,016; USA Secretary of the Navy, Design (Person with quadruled vest), Sn 76-436,381 for flyers and journals, glasses and mugs, clothing, emblems, and electronic transmission of technical data and information to a person via computer from personal and on-board detection equipment; US Postal Service, CC CITY CARRIER (stylized) for decorative electric switchplate covers, stationery, key chains, cosmetic bags, mugs, water bottles, Sn 78-307,410, Sn 78-307,413; US Postal Service, MAIL CLERKS for key chains, cosmetic bags, backpacks, mugs; US Postal Service, multiple slogans for clothing --SEAL IT (78-307,678),

YOU KNOW WHERE TO FIND ME (78-307,733), SORTIN' SKILLS (78-307,714), RETURN TO SENDER (78-307,664), MAINTENANCE MAKES IT WORK (78-307,612), MAIL HANDLER MAKING MOVES (78-307,438), LETTER CARRIERS WE KNOW THE ELEMENTS (78-307,431); White House Commission on the National Moment of Rememberance, PATRIOTS PATROL for promoting awareness in children about patriotism and the American spirit through projects designed to provide ways for children to put patriotism into action, Sn 76-566,724; Transport For London, UNDERGROUND & Design (Circle & bar), for computer software for travel planning, printed publications, toys, coffee, tea, flour, pastries, chocolates, treacle, cartoon and documentary television programs, Sn 76-535,108.

19. Naming rights have been granted in cities, including San Francisco (3Com Park), Toronto (Air Canada Centre), Rosemont (Allstate Arena), Little Rock (Alltel Arena), Jacksonville (Alltel Stadium), Phoenix (America West Arena), Miami (American Airlines Arena), Dallas (American Airlines Center), Sacramento (Arco Arena), Anaheim (Arrowhead Pond of Anaheim), Sacramento (Atlantic Richfield Stadium), Memphis (AutoZone Park Bank of America Center), Phoenix (Bank One Ballpark), Chattanooga (BellSouth Park), Greenville (Bi-Lo Center), Rochester (Blue Cross Arena), Calgary (Canadian Airlines Saddledome), Cincinnati (Cinergy Field), Foxboro (CMGI Field), Myrtle Beach (Costal Federal Field), College Park (Comcast Center), Detroit (Comerica Park), Bridgewater (Commerce Bank Park), Houston (Compaq Center), Boston (Fleet Center), Vancouver (General Motors Place), Chicago (Hawkinson Ford Field for the Cook County Cheetahs), Milwaukee (Miller Park), San Francisco (Pacific Bell Park), Indianapolis (Pepsi Collseum), Indianapolis (RCA Dome), Minneapolis (Target Center), Chicago (United Center), and many more.

20. *Crain's Chicago Business*, "An official state drink?, Sept. 13, 2004.

21. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

22. Court of Claims jurisdiction. The court shall have exclusive jurisdiction to hear and determine the following matters: (a) all claims against the State founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency; provided, however… (b) All claims against the State founded upon any contract entered into with the State of Illinois; (c) All claims against the State for time unjustly served in prisons of this State …; (d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, and all like claims sounding in tort against [several state academic universities]; (e) All claims for recoupment made by the State of Illinois against any claimant; ….

23. The following discussion, through Article 6ter of the Paris Convention, is from TMEP §1205.01.

24. 36 USC Sec. 220506. - Exclusive right to name, seals, emblems, and badges

(a) Exclusive Right of Corporation. - Except as provided in subsection (d) of this section, the corporation has the exclusive right to use -
  (1) the name ''United States Olympic Committee'';
  (2) the symbol of the International Olympic Committee, consisting of 5 interlocking rings, the symbol of the International Paralympic Committee, consisting of 3 TaiGeuks, or the symbol of the Pan-American Sports Organization, consisting of a torch surrounded by concentric rings;
  (3) the emblem of the corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief; and
  (4) the words ''Olympic'', ''Olympiad'', ''Citius Altius Fortius'', ''Paralympic'', ''Paralympiad'', ''Pan-American'', ''America Espirito Sport Fraternite'', or any combination of those words.

(b) Contributors and Suppliers. -
  The corporation may authorize contributors and suppliers of goods or services to use the trade name of the corporation or any trademark, symbol, insignia, or emblem of the International Olympic Committee, International Paralympic Committee, the Pan-American Sports Organization, or of the corporation to advertise that the contributions, goods, or services were donated or supplied to, or approved, selected, or used by, the corporation, the United States Olympic team, the Paralympic team, the Pan-American team, or team members.

(c) Civil Action for Unauthorized Use. -
  Except as provided in subsection (d) of this section, the corporation may file a civil action against a person for the remedies provided in the Act of July 5, 1946 (15 U.S.C. 1051 et seq.) (popularly known as the Trademark Act of 1946) if the person, without the consent of the corporation, uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition -
  (1) the symbol described in subsection (a)(2) of this section;
  (2) the emblem described in subsection (a)(3) of this section;
  (3) the words described in subsection (a)(4) of this section, or any combination or simulation of those words tending to cause confusion or mistake, to deceive, or to falsely suggest a connection with the corporation or any Olympic, Paralympic, or Pan-American Games activity; or
  (4) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee, the International Paralympic Committee, the Pan-American Sports Organization, or the corporation.

(d) Pre-Existing and Geographic Reference Rights. -
  (1) A person who actually used the emblem described in subsection (a)(3) of this section, or the words or any combination of the words described in subsection (a)(4) of this section, for any lawful purpose before September 21, 1950, is not prohibited by this section from continuing the lawful use for the same purpose and for the same goods or services.
  (2) A person who actually used, or whose

assignor actually used, the words or any combination of the words described in subsection (a)(4) of this section, or a trademark, trade name, sign, symbol, or insignia described in subsection (c)(4) of this section, for any lawful purpose before September 21, 1950, is not prohibited by this section from continuing the lawful use for the same purpose and for the same goods or services.

(3) Use of the word ''Olympic'' to identify a business or goods or services is permitted by this section where -

(A) such use is not combined with any of the intellectual properties referenced in subsections [1] (a) or (c) of this section;

(B) it is evident from the circumstances that such use of the word ''Olympic'' refers to the naturally occurring mountains or geographical region of the same name that were named prior to February 6, 1998, and not to the corporation or any Olympic activity; and

(C) such business, goods, or services are operated, sold, and marketed in the State of Washington west of the Cascade Mountain range and operations, sales, and marketing outside of this area are not substantial.

25. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. Article VI.

26. The overt political uses of the Olympics in Nazi Germany may have prompted today's rules against political exploitation.

27. Esther O. Kegan & Daniel L. Kegan. Use of the Trademark Act for Protectionn Against Unfair Competition: Is Congressional Overview Needed?, 75 *Illinois Bar Journal* 562 (June 1987).

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