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Will the Real Candidate Please Stand Up?: Political Parody On the Internet

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WILL THE REAL CANDIDATE PLEASE STAND UP?: POLITICAL PARODY ON THE INTERNET

Jon H. Oram* 

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The Internet these days is like a box of cyber-chocolates: You can try searching for the information you want, but you just never know what you're gonna get. Over the past four years, numerous commentators have promised that, by providing access to accurate and pertinent information about candidates and public policy issues, the Internet will reform the American political system. However, the 1996 election—the first in which the Internet played a significant role—demonstrated that despite politicians' eagerness to exploit the new medium, cyberspace was not yet prepared to shoulder the responsibilities required of a savior of representative democracy. Although the Internet is still in relative infancy, its role in this important area of American life reveals the problems its unique features have engendered. Judicial adjudication of these controversies sheds light on the ability of legal institutions to control the impact of this chaotic medium.

While prospects for World Wide Web commerce have advertisers and retailers drooling, the Web's promise to be a cheap tool by which politicians can target messages to millions of voters has yet to be realized. Instead, picture this scenario: It's the 1996 presidential primary season and you are a conscientious voter who wants to find out who the candidates are and what they stand for.


4 Of course, this would likely make you an irrational voter and would definitely put you among the minority of the electorate, since most voters make a rational determination that the process of seeking information about candidates is simply too costly and thus refrain from procuring any information whatsoever. See Anthony Downs, An Economic Theory
You have heard the media trumpeting the Information Superhighway\(^5\) for its plethora of political information. So you log onto the Net, boot up your free copy of Netscape, and begin searching for the leading candidates’ Web sites. First you try typing potential domain names\(^6\) into your browser with the hope of stumbling upon a candidate’s home page. You try “http://www.dole.org.” Unfortunately, this address is being used by an Internet service provider that hosts, among other things, home pages of three gay and lesbian organizations.\(^7\) So next you check out “http://www.dole.com”—and you end up at the home page of the pineapple company.\(^8\) Now you are beginning to get agitated.

Perhaps “http://www.dole96.org” might work. This site looks much more promising. Entitled “Bob Dole for President,” and covered with high-quality, patriotic, red, white, and blue graphics featuring the Senator and his familiar conservative themes, the

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\(^5\) You have heard the media trumpeting the Information Superhighway for its plethora of political information.

\(^6\) Domain names are “mnemonic, alphanumeric, user-friendly alternatives to the numeric Internet protocol (IP) addresses by which computers refer to one another.” Jon H. Oram, Case Note, The Costs of Confusion in Cyberspace, 107 YALE L.J. 869, 869 (1997). A fully qualified domain name consists of three parts, delimited by periods: from right to left, the top-level domain (e.g., “.org”), the second-level domain (“dole96”), and the name of the individual server (e.g., “www”). See Intermatic Inc. v. Toeppen, 947 F. Supp. 1227, 1230-31, 40 U.S.P.Q.2d (BNA) 1412, 1414-15 (N.D. Ill. 1996); Kenneth Sutherlin Dueker, Note, Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses, 9 HARV. J.L. & TECH. 493, 492-97 (1996). For more discussion of domain names, see infra Part II.

\(^7\) “Domain names are “mnemonic, alphanumeric, user-friendly alternatives to the numeric Internet protocol (IP) addresses by which computers refer to one another.” Jon H. Oram, Case Note, The Costs of Confusion in Cyberspace, 107 YALE L.J. 869, 869 (1997). A fully qualified domain name consists of three parts, delimited by periods: from right to left, the top-level domain (e.g., “.org”), the second-level domain (“dole96”), and the name of the individual server (e.g., “www”). See Intermatic Inc. v. Toeppen, 947 F. Supp. 1227, 1230-31, 40 U.S.P.Q.2d (BNA) 1412, 1414-15 (N.D. Ill. 1996); Kenneth Sutherlin Dueker, Note, Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses, 9 HARV. J.L. & TECH. 493, 492-97 (1996). For more discussion of domain names, see infra Part II.


Web site contains hyperlinks to Senator Dole's positions on issues such as crime, drugs, terrorism, and family values. The site apparently also offers polling data, the campaign's latest TV spot, a press release on California Governor Pete Wilson's endorsement of Dole, and a form that allows visitors to sign up for the campaign mailing list. Once you look past the snazzy graphics and officialsounding domain name, however, you notice this statement:

Bob Dole, of course, is the founder of the Dole Fruit Company and a popular Senator. Mr. Dole loves tropical fruits, especially slightly over-ripe bananas which are just starting to turn black and mushy, but not so black and mushy as to be inedible. Mr. Dole is also very fond of apricots, which aren't so tropical, despite years of effort by the Dole Fruit Company's best scientists.

All of a sudden you realize you've been fooled. The site is actually a spoof of the real Dole campaign site, and a pretty convincing one.

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9 Hyperlinks, or links, are highlighted text or images that, when selected by the user, permit him to view another, related Web document. Because Web servers are linked to the Internet through a common communications protocol, known as hypertext transfer protocol ("HTTP"), a user can move seamlessly between documents, regardless of their location; when a user viewing a document located on one server selects a link to a document located elsewhere, the browser will automatically contact the second server and display the document.


10 See Bob Dole for President (visited Mar. 20, 1998) <http://www.archive.org/pres96/parody/dole961.htm>. The Smithsonian Institute has corroborated with a group called the Internet Archive to establish an excellent World Wide Web archive of materials from the 1996 presidential election, including candidate Web sites, political media coverage, and even the parody sites themselves (in different stages of development). Given the ephemeral nature of World Wide Web sites, this site is an excellent resource for the countless number of researchers who will inevitably be studying the first ever Internet presidential campaign. See Internet Archive, Web Archive 96 (visited Mar. 20, 1998) <http://www.archive.org/smithsonian.html>.

11 See Bob Dole for President, supra note 10.
at that. Perhaps you will eventually discover that the actual Dole site is located at “http://www.dole96.com.” (Note the difference: The top-level domain is “.com,” not “.org,” despite the fact that the campaign is not a commercial business). Or maybe you get so fed up with looking that you simply quit your search. Or perhaps you never figured out that the parody Web page was not actually the real thing, and you left the site seriously believing that Senator Dole once had to fight with the ruler of Turkey because the Turks weren’t eating enough bananas. Regardless, if it remains this difficult to locate bona fide political information on the World Wide Web, voters will refuse to utilize this new communications medium as a way to learn about the candidates. This isn’t an Information Superhighway. It’s stop-and-go, bumper-to-bumper traffic—with a significant number of accidents along the route.

In an effort to define the appropriate relationship between politics, voters, and the Internet, this Article analyzes the issue of political parody on the World Wide Web within the context of existing legal rules. The Internet has already proved itself to be a

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12 Were you fooled, you would not have been alone. Victims of the parody included numerous Web surfers, not to mention America Online and the New York Times. See infra notes 107-111 and accompanying text; see also Al Cross, Error Has Republicans Weaving Tangled Web, COURIER-J. (LOUISVILLE), Apr. 28, 1996, at 2A (chronicling the Kentucky Republican Party’s embarrassment arising from its mistaken link to the parody Clinton page).

13 Network Solutions, Inc., the company that currently maintains the system of domain name registration, see infra notes 87-89, “allows non-profit corporations, as well as for-profit businesses and individuals, to use the ‘.com’ designation.” Planned Parenthood Fed’n of Am., Inc. v. Bucci, 42 U.S.P.Q.2d (BNA) 1430, 1437 (S.D.N.Y. 1997).

14 See Bob Dole for President, supra note 10.

15 Even the so-called search engines are of little assistance. Try entering “Dole,” “Bob Dole” or “Dole campaign” on one of the top Web search engines, AltaVista. The queries return 25,064, 23,957, and 2702 possible site locations respectively. Search of AltaVista <http://altavista.digital.com> (Mar. 20, 1998). These search engines have no ability to distinguish between parody and the real thing; they simply match text. Yahoo!, <http://www.yahoo.com>, an Internet directory, is more promising because it organizes sites according to content (i.e., the indexing is done by real live human beings). However, unlike AltaVista, Yahoo! does not search the Web for every document in cyberspace. Rather, Yahoo! requires that Web site owners notify it of the existence of their sites, and often lets site owners choose which category they would like to be listed under. Thus, often a Yahoo! search will be as inclusive and up-to-date—and better organized—as an AltaVista search.
hotbed of trademark, copyright, commercial misappropriation, and unfair competition abuses, as well as defamation.


Almost every claim of federal trademark infringement will also include a claim of unfair competition. Thus, nearly all of the cases cited at supra note 16 include unfair competition claims. See, e.g., Maritz, 947 F. Supp. at 1338; Chuckleberry Publg., Inc., 939 F. Supp. at 1034; Cyber Promotions, Inc., 948 F. Supp. at 437; Cardservice Int’l, Inc., 950 F. Supp. at 739; Hearst Corp., 1997 WL 97097 at *5; see also Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 44 U.S.P.Q.2d (BNA) 1928 (9th Cir. 1997) (alleging trademark infringement and unfair competition).


See, e.g., Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997) (dismissing suit against America Online, Inc. that alleged that AOL knew about but failed to remove defamatory postings).

See, e.g., Hornell Brewing Co., 133 F.3d at 1089 (alleging defamation for the use of the plaintiff’s spiritual and political leader’s name in the advertising of malt liquor on the Internet); United States v. Maxwell, 45 M.J. 406 (C.A.A.F. 1996) (holding that, under the circumstances, the accused had a reasonable, albeit limited, expectation of privacy in e-mail messages that he sent and received over a computer subscription service); Stern v. Delphi Internet Servs. Corp., 626 N.Y.S.2d 694 (N.Y. Sup. Ct. 1995) (dismissing complaint against a company that used a celebrity’s name and picture to advertise its electronic bulletin board for debate on celebrity’s candidacy for office of governor).
have afforded parody substantial First Amendment protection,25 often times providing humorists with virtual immunity against claims of intellectual property infringement26 and defamation.27 However, in an effort to clamp down on improper Internet behavior, courts have interpreted existing legal rules broadly. This practice allows judges to apply precedents from traditional media to offenses that occur in cyberspace. Unfortunately, this judicial finesse often leads to the manipulation of legal doctrine,28 and thereby threatens to eviscerate much of the First Amendment protection that parody and satire have earned in other contexts. While few would argue with the proposition that the Internet is fraught with trademark and copyright infringement, swiftly-conceived and overly-broad rules represent a danger to political parody as it exists in the emerging world of cyberspace.

As a nation of netizens,29 we face conflicting pressures both for and against regulation and judicial interference in this area.30 This Article explores the legal status of political parody on the Internet and suggests possible solutions designed to facilitate access to online information in order to create a healthier, better informed, and more engaged citizenry,31 while simultaneously

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24 See, e.g., United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997) (prosecuting defendant for transmitting interstate communications containing threats to kidnap or injure another person); Cybersell, Inc., 130 F.3d at 416 (alleging fraud and RICO violations); Cody v. Ward, 954 F. Supp. 43 (D. Conn. 1997) (alleging fraudulent misrepresentation via electronic mail and a Prodigy bulletin board); Telco Communications, 977 F. Supp. at 405 (alleging tortious interference with contractual relationships and reasonable business expectations).
25 See infra Part III.
26 See infra Sections III.A.-C.
27 See infra Subsection III.D.1.
28 Cf. Oram, supra note 6, at 869 (arguing that manipulating and finessing traditional trademark principles threatens to misallocate the "costs of confusion" involved in navigating the Internet).
30 Of course, this issue parallels the hotly-debated question of whether the government can or should regulate indecent speech on the Internet. There is similar tension between the desire to promote free speech values and the need to protect children from online pornography. See Reno v. ACLU, 117 S. Ct. 2329 (1997) (holding certain provisions of the Communications Decency Act unconstitutional under the First Amendment).
31 Cf. Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 255 (“Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting
preserving free speech values. Part I of this Article investigates the relationship between politics and the Internet, its brief history, and its future potential. Part II explains the controversy over access to preferred domain names such as “dole96.org.” Part III considers possible causes of action that the “rightful” owner of a domain name might have against these unauthorized parodies, and the viability of the so-called “parody defense.” Part IV analyzes the Internet’s unique features, and asks whether, and if so how, these characteristics change the context of existing legal rules. Finally, Part V proposes possible solutions, both public and private, legal and technological, designed to advance free expression and bring about the informed electorate necessary to meet the rigorous demands of democratic self-government.32

I. POLITICS IN CYBERSPACE

A. THE PROMISE OF THE INTERNET

The Internet has the potential to radically alter the nature of American political campaigns—for better and for worse. Today, in nearly every electoral contest, campaigns produce truckloads of literature describing their candidates’ backgrounds and positions on the hot issues. Yet most of this material goes unread, often unnoticed, by the voters. Unfortunately, it is difficult and time-consuming for even the most conscientious voter to find and read through it all.33 Although organizations such as the League of

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32 See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948) (“The voters . . . must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about.”).

33 This is consistent with the concept of “bounded rationality.” Individuals do not always seek to maximize their personal welfare. Rather, most of the time they simply try to do their best given their limited time, information, and cognitive abilities. See generally 1 HERBERT A. SIMON, MODELS OF BOUNDED RATIONALITY: ECONOMIC ANALYSIS AND PUBLIC POLICY
Women Voters can collect and disseminate information through voter guides, mailing and production costs limit both the quality and distribution of their efforts.\textsuperscript{34} Furthermore, the costs of organization prevent all but the best-financed groups from having any significant voice in the political process. As a result, voters often make relatively uninformed choices not because candidates are unwilling to reach out to them, but because the process of becoming informed simply requires too much effort.\textsuperscript{35}

The Internet, on the other hand, offers candidates the opportunity to reach out to thousands, if not millions, of voters with superior information and high-quality propaganda—and at relatively minimal cost. For just a few thousand dollars, a politician can maintain electronic communications with her core supporters, thereby strengthening her campaign organization.\textsuperscript{36} In addition, she can use the Internet to reach those voters who have yet to make up their minds; and ideally, voters can easily locate whatever information about the candidates they desire. Moreover, studies have shown that Internet users are much more likely to vote than the average citizen.\textsuperscript{37} Thus, the demographics of netizens make them a key swing voter group, and Web sites provide candidates with an effective method of persuasion.

In fact, the Internet has already been credited as a decisive factor in three recent federal elections: the January 1996 special election of Oregon Senator Ron Wyden,\textsuperscript{38} the late Rep. Walter Capps's (D-CA) successful challenge of incumbent Rep. Andrea Seastrand,\textsuperscript{39}

\textsuperscript{34} See Alexander, \textit{supra} note 31, ¶ 5.
\textsuperscript{35} See id. ¶ 4.
\textsuperscript{36} See Bonchek, \textit{supra} note 1, ¶ 7.
\textsuperscript{37} See BROWNING, \textit{supra} note 1, at 5; see also Seib, \textit{supra} note 29 (describing Republican pollster Frank Luntz's conclusion that "Connected Americans" are more likely to say they always vote than are non-connected Americans).
\textsuperscript{38} See BROWNING, \textit{supra} note 1, at 2. ("Wyden won his race by less than 18,000 votes, a measurable proportion of them supplied by voters attracted to Wyden's candidacy though his Internet appeals, activists believe.")
\textsuperscript{39} See California Voter Found., \textit{Contested California House Seat May Be Decided in Cyberspace} ¶ 3 (Nov. 8, 1996) <http://calvoter.org/cvf/pr/Nov8.html>. Capps's Webmaster believes the campaign site was visited about 20,000 times over the course of the election.
and Rep. Ellen Tauscher's (D-CA) victory against incumbent Rep. Bill Baker. In each of these races, pundits have claimed that the World Wide Web may have provided the victorious candidate with the slight edge he or she needed to win.

Unlike the telephone, which primarily supports one-to-one communication, or radio and television, where information flows in a single direction towards a passive audience, the Internet allows for truly interactive discourse between candidates, interest groups, and voters. A report presented to the American Political Science Association in September 1994 illustrates its potential:

"For optimists, political participation in cyberspace approximates an ideal type of communitarian democracy that emphasizes mutuality . . . . The time and money needed to become informed about any topic drop substantially when citizens can employ . . . servers to locate and retrieve desired information on a vast variety of topics, including matters of public policy that comprise the formal business of government. Mass democracy, whether conceived of as an adversarial contest among competing interests, a unitary process for building consensus, or some combination of the two, becomes feasible."
The potential for this type of mutual exchange is unlimited, and rather astonishing, especially given the current lack of interaction between government and the people. Today, despite the cries of many in politics and the media, the Internet is "more than a place to find pictures of people having sex with dogs." For example, during the online protest against Internet censorship, an estimated 65,000 to 100,000 netizens read regular legislative updates about the Communications Decency Act ("CDA") within three to four days of each update's posting. The result of this political dialogue was a six-inch-thick petition signed electronically by 112,000 voters who opposed the CDA. Senator Patrick Leahy (D-VT) presented the petition on the Senate floor in June 1995. This incident provides a perfect example of how, in its ideal form, Internet communication affords citizens the opportunity to express their opinions to their representatives while at the same time providing politicians with a mechanism for promoting themselves.

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45 See BROWNING, supra note 1, at 6.

46 See id.; see also 141 CONG. REC. S3841 (daily ed. June 14, 1995) (statement of Sen. Leahy) (claiming to have received 35,000 separate petitions from concerned netizens). The other often-invoked example of the Internet’s potential to change the world of politics involves Rich Cowan, a 32-year old former campus protester, who ran a nationwide campaign to organize a day of over one hundred campus protests against the Republican Party’s Contract with America—from his basement. See Bonchek, supra note 1, § 1.

47 Many members of Congress now rely on the Internet to maintain communications with their constituents back home. As of March 1998, 95 of the 100 U.S. Senators, and 347 of the 435 Representatives had Web sites. Three years ago, only 10 senators and four representatives were online. See Kara G. Morrison, Savvy Constituents Pull Congress to the Web, OMAHA WORLD-HERALD, Mar. 7, 1998, at 1. According to an American University survey, 58% of the members of Congress actually use the Internet regularly, and 97% of their legislative staff use it to gather online information. See id. However, while 90% of congressional offices receive e-mail, only 6.5% consistently respond electronically to e-mail correspondence. Each Web page has its own “personal touches.” Some offices provide humorous quotes about or by members of Congress, while others post their replies to constituent questions. See id. However, some have criticized Congress for using the Web for “putting up (public relations) material and fluff and garbage” instead of useful information such as voting records and the full text of all proposed congressional bills. Id. (quoting Gary Ruskin, director of the Congressional Accountability Project, a one-man Washington watchdog operation).
While many have recognized the Web's potential for changing the nature of political discourse, the reality is that the transformation is already well underway. The Internet played an important role in the 1996 election, in terms of linking candidates with the media, voters with the candidates, and, perhaps most notably, the media with the voters.\textsuperscript{48} During that election, the World Wide Web was used to register voters,\textsuperscript{49} provide interactive polling,\textsuperscript{50} assemble links to thousands of candidate Web sites to facilitate voter-candidate interaction,\textsuperscript{51} monitor campaign contributions,\textsuperscript{52} and educate the electorate via both partisan\textsuperscript{53} and non-partisan\textsuperscript{54} messages. But was this plethora of information actually reaching the voters themselves, or was it all just media hype? The numbers are still rather modest, but the Voters News Service has estimated that 26% of 1996 voters were regular Internet users.\textsuperscript{55} The Pew Research Center has reported that in 1996 "[a]bout 21 million Americans (12% of the voting-age population) obtained political or policy news from online sources."\textsuperscript{56} As many as 10% of the sample polled stated that they received at least some election


\textsuperscript{55} See California Voter Found., supra note 39, ¶ 5.

information from the Net. In addition, 8% visited sites sponsored by candidates or political parties, and 3% said that the Internet was their principal source of campaign information.

Individuals polled responded that they were specifically looking to the Internet for information that was not available in traditional media sources, and appreciated "the convenience of getting political material online." The Internet was not only used for tracking the Presidential election, but, to a surprising extent, for information on congressional and local races as well. Estimates are that half of the electorate could be online by the 2000 election, and politicians thinking ahead towards that date have already begun preparations.

C. THE MIS-STEPS: 1996

In conjunction with these unique benefits, however, come serious problems inherent to the new technology. While cyberspace offers revolutionary opportunities to reform both the ways in which candidates reach their constituents and voters access political information, the Net also provides a "uniquely effective means of

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57 See id.
58 See CNN AllPolitics, Study: Half of Voters Could Be Online in 2000 ¶ 4 (Jan. 24, 1997) <http://allpolitics.com/1997/01/24/new.media/index.html>. Post-election polls revealed that more voters visited the Clinton-Gore site than Dole-Kemp, see Pew Research Ctr., supra note 56, ¶ 8, despite the fact that the incumbents' site went online more than six months after their challengers'.
60 See id. ¶ 6.
61 See CNN AllPolitics, supra note 58, ¶ 3.
62 Friends of Vice President Al Gore have already registered several domain names in anticipation of Gore's inevitable candidacy in 2000. A group called "Gore 2000 Internet" has registered gore2000.com and a group called "Friends of Al Gore" has registered "gore2000.org." However, Brooks Talley has already registered "gore00.org" and has plans for yet another parody site. To find out who has registered individual domain names, see InterNIC, Web Interface to Whois (visited Mar. 20, 1998) <http://rs.internic.net/cgi-bin/whois>. An individual parodist-to-be has already registered "gephardt2000.org" to be the "Karl" Gephardt for President home page. See InterNIC, Whois Query Results (visited Mar. 20, 1998) <http://rs.internic.net/cgi-bin/whois?gephardt2000.org>. The bidding has already begun for "forbes2000.com," which is being auctioned off by the current registrant to the highest bidder (reportedly at a price approaching five digits). See Laurence Arnold, What's in a Name? Bidding Begins for Forbes2000.com, WASH. POST, Feb. 2, 1998, at A4. Many domain names that include the names of potential presidential candidates are already being sold on the open market. See id.
anonymous attack" for any individual or group interested in maligning a candidate. Although the closest thing to online dirty tricks in the last presidential election were the parody Web sites that appeared on the Internet in late 1995, one can imagine the possibilities for deception and mischief the technically skilled might pursue to promote their own political agendas. Meanwhile, in other contexts, the Web has already been used as a platform for scandal-mongering and vicious political attacks.

Though unrelated to politics, a recent case illustrates the risks intrinsic to the new medium. As part of a malicious hoax, in April 1995, an unknown individual affixed Kenneth Zeran's name and telephone number to a series of notices on an America Online ("AOL") bulletin board advertising t-shirts and other items emblazoned with slogans that glorified the Oklahoma City bombing attack. Predictably, Zeran was inundated with disturbing and threatening calls from outraged Net users. The rumor spread rapidly to newspaper reporters and to an Oklahoma City radio station. Unable to clear his name or find his attacker, Zeran sued AOL. The district court, however, granted AOL's request for judgment on the pleadings on the ground that a provision in the newly-enacted federal Telecommunications Act allows online

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64 See supra Section I.B.
66 See, e.g., Suzanne Keating, Web Site Spurs Feud in Athol, TELEGRAM & GAZETTE, Mar. 12, 1997, at A1 (reporting on a local education advocate's use of the Web to attack conservative school board candidates with charges of "incest, drug and alcohol abuse and [the community's] supposed lack of support for education").
67 Although the incident seems most likely to be a personal or perhaps commercial attack, one of the advertisements in question did include the slogan "McVeigh for President 1996." Zeran v. America Online, Inc., 958 F. Supp. 1124, 1127 n.3 (E.D. Va. 1997), aff'd 129 F.3d 327 (4th Cir. 1997). Still, a successful political parody argument seems highly unlikely, considering the obvious malice involved in this online attack and the fact that the defendant was not a "public figure." Cf. New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (announcing the "public figure" doctrine).
68 See Zeran, 958 F. Supp. at 1127.
69 See id.
70 See id. at 1127-28.
service providers to escape liability for negligent distribution.\textsuperscript{72} Thus, Zeran was left without a remedy for the wrong he had suffered.

In the anonymous world of cyberspace, any user could employ similar tactics to link a candidate with an unpopular issue, group, or individual in order to create the appearance that the message is in fact coming from the candidate herself. Ironically, the benefits promised by the Internet—most notably, the fact that the World Wide Web allows one to publish high-quality campaign materials at a relatively low cost—make this problem all the more difficult to solve. The skilled Web site artist can easily construct a parody or hoax site that looks as good as, or perhaps better than, the real thing. On the Net, all candidates and non-candidates alike are inherently equal—at least in terms of their abilities to reach and persuade the voters.\textsuperscript{73}

Perhaps the most serious problem faced by this emerging marketplace of ideas is the congestion and sheer overload of information available online. While the Internet does provide a surfeit of invaluable knowledge and important facts, the valuable information often comes hidden amongst an abundance of "outdated, unreliable or just plain useless information."\textsuperscript{74} The Web is an anarchic example of disorganized communications mayhem. There are more than one million sites registered with unique Internet addresses,\textsuperscript{75} and more than 900,000 end with the familiar ".com" suffix.\textsuperscript{76} Even the Internet search engines,\textsuperscript{77} which are designed

\textsuperscript{72} See Zeran, 958 F. Supp. at 1135.

\textsuperscript{73} Of course, this may change dramatically as new technology develops. Currently there are a limited number of things a Web site can do, and none requires much technical expertise (although Internet consultants generally charge as though they do). If you have the know-how, you can still publish a top quality Web page with only a computer, a $19.95 Internet connection, some Web publishing software, and a day’s work. However, as the Internet matures, it is possible that newly-developed Internet functions could require significant capital investment or technical expertise. Under such a scenario, once not everyone can build a top-quality Web page, this problem of confusion over which site is the parody and which is the real thing could significantly diminish. See infra Section V.C.

\textsuperscript{74} Michael Newman, Conquering the Web, PITT. POST-GAZETTE, Mar. 16, 1997, at D1.

\textsuperscript{75} See Rajiv Chandrasekaran, Network Solutions Shares Surge 30 Percent in IPO, WASH. POST, Sept. 27, 1997, at C1.

\textsuperscript{76} See Newman, supra note 74.
to help Web users find what they are looking for, are overwhelmed. For example, try searching Altavista for the phrases “Dole for President” or “Clinton and Lincoln Bedroom” and see how many documents you get. Without a better way to separate the wheat from the chaff, searching the Internet can be frustrating, especially for the Net novice. Thus, the conscientious voter still faces the same problem: The overabundance of online information often demands too much effort for one to become adequately informed.

One tool that in theory ought to help users locate information online is the domain name, or URL, which headlines and identifies each home page. Analogous to local street address, a Web site’s domain name provides a way for Internet users to jump directly to a particular location without having to traverse a myriad of links or wade through an overflow of search engine results. Instead, users can simply type the address into their Web browsers. Domain names offer a user friendly means by which to distinguish and locate various computers, users, files, and other resources

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77 Search engines allow a user to type in key words which describe what he or she is searching for, and the site returns the addresses of all pages which contain those key words, often sorted by some sort of mathematical formula which considers the frequency and location of the words. These sites include Yahoo! <http://www.yahoo.com>; Excite <http://www.excite.com>; Webcrawler <http://www.webcrawler.com>; Lycos <http://www.lycos.com>; and Altavista <http://altavista.digital.com>.

78 As of this writing, a query of “Dole for President” produced 410,332 documents, while “Clinton and Lincoln Bedroom” yielded 1,999,129. Search of Altavista <http://altavista.digital.com> (Apr. 1, 1998).

79 See Newman, supra note 74.

80 A domain name is generally divided into three (though occasionally four) fields separated by periods, known to netizens as “dots.” For example: “www.stanford.edu.” The fields designate subdomains, from right to left. The rightmost field is called the top-level domain, designating the type of organization to which the address belongs (in this example .edu is for educational institutions). Many top-level domains serve as country designators, such as “.uk” for the United Kingdom and “.it” for Italy. Network Solutions, Inc. currently allocates second-level domain names (i.e., the “stanford” portion) within the five major top-level domains. See infra notes 84-96 and accompanying text. The owner of the second-level domain can allocate first-level domains within his site as he or she chooses. For example, Stanford University’s Web presence includes “www.stanford.edu,” “rescomp.stanford.edu,” “tickets.stanford.edu,” “kzsu.stanford.edu,” and many others. For a technical explanation of the function of domain names, see Intermatic, Inc. v. Toeppen, 947 F. Supp. 1227 (N.D. Ill. 1996); and Dan L. Burk, Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks, 1 RICH. J.L. & TECH. 1, ¶¶ 10-15 (Apr. 10, 1995) <http://www.urich.edu/~jolt/viii/burk.html>.

81 “URL” stands for Uniform Resource Locator.
attached to the Net; essentially they serve as a mnemonic substitute for the numeric Internet protocol (IP) addresses by which computers communicate. In theory, these Net addresses should allow a user to quickly navigate the Internet, particularly when the user knows what she is looking for. However, as the next part indicates, this ideal has yet to come to fruition.

II. THE DISPUTE OVER DOMAIN NAMES

Like every other aspect of the Internet, the system of domain name registration remains virtually unregulated and thus somewhat chaotic. To date, the process of laying claim to a particular domain has been governed by the rule of "first come, first served." Under a franchise established by the National Science Foundation (NSF) (the Internet's original "owner"), a consortium of organizations called the InterNIC currently holds a monopoly on all "com," "net," "org," "edu," and "gov" domains. Distribution of domain names is administered by Network Solutions, Inc. (NSI), a for-profit Virginia corporation, though that will likely change in the near future. Until September 1996, NSI main-

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82 See Burk, supra note 80, ¶¶ 10, 12.
85 "InterNIC" stands for Internet Network Information Center. The consortium includes the National Science Foundation, General Atomics, AT&T, and Network Solutions, Inc. See generally DANIEL P. DERN, THE INTERNET GUIDE FOR NEW USERS 412-16 (1994) (describing the history and organization of the InterNIC).
87 NSI's contract with the NSF expired in March 1998; however, the agreement will be extended through September. See Rajiv Chandrasekaran, A Pressing Matter of Addressing: Who'll Decide Domains?, WASH. POST, Oct. 7, 1997, at D1. The Department of Commerce has proposed the creation of a private, not-for-profit corporation that will "set policy for and direct the allocation of number blocks to regional number registries for the assignment of Internet addresses." Improvement of Technical Management of Internet Names and Addresses, 63 Fed. Reg. 8826, 8827 (to be codified at 15 C.F.R. ch. XXIII) (proposed Feb. 20, 1998). These regional registries will compete with each other for domain name registrations. See id. at 8828-29. The corporation will also oversee the operation of an authoritative root server system and the policy for determining the circumstances under which new top-level domains will be added to the root system. See id. It will also "coordinate the development of other technical protocol parameters as needed to maintain universal connectivity on the Internet." Id. at 8827. The U.S. government would gradually transfer existing domain
tained a policy of strict neutrality, awarding each particular address to the first applicant to make a request and allowing the individual parties to sort out their disputes on their own. Domain name registration was free until 1995, when NSI began to charge registrants $100 for registration (which covers two years), as well a $50 annual maintenance fee. The fee was an attempt to recoup expenses and to limit the practice of cyber-squatting—in which speculators would stake out names of well-known companies and products with the intent of selling the names back to the companies themselves. Often the domain names taken by the cyber-squatters were identical to registered trademarks. This practice spawned a host of legal disputes, including many in which NSI itself was named as a defendant.

In an effort to shield itself from liability, in September 1996, NSI adopted a new domain name dispute policy that redefined its role and sought to limit any legal obligations arising from the registration process. Under the new policy, NSI maintains that it does not determine the legality of domain name registration or otherwise evaluate whether a registration infringes on the rights of a third party, nor will it act as an arbiter of disputes. Rather, upon proof that a domain name is identical to a valid and subsisting registration functions to this new corporation. See id. The corporation is expected to be “established and stable” no later than September 30, 2000. Id. at 8828.


See Network Solutions, Inc., supra note 91, ¶ 1, 3.
foreign or United States registered trademark owned by another entity, NSI will place the domain name on "hold," meaning it will not be available for use by any party. In the event of litigation, NSI will deposit control of the domain name into the court registry and will agree to abide by any court orders.

Perhaps the most striking aspect of the new domain dispute policy is the indemnity agreement that each registrant must accept. Per the contract, the registrant agrees to "defend, indemnify and hold harmless" NSI, NSF, and a host of other Internet organizations for any loss or damages resulting from claims arising from the registration or use of a domain name. The registration agreement also includes a limited liability clause, confining NSI's maximum exposure to $500.

If nothing else, the new policy signifies NSI's refusal to become involved as an arbiter in these increasingly hostile disputes. While heavily criticized by both existing domain name owners and exasperated trademark victims alike, the policy of neutrality demonstrates the practical difficulties and legal costs involved in finding a fair and efficient solution. Since only one party can own each individual domain name, these conflicts are inevitable. This is particularly true in instances where multiple parties own trademark rights to the same name, but only have the rights to use the trademark in certain distinct product markets. For example, among United Airlines, United Van Lines, the United Mineworkers

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93 See id. ¶ 9-19.
94 See id. ¶ 20-23.
95 Id. ¶ 6.
96 See id. ¶ 11.
98 See Dueker, supra note 6, at 505 (quoting critics of the policy).
Union, and the United Way, only one can own “united.com”.99 Personal names present yet another predicament, as multiple claimants to individual surnames are inevitable.100 Of course, prospective Web site hosts could always choose alternative domain names.101 Still, the value in having the most simple, easy-to-remember (if not easy-to-guess) domain address has an obvious value, one that has already provoked numerous lawsuits between companies with similar names102 and from companies who have registered a competitor’s names in order to prevent the competitor from establishing a Web presence.103

99 The United example is discussed in Intermatic Inc. v. Toeppen, 947 F. Supp. 1227, 1233 (N.D. Ill. 1996).
100 These problems are particularly relevant with respect to candidates for public office, who typically use their surnames as part of their domain names. It is very likely that multiple candidates with the same surname will appear on the ballot somewhere in the same election year—if not in the same race, as in Texas’s tenth congressional district, in which both candidates in 1996 were named Doggett. In such a case, who gets the preferred domain address? Here the “first come, first served” rule may be appropriate, since it establishes a clear property right to the address, allowing the parties to bargain for the address if one values it more than the other. Two obvious difficulties remain, however. First, the likelihood that political adversaries will bargain in good faith is rather low. Second, the value of a domain name increases dramatically once it is used; therefore, once visitors to the home page become familiar with the address, it will be costly to change domain names. Thus, there are no easy answers.
101 For example, the mammoth corporation Fidelity Investments was forced to use “fid-inv.com” after Fidelity National, a small financial services company in San Jose, California, registered “fidelity.com” See Dueser, supra note 6, at 494 n.57.
103 See Dueser, supra note 6, at 501 (chronicling the dispute that arose between Princeton Review and Stanley Kaplan Co. after Princeton registered “kaplan.com” as a “prank”). Similarly, an anti-abortion radio show host registered “plannedparenthood.com” for a site used to promote sales of a pro-life book. A federal district court in New York awarded the domain name to Planned Parenthood after the organization sued claiming trademark
From a candidate's perspective, the use of a confusing domain name can be the difference between a humorous but harmless attempt to poke fun and an act of political sabotage. By appropriating an official-sounding domain name, the parodist can draw Internet traffic away from the real candidate's home page. This in turn will diminish the size of the candidate's audience, thereby hindering his ability to recruit supporters, communicate with the press, and disseminate his message to the undecided voters. Furthermore, by diverting potential visitors, a parody site can also impede Internet fund-raising.

The problem becomes especially damaging when Net users fail to recognize that the parody is not really the official campaign site. For example, when software test developers Brooks Talley and Mark Pace established Web sites at “dole96.org,” “clinton96.org,” “forbes96.org,” and “buchanan96.org,” about twenty percent of the e-mail inquiries they received were “sincere campaign questions or comments” asking for bumper stickers and offering to volunteer. America Online also thought the sites were the real thing: In October 1995, AOL directed users to the “dole96.org” parody for information about the congressional debate over the various balanced budget proposals. Over two thousand messages streamed into the parodists’ mailboxes, and Talley and Pace had to politely explain that they were not accepting campaign contribu-

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104 In the political arena, a conflict has recently arisen between Sen. Alphonse D'Amato (R-NY) and Geraldine Ferraro, candidates for U.S. Senate from New York. A Republican political consultant in Tennessee registered “ferraro.com” for a site that urges visitors to “Vote D'Amato!” before sending them to the official D'Amato campaign site. See Jon R. Sorensen, Site Snares Ferraro Fans in D'Amato Web, N.Y. DAILY NEWS, Feb. 3, 1998, at 10.

105 Political fundraising over the Internet has already proven to be “more successful than anticipated.” Powell, supra note 3 (quoting Adam Sohn, one of the organizers of the Clinton-Gore Web site); see also Kevin Maney, Cyber-Campaigning, USA TODAY, Apr. 15, 1996 at A1 (discussing the future of online campaign fundraising).

106 Talley and Pace also established sites at “wilson96.org,” “powell96.org,” “limbaugh96.org,” “quayle96.org,” and “gates96.org.”


108 See Mike Christensen, Surfing Cyberspace: From Candidates to Critics, Internet Goes Political, ATLANTA J. & CONST., Aug. 30, 1995, at 11A.
tions for the Dole campaign. After Bob Dole made a slight mistake in announcing his Web site’s address during the first presidential debate, thousands of visitors mistakenly ended up at the parody instead. Even the New York Times on one occasion mislabeled the pranksters’ parody Buchanan site as his campaign’s official home page.

Thus, in its current state, the Internet is not yet ready to assume its responsibilities as the solution to the uninformed voter dilemma. Voters need assurances that the information they retrieve is accurate, or else they will not invest in its procurement. Yet on today’s Internet, as George Pateman of InterNIC Registration Services stated, “[i]f you mis-hit a couple keys, you could wind up somewhere completely unintended and not know it.” Although seemingly harmless, the ease with which unauthorized sites could become a haven for dirty tricks, misinformation, and voter confusion demonstrates their potential for misuse, whether intentional or not. As Howard University Professor Ron Beasley remarked, “[a]ll it would take is for someone, just before the election, to start posting items attributing remarks to candidates that the candidates did not make.” If users cannot recognize the fake for what it is, “[i]t could alienate just enough voters to make a difference.”

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109 See id.
112 Cf. Kelly Kunsch, Diogenes Wanders the Superhighway: A Proposal for Authentication of Publicly Disseminated Documents on the Internet, 20 SEATTLE U. L. REV. 749 (1997) (discussing the problems associated with using the Internet for research due to the fact that the Internet has no overseeing entity that checks documents for truth and accuracy).
115 Id. Though the prospect that Internet campaign fraud could somehow affect the outcome of a presidential election seems unlikely, one can easily recognize the potential for such activities to influence local elections, including congressional races, which are often decided by less than one thousand votes. As the number of Internet users increases, the potential for online misinformation to affect electoral outcomes grows substantially.
III. HOW PROTECTED IS POLITICAL PARODY?

One can imagine that office-seekers would not be very happy to have such “spurious, derogatory or misleading” information attached to their candidacy, whether intended as a joke or an attack. Undoubtedly, during the 1996 presidential campaign, many campaign staffers pondered legal attempts to enjoin the offensive material. Other campaigns may have curtailed their own involvement in online campaigning as a result of the appearance of the parodies, concluding the Internet is nothing but “a vast wasteland of unregulated . . . communication.” Online parodists may indeed be able to take refuge in the First Amendment, particularly when their sites are recognized as “political speech.” However, in the past, courts have enjoined parodies on a number of different grounds, especially in cases where the person or organization spoofed suffered measurable damages.

Similarly, governments have been permitted to regulate even parody and satire when the expression is responsible for substantial harm. In fact, previous parody cases have defined the limits of free expression over new communications technologies. For example, the Supreme Court’s decision in FCC v. Pacifica Foundation allowed a federal regulatory agency to punish a radio station for airing George Carlin’s satirical monologue that mocked the seven dirty words that were forbidden to be uttered over the airwaves. Maintaining that content found to be “‘vulgar,’ ‘offensive’ and ‘shocking’ . . . . is not entitled to absolute constitutional protection under all circumstances,” the Court disallowed

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116 Id.
117 There is significant evidence that this did indeed occur. White House spokeswoman Mary Ellen Glynn said that the White House was “going to see if there’s anything that can be done to make sure our page isn’t confused with [www.whitehouse.net].” See Bowles, supra note 113. The Pete Wilson campaign threatened to sue Brooks and Talley under libel and election laws. See Letter from Brooks Talley to the author (via e-mail) (Mar. 12, 1997) (on file with the author). However, Wilson was out of the race three days later; thus, the suit never materialized.
119 See infra Sections III.A-E.
121 See id.
122 Id. at 747.
the station's defense that the broadcast was "merely using words to satirize as harmless and essentially silly [Americans'] attitudes towards those words."^{123}

Over the past four years, state and federal courts have tangled with the question of how to apply traditional legal rules to Internet cases. Since no court has yet addressed the issue of parody in cyberspace,^{124} these controversies present an interesting opportunity to determine whether the legal doctrines judges have begun to establish in other Internet contexts are appropriately extended to proscribe unauthorized trademark uses. Like Pacifica, which defined the limits of broadcast speech—the last revolution in communications technology—such cases will likely force the courts to draw similar boundaries for First Amendment protections in the digital age.

A. PARODY AND TRADEMARK INFRINGEMENT

Trademark law represents the most fertile ground for parties seeking to enjoin unauthorized domain name use, and thus would probably be the first legal claim made in any attempt to suppress these political parodies. A trademark is any word, name, symbol or device, or any combination thereof, used by a party to identify and distinguish its products or services from those offered by others.^{125} Unlike copyright law, which permits a broad fair use exception,^{126} trademark law forbids the unauthorized use of

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^{123} Id. at 730.

^{124} The issue of parody on the Internet has arisen in two cases; however, the courts have yet to engage in any substantive analysis of the issue. In Planned Parenthood Federation of America, Inc. v. Bucci, 42 U.S.P.Q. 2d (BNA) 1430, 1440 (S.D.N.Y. 1997), the court rejected the defendant's argument that his Web site was intended to be a parody because the site did not "convey the simultaneous message that the home page and Web site are those of the plaintiff and those of the defendant." And in Dow Jones & Co. v. Parisi, 133 F.3d 906 (2d Cir. 1998), the Second Circuit affirmed the district court's granting of Dow Jones's motion for voluntary dismissal before the parties had the opportunity to submit briefs on the issue of whether Parisi's use of "wsj.com" was entitled to protection as a parody.


^{126} The fair use exception excuses copyright infringement where a derivative work is a new composition that uses the protected work to comment on the original. See 17 U.S.C. § 107; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994); see also Pierre N. Leval, Towards a Fair Use Standard, 103 Harv. L. Rev. 1105 (1990) (discussing fair use as a
another party's mark wherever the use is "likely to cause confusion, or to cause a mistake, or to deceive."\textsuperscript{127} Regardless of their humor or redeeming social value, parodies that utilize registered trademarks have often been enjoined, including efforts that could be characterized as political speech.\textsuperscript{128}

Before considering the case law in this area, it is important to define the role of trademark law. A trademark is a distinctive attribute attached to goods or connected to services that identifies their source.\textsuperscript{129} By simplifying the process by which consumers acquire product information, trademarks lower the "search costs" consumers face in differentiating between various goods.\textsuperscript{130} In addition, trademarks are valuable symbols of the goodwill that companies establish through continued investment in quality products or services. Thus, sellers can capture some of the benefits of trademarks by charging higher prices.\textsuperscript{131} The law therefore serves dual purposes: It provides producers a means by which to establish a reputational relationship with their customers, and offers consumers assurance that the goods they purchase are in fact of the quality they have come to expect from particular sellers.\textsuperscript{132} The unauthorized use of a registered mark threatens to cause confusion in the marketplace, thus raising consumers' "search costs" and destroying the reputational benefits of trademarks.

The federal Lanham Act\textsuperscript{133} places significant limits on the ownership of trademark rights. Most importantly, trademark rights do not accrue until the mark itself is used in commerce.\textsuperscript{134}
The Act defines commerce broadly as "all commerce which may be lawfully regulated by Congress." As such, a political campaign can register its candidate's name as a trademark since campaigns involve a myriad of commercial activities that Congress has the power to regulate, including fundraising, political campaign services, and the distribution or sale of campaign propaganda. In 1996, some presidential candidates did register trademarks for these purposes. Federal trademark registration provides prima facie evidence of a mark's validity and the registrant's exclusive right to use the mark in connection with the goods or services specified in the registration application. However, a campaign that did not register a trademark might still have a federal remedy for unfair competition under Section 43(a) of the Lanham Act.

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15 U.S.C. § 1127; see also U.S. CONST. art. 1, § 8, cl. 3 (The Commerce Clause) ("Congress shall have the Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . ."). Until recently, the Commerce Clause has been construed very broadly, giving Congress the power to regulate many areas not generally considered to involve "interstate commerce," so long as there was a rational basis for a finding that the regulated activities "substantially affected" commerce. See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981). However, the Supreme Court recently reaffirmed the principle that the Commerce Clause represents a limitation on federal power. See United States v. Lopez, 514 U.S. 549 (1995).

The Lanham Act does contain a provision which excludes marks that "consist of a surname" from the Federal Register. 15 U.S.C. § 1052(e). However, although surnames themselves cannot be protected, a name can be registered as a trademark if it has achieved secondary meaning in the marketplace—that is, the mark must have become uniquely associated with a specific source. See In re Harris-Intertype Corp., 518 F.2d 629, 186 U.S.P.Q. (BNA) 238 (C.C.P.A. 1975); In re Kahan & Weisz Jewelry Mfg. Corp., 508 F.2d 831, 184 U.S.P.Q. (BNA) 421 (C.C.P.A. 1975). Such a showing will overcome the prohibition under Section 1052(e). In addition, there is no ban against using a surname as part of a mark; the prohibition only applies to marks which consist solely of a single surname. See SCOTT, supra note 125, § 5.09, at 5-16; see also In re Hutchinson Tech., Inc., 852 F.2d 552, 7 U.S.P.Q.2d (BNA) 1490 (Fed. Cir. 1988) (holding that the entire mark, not merely the surname, must be considered in determining whether the mark has achieved secondary meaning).

The Dole campaign registered "Dole for President" along with a distinctive design as the trademark for the campaign. See Trademark Serial No. 74-679,072, available in WESTLAW's FIP-TM database. In addition, friends of eventual Republican vice-presidential nominee Jack Kemp registered "Team Kemp" as both a trademark and a service mark. Their trademark application sought use of the mark on products such as paper goods, housewares and glass, receptacles, prints and publications, and clothing. See Trademark Serial Nos. 74-430,419 & 74-430,234.
or for trademark dilution under Section 43(c).\textsuperscript{140} Hence, even if a campaign does not register its mark, it can still protect itself from the unauthorized use of "any word, term, name, symbol, or device, or any combination thereof" used to designate the source, sponsorship, or approval of any product or service.\textsuperscript{141}

Thus, petitioning for legal protection under the trademark laws appears to be a simple solution. If political campaigns can protect their symbols and slogans by registering them with the Patent and Trademark Office (PTO), this ought to solve the problem. And for many violations, it does. For example, if the Political Americana store in Washington, D.C. sells T-shirts embroidered with the campaign’s “Dole for President” mark, it must first obtain permission from the campaign. Without permission, the store would essentially be “passing off” the T-shirts as official Dole campaign merchandise.\textsuperscript{142} This “passing off” would constitute an unauthorized use in commerce, and therefore a trademark infringement under the statute.\textsuperscript{143}

The typical parody, however, does not involve a commercial use, at least not as the phrase has been interpreted by the courts. While the Lanham Act does not contain a fair use exemption,\textsuperscript{144} courts have often interpreted the “in commerce” requirement to serve a similar function. Indeed, courts have continuously ruled that “parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism.”\textsuperscript{145}

As a result of this judicial leniency, satirists have targeted trademarks, providing social commentary on many famous marks that have become an “integral part of the national culture.”\textsuperscript{146}

Despite this judicial tendency, there is no \textit{per se} parody exception under trademark law. Rather, a so-called “parody defense” will entail one of two arguments. First, a parody defense might involve

\begin{itemize}
\item \textsuperscript{140} See 15 U.S.C. § 1125(c); \textit{infra} Section III.c.
\item \textsuperscript{141} 15 U.S.C. § 1125(a)(1).
\item \textsuperscript{143} 15 U.S.C. § 1114(1)(a).
\item \textsuperscript{144} See \textit{supra} note 126 and accompanying text.
\item \textsuperscript{145} Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545, 14 U.S.P.Q. 1, 4 (2d Cir. 1964).
\end{itemize}
a provocative phrasing of the traditional response that customers are not likely to be confused about a particular product's source or sponsorship on account of the unique nature of the unauthorized use.\textsuperscript{147} Under the statute, where there is no likelihood of confusion as to source or sponsorship, there can be no infringement.\textsuperscript{148} Simply put: "A non-infringing parody is merely amusing, not confusing."\textsuperscript{149}

However, an inherent tension exists between the nature of parody and the "likelihood of confusion" test. As the Second Circuit has stated, "A parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is not the original and is instead a parody."\textsuperscript{150} Therefore, every parody must be at least "confusing" enough to grab the viewer's attention and spur her to recall the original; yet at some point the viewer must recognize the parody for what it is, otherwise it has not conveyed its communicative message.

The second "parody defense" argument is derived from the "in commerce" requirement. This provision ensures that when the unauthorized use of a mark is part of a communicative message, and therefore does not function as a source identifier, the First Amendment trumps the trademark owner's property rights.\textsuperscript{151} Many uses have been held to constitute "expressions of non-commercial speech,"\textsuperscript{152} despite the fact that the user's expression is employed to sell a book,\textsuperscript{153} movie,\textsuperscript{154} magazine,\textsuperscript{155} or nation-
However, property rights in trademarks are not extinguished "simply because the alleged infringing use is in connection with a work of artistic expression." In interpreting the "in commerce" requirement, courts have held that the right to prohibit unauthorized uses of a mark extends only to injurious, commercial uses. This idea is consistent with the suggestion in the Restatement of Unfair Competition that, in the context of expressive uses, courts apply a balancing test. Under such a test, substantial evidence of confusion is required to outweigh the strong public interest in free expression. As a result, there is a not-so-fine line between protected expression and illegal infringement.

Within the context of the Internet, however, the federal courts have held that the reach of the "in commerce" requirement unquestionably encompasses domain name controversies. Because "Internet users constitute a national, even international, audience, who must use interstate telephone lines to access [Web sites]," the commercial requirement may be automatically satisfied by any Internet activity whatsoever. Such a rule essentially allows courts to avoid the messy jurisdictional requirement in cases involving trademarks in cyberspace. The risk, however, is that


108 See id.

109 See Restatement (Third) of Unfair Competition § 20 cmt. b (1995) (Reporters note). Cases employing this balancing test include Cliffs Notes, Inc. v. Bantam Doubleday Dell Publg Group, Inc., 886 F.2d 490, 495 (2d Cir. 1989); Rogers, 875 F.2d at 999; and Yankee Publg, 609 F. Supp. at 277-78.

110 Planned Parenthood Fed'n of Am., Inc. v. Bucci, 42 U.S.P.Q.2d (BNA) 1430, 1434 (S.D.N.Y. 1997). Thus, the mere registration of a federally registered trademark as a domain name can be actionable; there need not be any actual use in cyberspace. The instant a registered mark is registered as a domain name with NSI, federal Lanham Act jurisdiction is triggered. This allows for swift legal action against cyber-squatters and domain-hijackers, including those who have yet to use the mark to identify a particular site or server. See Intermatic Inc. v. Toeppen, 947 F. Supp. 1227, 1239 (N.D. Ill. 1996) (holding that use of plaintiff's trademark in domain name on Internet satisfies the "in commerce" requirement); see also 1 JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 5.11(2), at 5-234 (1996) ("Because Internet communications transmit instantaneously on a worldwide basis there is little question that the 'in commerce' requirement would be met in a typical Internet message, be it trademark infringement or false advertising.").
allowing an Internet presence alone to trigger "use in commerce" will bring a myriad of non-commercial uses into the purview of the Lanham Act, such as news reporting, criticism, and parody, that would be outside the reach of the Act were the uses confined to traditional media.

Other courts have held that interfering with the commerce of another party will fulfill the statutory test. In Planned Parenthood Federation of America, Inc. v. Bucci,¹⁶¹ the court ruled that the defendant's use of "plannedparenthood.com" prevented users from reaching plaintiff Planned Parenthood's official site ("ppfa.org") because "[p]rospective users of plaintiff's services who mistakenly access defendant's Web site may fail to continue to search for plaintiff's own home page, due to anger, frustration, or the belief that plaintiff's home page does not exist."¹⁶² Therefore, the court stated that the act of establishing a Web site was sufficient to trigger the "in commerce" requirement because of the effect the defendant's behavior had on the plaintiff's interstate commercial activities.¹⁶³ This notion, which I will refer to as the "doctrine of commercial interference," also provides courts with a bright-line rule—an easy way to justify decisions against the cyber-squatters and domain-name hijackers.

Despite the significant value the First Amendment affords to parody and political expression, the case law suggests that in a hypothetical Dole v. Talley claim of trademark infringement the former Senator would be likely to prevail. First, under both the "doctrine of commercial interference" and the theory that the nature of the Internet as an interstate communications medium brings any online trademark use under the jurisdiction of the federal courts,¹⁶⁴ the site would probably be found to be "in commerce." Second, Talley and Pace included the Dole campaign's federally registered trademark in the title of their Web site,¹⁶⁵

¹⁶² Id. at 1435.
¹⁶³ See id. at 1437.
¹⁶⁴ See supra note 160 and accompanying text.
¹⁶⁵ On most World Wide Web browsers, a Web site's "title" appears prominently in large type at the top of the page. Furthermore, when a search engine includes the page in its report to the user, the page's title appears in bold print. Thus, the title represents one of the most distinctive aspects of a Web site.
and clearly employed the phrase in an attempt to briefly create the impression that the page was actually a product of the Dole campaign; thus, the use was clearly meant to convey a false designation of source, as required under the statute.\textsuperscript{166}

Finally, because most netizens have not yet become fully Internet-proficient, the likelihood of confusion online is potentially greater than it would be for similar uses in traditional media. Given the infancy of the medium and the learning curve individuals must brave to master its intricacies, many aspects of the Internet continue to provoke significant consumer confusion. This heightened degree of confusion has provided the basis for many courts to enjoin the unauthorized use of a trademark as a domain name.\textsuperscript{167}

In \textit{Bucci}, for example, the district court held that the degree of similarity between "plannedparenthood.com" and the words "Planned Parenthood" made the two marks "nearly identical."\textsuperscript{168} In addition, the judge found that, because ".com" is a popular designation for domain names, many users are likely to simply assume that appending ".com" to the end of a company's name will bring them to its home page.\textsuperscript{169} Of course, this is a naïve view: Though a user may get lucky on occasion, guessing domain names is hardly a fail safe method.\textsuperscript{170}

In addition, because of the "temporary delay" that occurs while a Web page "loads" into the computer, users cannot immediately determine the content of a site upon entering its address into their browsers.\textsuperscript{171} Depending on the speed at which one accesses the Internet, the user encounters a delay of a few seconds between the time when she types the domain name into her browser and the moment the page appears. Additional delays occur each time the user clicks on a link to retrieve additional information. According to \textit{Bucci}, these "lengthy" delays between the user's intent to access information and her recognition of the spoof also raise the likeli-
This reasoning is more evidence of the judiciary's heightened scrutiny over cyberspace activity, which can be understood as an attempt to crack down on the ubiquitous intellectual property infringement that plagues the Internet.

Compare this reasoning with the First Circuit's 1996 decision in *International Ass'n of Machinists v. Winship Green Nursing Center*. In that case, the court found that there was no likelihood of confusion where management had disseminated a letter displaying the union's service mark, written on union letterhead, and bearing the signature of a union plenipotentiary. The letter suggested that the union (IAM) supported the termination of the recipient's employment, but was meant to be anti-union propaganda. A second correspondence contained a simulated invoice, again inscribed on IAM letterhead (and again bearing its service mark), this time implying that union dues would skyrocket were workers to choose IAM as their collective bargaining representative. Despite the clever fake, however, the court ruled that the "historic enmity between labor and management" should have conditioned voters to "view with suspicion any claims made by either party about the other." Thus, there could be no likelihood of confusion because the voters were expected to be vigilant enough to recognize the hoax.

A comparison between these two cases suggests that the most important distinguishing factor is the difference in communications media employed. Surely any person of ordinary intelligence

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172 Id.
173 103 F.3d 196, 41 U.S.P.Q.2d (BNA) 1251 (1st Cir. 1996).
174 See id. at 201.
175 See id. at 199.
176 Id. at 207.
177 In determining whether the use of a mark promotes a likelihood of confusion, the courts generally adopt the test of whether an individual of "ordinary intelligence" would be likely to be confused by the unauthorized use. See *Fisons Horticulture, Inc. v. Vigoro Indus.*, 30 F.3d 466, 475, 31 U.S.P.Q.2d (BNA) 1592, 1600 (3d Cir. 1994) (concluding that "'purchasers of ordinary intelligence' were unlikely to [be] confuse[d]"); see also *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd.*, 34 F.3d 410, 414, 31 U.S.P.Q.2d (BNA) 1811, 1815 (7th Cir. 1994) (Posner, J.) (explaining that trademark law is not meant "to protect the most gullible fringe of the consuming public"); *United States v. 88 Cases, More or Less, Containing Bireley's Orange Beverage*, 187 F.2d 967, 971 (3d Cir. 1951) (noting that Congress "contemplated the reaction of the ordinary person who is neither savant nor do[lt], [and] who . . . exercises a normal measure of the layman's common sense and judgment").
would be just as likely to recognize the conflict in *Bucci* between pro- and anti-abortion advocates, and would therefore be suspicious of either party's claims. Despite the fact that Internet users are, as a whole, more affluent and better educated than the general public, the *Bucci* court doubted their sophistication as consumers of political propaganda.

*Bucci* suggests that until users become familiar and comfortable with surfing the Internet, courts will continue to treat Net users as unwitting victims, while holding users of conventional media to a significantly higher standard of sophistication. This judicial paternalism may help deter cyber-squatters and domain-hijackers, but it comes at a significant cost. For while it may be meant to serve legitimate government purposes, it also makes it incredibly easy for parody victims to enjoin the speech of their assailants, regardless of the value or political or social importance of parody's message. Courts have tended to find any unauthorized use to be a *per se* violation of the Lanham Act. Thus, through doctrines already developed by the courts, parodies that employ officialsounding domain names must automatically be treated as suspect with respect to trademark infringement.

Few would argue against the proposition that domain names have taken on a source-denoting role. Because judges have decided that merely having an Internet presence constitutes a "use in commerce," and have implicitly assumed that Web surfers are less sophisticated than consumers who rely on traditional communications media, little breathing room remains for Web expression that utilizes registered marks. Given these precedents, a candidate

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178 The judiciary is not alone in its assumption that Americans are the unwitting victims of new technologies. Witness U.S. Patent and Trademark Office Commissioner Bruce Lehman's justification for why he thinks current intellectual property law will last well into the next century: "Most Americans still can't figure out how to program their VCRs. . . . They are not going to be able to get onto the World Wide Web and locate, on some obscure bulletin board, the latest copies of Microsoft's computer programs." Michael Noer, *Policing Cyberspace*, FORBES, Apr. 10, 1995, at 50, 51.

179 Political speech, though highly venerated in our society, is not immune from government regulation—particularly time, place, and manner restrictions. See infra Section III.F (noting that some restrictions on political speech are justified).

180 But cf. Oram, *supra* note 6, at 872 (maintaining that the appropriate question to ask is not whether domain names currently serve a source-denoting function, but whether they *should* play such a role).
would probably have an excellent case against pranksters like Talley and Pace, despite the fact that their efforts were meant to spoof and not to deceive. Conceivably, a court might enjoin only the use of the infringing domain addresses, thereby leaving open other avenues of expression for similar efforts. For example, the defendants might be allowed to choose a different, less-confusing domain name, such as "dole-parody.org." Without an official-sounding domain, however, the parodists would be unable to simultaneously create the appearance that their composition both is and is not the original. In essence, then, these legal rules can be used to thwart effective trademark parodies, since without an official-sounding domain, a parody would be left effectively impotent.

B. PARODY AND UNFAIR COMPETITION

Its roots in the common law tort of deceit, the law of unfair competition is also aimed at "protecting consumers from confusion as to source." As amended in 1988, the federal unfair competition statute, Section 43(a) of the Lanham Act, forbids the use of marks, false designations of origin, or false or misleading descriptions and representations of fact that are likely to cause marketplace confusion as to the origin, sponsorship, or approval of commercial activities. Since it does not require PTO registration as a prerequisite to federal protection, Section 43(a) provides a remedy for individuals and corporations whether or not they have registered their marks. Furthermore, it allows claims for infringement of many aspects of products or services that are not registerable under the Lanham Act, for example, distinctive trade

183 15 U.S.C. § 1125(a)(1) (1994) (including "any word, term, name, symbol, or device, or any combination thereof").
dress. The statute could, therefore, conceivably provide a cause of action for a candidate whose graphics had been copied from his or her campaign Web page to create a look-alike parody.

Again, the test for determining liability under Section 43(a) is likelihood of confusion. Courts generally engage in an analysis similar to that used in trademark infringement cases, typically considering a number of different factors to weigh the likelihood of confusion. For example, such a finding could be supported by evidence of actual confusion, including the reported statements by Talley and Pace that many visitors actually thought their parodies were the real thing.

There has been significant debate regarding the extent to which Section 43(a) can be used to suppress certain forms of constitutionally protected speech. For example, during the 1989 congressional debate over amendments to Section 43(a) that were designed to make product disparagement an actionable wrong, members of Congress voiced concerns that the proposed changes “should not be read in any way to limit political speech, consumer or editorial comment, parodies, satires, or other constitutionally protected material.” Today, however, plaintiffs often invoke Section 43(a) in attempts to enjoin activities that defendants maintain are merely intended as parody or satire. Therefore, these concerns

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185 Trade dress is broadly defined as the overall look or appearance of a product or its packaging. The appearance must be both “distinctive” and “non-functional” to gain federal protection. See Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992) (upholding a restaurant’s claim for trade dress infringement under § 43(a)).

186 See Sally M. Abel & Marilyn Tiki Dare, Trademark Issues in Cyberspace: The Brave New Frontier ¶¶ 70-71 (Oct. 28, 1996) <http://www.fenwick.com/pub/sma-trade2.html> (suggesting that Pat Buchanan might have a claim of trade dress infringement against Talley and Pace because the parodists “slavishly copied” the candidate’s site).

187 See 15 U.S.C. § 1125(a)(1)(A) (forbidding unauthorized uses that are “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person”).

188 See supra notes 107-109 and accompanying text.

189 135 CONG. REC. H1216-17 (1989) (statement of Rep. Kastenmeier); see also Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1383 n.6 (5th Cir. 1996) (citing Kastenmeier’s concerns for the proposition that § 43(a)(1)(B) applies only to commercial speech).

190 See, e.g., Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997) (holding Penguin Books liable for its parody of the O.J. Simpson murder trial, written in the same style and substantially similar to The Cat in the Hat), cert. denied, 118 S. Ct. 27 (1997); Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959, 39 U.S.P.Q.2d (BNA)
over the effect of the 1989 amendments must be viewed as inconsistent with both the history of unfair competition law and the nature of our constitutional system of government. First, as the cases demonstrate, unfair competition law has always recognized limits to the protection of both parody and political speech where the result is consumer or voter confusion.\textsuperscript{191} Second, regardless of Congress' intent, courts would never interpret the statute so as to infringe on constitutionally-protected expression, for a law of Congress cannot be read to constrain the reach of the First Amendment.\textsuperscript{192} Thus, these statements represent nothing more than a reminder that even after the revision of Section 43(a), parody retains the same degree of First Amendment protection previously extended by the courts. Where free speech interests are outweighed by the state's compelling interest in preventing marketplace confusion, the judiciary retains the obligation to limit even political parody.

Unlike the federal dilution statute,\textsuperscript{193} Section 43(a) has not been construed to contain a blanket parody exemption that would allow humorists to disparage products and confuse consumers.\textsuperscript{194} In the context of domain names, courts have held that the use of a confusing domain name can create the appearance that the Web site has the "origin, sponsorship or approval" of the marks' rightful owner.\textsuperscript{195} In practice, courts have applied Section 43(a)'s "likelihood of confusion" test in the same manner as they have the test

\textsuperscript{1865} (10th Cir. 1996) (refusing to enjoin Cardtoons from producing trading cards that lampooned professional baseball players); Nike, Inc. v. "Just Did It" Enters., 6 F.3d 1225, 28 U.S.P.Q.2d (BNA) 1385 (7th Cir. 1993) (remanding to the district court to determine likelihood of confusion between "Mike" and "Just Did It" and Nike's "Nike" and "Just Do It" trademark); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 23 U.S.P.Q.2d (BNA) 1583 (9th Cir. 1992) (remanding to determine if Samsung's depiction of Vanna White as a robot, used to promote its products, resulted in confusion).

\textsuperscript{191} See, e.g., \textit{Dr. Seuss Enters.}, 109 F.3d at 1405; Nike, Inc., 6 F.3d at 1228; White, 971 F.2d at 1401 & n.3.


\textsuperscript{193} See infra Section III.C.

\textsuperscript{194} See, e.g., Planned Parenthood Fed'n of Am., Inc. v. Bucci, 42 U.S.P.Q.2d (BNA) 1430, 1436 (S.D.N.Y. 1997) (finding defendant's actions to be a commercial use within the meaning of the Federal Dilution Act).

for trademark infringement.\textsuperscript{196} Given the courts' reluctance to allow any unauthorized use of trademarks on the Internet, there is little doubt that the Lanham Act would provide a successful cause of action for a candidate aggrieved by an offending parody, regardless of whether or not the campaign had registered a trademark with the PTO.

C. PARODY AND TRADEMARK DILUTION

In January 1996, President Clinton signed into law the Federal Trademark Dilution Act,\textsuperscript{197} which protects "famous" trademarks from unauthorized use even where the use engenders little or no likelihood of confusion.\textsuperscript{198} The Act offers an injunction remedy to trademark owners where the unauthorized use causes the blurring\textsuperscript{199} or tarnishment\textsuperscript{200} of the mark's distinctive quality. In addition, twenty-eight states have similar statutes that protect marks against dilution.\textsuperscript{201} One of the purposes of the federal statute was, as articulated by Senator Pat Leahy (D-VT), to "help stem the use of deceptive Internet addresses taken by those who are choosing marks that are associated with the products and

\textsuperscript{196} See, e.g., Bucci, 42 U.S.P.Q.2d at 1436.


\textsuperscript{198} See 15 U.S.C. § 1125(c) (Supp. 1996). The statute, however, does establish a list of eight factors that a court may consider in determining whether a mark is distinctive and famous. See § 1125(c)(1)(A)-(H). These factors are similar to the traditional likelihood of confusion test; therefore "their application can be expected to draw from existing [trademark infringement] precedents." David S. Versfelt, Early Developments Under the Federal Trademark Dilution Act, in FALSE ADVERTISING AND THE LAW: COPING WITH TODAY'S CHALLENGES 323, 339 (1996) (PLI Corporate Law & Practice Course Handbook Series No. 954, 1996).


\textsuperscript{200} Tarnishment involves "an injury resulting from another's use of the mark in a manner that tarnishes or appropriates the goodwill and reputation associated with the plaintiff's mark." Id. at 1081.

\textsuperscript{201} See Susan L. Sered, One Year After Dilution's Entry into Federal Trademark Law, 32 WAKE FOREST L. REV. 215, 218 n.34 (1997). Many of these laws have existed for decades and some may have provided the model for the federal statute. See, e.g., 765 ILL. COMP. STAT. 1035/15 (West 1993); N.Y. GEN. BUS. LAW § 360-l (McKinney 1998).
reputations of others." Since its passage, the Act has been invoked by a number of trademark owners to retrieve trademarked Internet domain names from cyber-squatters and domain-hijackers.

The new law defines dilution as "the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake or deception." To qualify under this statute, marks need not be registered under federal law; however, registration can provide evidence that a mark is indeed "famous" enough to deserve protection. Although most states do not require that a mark be famous to earn protection, courts have often interpreted state dilution statutes to extend protection only to well-known marks.

On its face, the federal anti-dilution law would appear to provide a strong claim for parody victims seeking to retrieve a particular domain address. Because the statute requires neither a showing of market competition nor likelihood of confusion, a campaign could conceivably enjoin a site even where it was clear to all who visited that the site was merely a joke. The statute, however, contains an exception for what it terms "noncommercial use." The exception was included to appease critics who feared the Act might be used to limit consumer criticism and genuine news reporting.

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206 See Serad, supra note 201, at 219. For example, in Accuride Int'l, Inc. v. Accuride Corp., 871 F.2d 1531, 1539, 10 U.S.P.Q.2d (BNA) 1569, 1595 (9th Cir. 1989), the Ninth Circuit held that "[i]t is clear that anti-dilution statutes . . . are designed to protect only strong, well-recognized marks."
208 Id. The Act also contains exceptions for comparative commercial advertising, see 15 U.S.C. § 1125(c)(4)(A), and all forms of news reporting and news commentary, see 15 U.S.C. § 1125(c)(4)(C).
Furthermore, the legislative history associated with the Act suggests that the “noncommercial use” exception may be far broader than the set of activities that fall outside the Lanham Act’s “in commerce” requirement. In introducing the bill on the Senate floor, Senator Orrin Hatch (R-UT) declared, “[t]he proposal adequately addresses legitimate First Amendment concerns espoused by the broadcasting industry and the media. The bill will not prohibit or threaten noncommercial expression, such as parody, satire, editorial and other forms of expression that are not a part of a commercial transaction.” Of course, as discussed earlier, many of these forms of expression can constitute a use “in commerce” under the trademark infringement or unfair competition laws. Moreover, state dilution statutes have long been used to enjoin parody, specifically when the offending use may drain a mark’s ability to denote the source of a product. Thus, the federal dilution statute may actually provide less protection from blurring and tarnishment than do existing state laws.

Despite Senator Hatch’s proclamation, it is unclear whether the Act does in fact create such a broad exemption. Contrary to his assertion, the House Report characterized the exception far more narrowly, noting that “[t]he bill will not prohibit or threaten

209 See supra notes 134-163 and accompanying text.
211 See supra notes 151-163 and accompanying text.
212 See, e.g., Deere & Co. v. MTD Prods., Inc., 41 F.3d 39, 44, 32 U.S.P.Q.2d (BNA) 1936, 1939 (2d Cir. 1994) (enjoining defendant’s parody of plaintiff’s trademark under New York’s dilution statute where it was used in advertising for a competing product).
213 Of course, many states do not have dilution statutes. One purpose of the federal statute was to eliminate the disparities among the states. In the context of the Internet, however, the problem of different laws in different states may be immaterial. Although the case law on jurisdiction is far from settled, some courts have held that a Web site owner can be subject to personal jurisdiction if her site can be accessed by Internet users in a particular state. See, e.g., EDIAS Software Int'l, L.L.C. v. BASIS Int'l, Ltd., 947 F. Supp. 413 (D. Ariz. 1996); see also Karin Mika & Aaron J. Reber, Internet Jurisdictional Issues: Fundamental Fairness in a Virtual World, 30 CREIGHTON L. REV. 1169 (1997) (arguing that a non-resident's virtual presence in the forum state can be the basis for in personam jurisdiction if traditional jurisdictional standards are met). A Web site owner can be held liable under whichever state's dilution law is most favorable to the plaintiff, so long as that state also subscribes to this broad conception of personal jurisdiction. Thus, in the Internet context, it matters little whether a particular state has a dilution law or not, since an aggrieved plaintiff can forum shop and file in whatever state maximizes her odds of winning.
'noncommercial expression,' as that term has been defined by the courts." Given the federal judiciary's broad interpretation of the "in commerce" requirement under other Lanham Act sections, the House Report suggests that parodies that fall within the realm of commercial activity—including those that trigger the "doctrine of commercial interference"—might still be actionable. Since the passage of the Act, judges have also been unable to agree on whether parody enjoys a blanket exemption from the trademark dilution law. Thus, it is too early to tell whether or not the federal courts will apply the Act to enjoin specific forms of parody.

Regardless, the dilution law remedy may be unnecessary in this context, because courts have held, in recent decisions such as Bucci and Intermatic, that parodists who procure official-sounding domain names are bound to cause confusion. Therefore, the Federal Dilution Act may well be superfluous—at least for those individuals and companies who have registered their trademarks with the PTO.

D. PARODY AND PRIVACY

In addition to federal trademark violations, a campaign that suffers from a parody spoof can seek relief based on a number of common law and state statutory tort claims. This section first considers the validity of tort claims for injuries suffered by a candidate's reputation and emotional health. I then examine whether political parodies can violate the common law tort of false light. Finally, I evaluate causes of action available under state publicity rights laws.

1. Libel, Defamation, and Intentional Infliction of Emotional Distress. Since New York Times Co. v. Sullivan,\(^{217}\) the Supreme Court has consistently held that a speaker is liable for damages caused to the reputation of a "public figure"\(^{218}\) only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."\(^{219}\) Because a rule that punished assertions that were merely false would have a "chilling effect" on robust political debate,\(^{220}\) the New York Times Court adopted the "actual malice" standard, which protects the public's interest in the free dissemination of ideas.\(^{221}\) In Hustler Magazine, Inc. v. Falwell,\(^{222}\) the Supreme Court noted that parody has "undoubtedly had an effect on the course and outcome of contemporaneous debate."\(^{223}\) Because the Hustler parody could not be "reasonably believable"\(^ {224}\) it could not comport with the "actual malice" standard, regardless of the publisher's true motive.\(^ {225}\)

In our hypothetical case of Dole v. Talley, though there has been documented evidence of actual confusion among visitors who were unclear whether the "dole96.org" site was officially sponsored by the Dole campaign,\(^ {226}\) this does not necessarily infer that com-

\(^{217}\) 376 U.S. 254 (1964).

\(^{218}\) The issue of who counts as a public figure has been considered by the Supreme Court many times. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974) (holding that an attorney representing a plaintiff in a high profile civil suit is not a public figure); Curtis Pub'g Co. v. Butts, 388 U.S. 130, 154-55 (1967) (finding that plaintiffs who commanded a "substantial amount of public interest" at the time of the defamatory publication were public figures); Rosenblatt v. Baer, 383 U.S. 75, 87 (1966) (remanding to the trial judge to determine if the respondent was indeed a public figure). Since then, many lower courts have addressed the public figure question. See Danny R. Veilleux, Annotation, Who Is a "Public Figure" for Purposes of Defamation Action, 44 A.L.R. 5th 193 (1996). Any elected official or individual who has, or appears to the public to have, substantial responsibility or control of government is considered a public figure. See Rosenblatt, 383 U.S. at 85.


\(^{220}\) Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 51-52 (1988). The Hustler case involved a parody of a Campari liquor ad that lampooned the Reverend Jerry Falwell. Playing on the double entendre of the phrase "first time," the parody intimated that Falwell's "first time" had been with his mother. Falwell was not happy. See generally Rodney A. Smolla, Jerry Falwell v. Larry Flynt: The First Amendment on Trial (1991).

\(^{221}\) New York Times Co., 376 U.S. at 279-80.


\(^{223}\) Id. at 55.

\(^{224}\) Id. at 57.

\(^{225}\) See id. at 53 (citing Garrison v. Louisiana, 379 U.S. 64, 85 (1964)).

\(^{226}\) See supra notes 106-111 and accompanying text.
ments on the parodists' Web site were "reasonably believable." Although an Internet user's lack of familiarity with the World Wide Web may increase the likelihood that she would become confused as to the actual source of the information, her ability to judge the plausibility of the site's comical assertions remains undiminished. In this case, viewers are no more likely to believe the actual content of the site than they would a Saturday Night Live skit or an "outrageous" ad parody in Hustler. Thus, with regard to claims of defamation, libel, and intentional infliction of emotional distress, parody should retain the same degree of legal protection in cyberspace that it has earned in other media. When the victim is a public figure, the remedy is generally limited to self-help. Public figures are encouraged to use available speech opportunities (in particular mass media) to contradict the lies or correct the errors, so as to minimize the negative impact on his or her reputation. Since public officials have greater access to channels of communication, they will have better opportunities to counter false statements and thus need not petition the judiciary for assistance.


228 Saturday Night Live was a late-night television program on NBC during the 1970s and 80s that lampooned, among other things, politicians, social issues, celebrities, and other television shows. The show was perhaps best known for its political sketches, specifically its caricatures of American presidents. See generally SATURDAY NIGHT LIVE: THE FIRST TWENTY YEARS (Michael Cader ed., 1994). It was often quite hysterical. In theory, the same show is still on today on Saturday nights at 11:30 PM. However, today's show is not nearly as funny.

229 Hustler Mag., Inc., 484 U.S. at 55.


232 See id. There is some question as to what remains of the "public figure" doctrine in the online world. It is possible that in many instances of libel and defamation in cyberspace, the victim may be held to be a "limited purpose public figure." A limited purpose public figure (1) voluntarily participates in a discussion about a public controversy; and (2) has access to the media to get his or her own view across. See Barry v. Time, Inc., 584 F. Supp. 1110, 1113-22 (N.D. Cal. 1984); Reader's Digest Ass'n v. Superior Court, 690 P.2d 610, 615-16 (Cal. 1984). Most instances of online defamation can be countered with a similar or proportionate response (e.g., the victim of a defamatory Web page could put up his own Web page in response, the victim of a defamatory e-mail could distribute a reply to everyone who received the original message, etc.). Thus, anyone who participates in an online discussion could be held to be a public figure for this limited purpose.
2. False Light. Publicity that places the plaintiff in a false light in the eye of the public is actionable in many states.\(^{233}\) The statements need not be false; they must only "create[] a false image of a person that would be offensive to a reasonable person."\(^{234}\) This tort is similar to defamation, yet need not entail a direct attack on the victim. Rather, the cause of action is typically invoked by plaintiffs where the victim is cast in a false light through "exaggeration or distortion of facts, innuendo, or fictionalization."\(^{235}\)

Again, for this tort to apply, the defendant's statement must be both offensive to a reasonable person and must be "reasonably believable" by the public. The Supreme Court has held that even private citizens, let alone public figures, must prove actual malice to prevail on a claim of false light.\(^{236}\) Thus, where the individual involved is a public figure, the equities generally tip in favor of the public interest and the false light claim is disallowed. Furthermore, where there is a disclaimer of some sort, there can be no liability, since the disclaimer eliminates the possibility that the message might be reasonably believed.\(^{237}\)

As such, the jokes about Senator Dole constitute the easy case—few people would actually believe, if they thought about it, that Dole once forced the nation of Turkey to consume more bananas. However, if Talley and Pace had, for example, asserted that Pat Buchanan had once been a member of the Ku Klux Klan,\(^{238}\) a cause of action might be viable were Buchanan able to

\(^{233}\) See SCOTT, supra note 125, § 12.06, at 12-8.
\(^{234}\) Id. § 12.06, at 12-8.
\(^{235}\) Id. § 12.06, at 12-9.
\(^{237}\) Cf. Byrd v. Hustler Mag., Inc., 433 So. 2d 593, 595 (Fla. App. 1983) (holding that a caption suggesting that a photo of the plaintiff had been retouched "sufficiently clarified the meaning of the picture so that the two, taken together, formed a publication that was neither fake nor defamatory"); Consumers Union v. General Signal Corp., 724 F.2d 1044, 1052 (2d Cir. 1983) ("Disclaimers are a favored way of alleviating consumer confusion as to source or sponsorship."). But cf. Anheuser-Busch, Inc. v. Balducci Publications, 28 F.3d 769, 774 (8th Cir. 1994) (holding that a disclaimer will not excuse unauthorized use when the disclaimer is "virtually undetectable").
\(^{238}\) Note that this is just a hypothetical; I am not asserting that Pat Buchanan is, or ever was, a member of the Klan. But cf. Carol McGraw, Distrust of Buchanan Surfaces Among O.C. Jews, ORANGE COUNTY (CAL.) REG., Mar. 22, 1996, at B6 (recounting tales of protestors at Buchanan rallies displaying signs reading "Pat = Duke Without the Sheets") that referred
show (1) that it would be reasonable for people to believe the statement, (2) that he suffered actual damage to his reputation or emotional health, and (3) that the attack was made with actual malice. Similarly, if the parodists attacked President Clinton with fictitious charges of political corruption or having engaged in improper sexual behavior, the President might have a valid claim were he able to prove actual malice. This again demonstrates the parody paradox as defined by the Second Circuit in Cliffs Notes: A parody must simultaneously create the impression both that it is, and that it is not, the original.\footnote{See Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Group, 886 F.2d 490, 494 (2d Cir. 1989).} If the parody does not adequately convey that it is not the real thing, it could be found "reasonably believable," and would merit significantly less constitutional protection; likewise, if it cannot create the impression that it is the real thing, it has failed as a parody, for the viewer will not associate it with the original. Regardless, the difficulty in proving actual malice would make it difficult for any public figure, let alone a political candidate,\footnote{It is conceivable that attacks by a political competitor could constitute "actual malice" if the comments were made by a candidate out of anger or spite towards her opponent. However, given our interest in encouraging robust and unfettered political debate, see New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), it is unlikely that any court would find a candidate liable for political attacks, absent evidence of overwhelming malice.} to sustain a claim on the ground of false light alone.\footnote{Other common law "privacy torts" include intrusion, see Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973), public disclosure of embarrassing facts, see Melvin v. Reid, 297 P. 91 (Cal. 1931), and the right of publicity, see infra Subsection III.D.3.}

3. The Right of Publicity. The right of publicity refers to an individual's right to control the commercial use of his or her identity.\footnote{See 4 MCCARTHY, supra note 132, § 28:1, at 28-3.} First recognized by the Supreme Court in Zacchini v. Scripps-Howard Broadcasting Co.,\footnote{433 U.S. 562, 562 (1977).} the privilege has evolved over the last two decades to protect celebrities from the commercial misappropriation of their names,\footnote{See, e.g., Edison v. Edison Polyform Mfg. Co., 67 A. 392 (N.J. Ch. 1907) (granting an injunction against the defendant company to restrain it from using the plaintiff's name as a part of its corporate title or in connection with its business or advertising).} nicknames,\footnote{See infra Subsection III.D.3.} images,\footnote{See infra Subsection III.D.3.}
voices,247 and even phrases merely associated with their identities.248 Today the doctrine has been recognized in many, though not all, states.249

These rights apply only against "commercial" uses of name or likeness,250 yet, where the appropriation concerns some matter of public interest, such as a newsworthy event, the First Amendment generally outweighs the celebrity's publicity rights. Unlike the privacy torts, however, the actual malice standard does not apply. Under this body of law, the "fundamental objection is not that the commercial use is offensive, but that the individual has not been compensated . . . . The harm to feelings, if any, is usually minimal."251 Therefore, a public figure can maintain a cause of action so long as the misappropriation is commercial in nature and not a matter "reasonably related to a matter of public interest."252 In general, courts balance the equities between the individual's publicity rights and the public's interest in the free flow of information.253

The parody defense to a right of publicity claim is similar to the fair use exception under copyright law.254 Typically, "the ultimate decision as to whether or not there is a fair use is the

246 See Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129 (Wis. 1979) (determining that the plaintiff did have a cause of action under Wisconsin common law where the defendant marketed products using the plaintiff's nickname "Crazylegs").
248 See, e.g., Midler v. Ford Motor Co., 849 F.2d 460, 7 U.S.P.Q.2d (BNA) 1398 (9th Cir. 1988) (holding that a singer had a cause of action where the defendant used a "sound alike" in its advertisements).
249 See Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 837, 218 U.S.P.Q. (BNA) 1, 6 (6th Cir. 1983) (holding that plaintiff Johnny Carson's right of publicity was invaded by the intentional appropriation of his identity for commercial exploitation by the defendant's use of the phrase "Here's Johnny!").
254 See Zacchini, 433 U.S. at 578.
255 See SCOTT, supra note 125, § 11.05[C], at 11-30.
commercial/nonprofit distinction."255 Thus, when the commercial aspect of the use is slight or vague, the parody defense will be difficult to overcome.

Where politicians are involved, regardless of the entertainment value their behavior provides, the standards are especially high. For example, in Paulsen v. Personality Posters, Inc.,256 a New York state court refused to enjoin a publisher from selling posters emblazoned with a photograph of Pat Paulsen, a comedian making a humorous run at the presidency, above the words "For President."257 Despite the fact that Paulsen had negotiated an extensive merchandising program with another company,258 the court noted that the national political scene "is itself always 'newsworthy' " and thus Paulsen's interests "must bow to the superior public interest in completely unfettered and unabridged free discussion of whatever persuasion, merit or style."259

Similarly, in Stern v. Delphi Internet Services Corp.,260 the same court, more than twenty-five years later, ruled that Delphi's use of a bare buttocks photo of Howard Stern (then a candidate for Governor of New York) to advertise its Internet news service was also a privileged use.261 The court held that informing subscribers about the contents of the online service was indeed a "newsworthy use of a private person's name or photograph [that would] not give rise to a cause of action ... as long as the use is reasonably related to a matter of public interest."262 Regardless of the medium used to inform the public, the fact that "the format may deviate from traditional patterns of political commentary, or that to some it may appear more entertaining than informing, [will] not

255 Id. § 11.05[A], at 11-30.
257 Id. at 503-04.
258 Paulsen had granted an exclusive license to a California company for the production of all campaign materials. See id. at 504.
259 Id. at 507.
261 See id. at 701 ("The fact that the advertisement also contained Stern's photograph ... cannot transform a privileged use into an unlawful use when the goal of the advertisement—to inform potential subscribers about the contents of the on-line service and induce them to purchase it—remains unchanged.").
262 Id. at 698-99.
alter its protected status. 263 Thus, even where a defendant has appropriated a politician's image for its own commercial profit, it is unlikely that a politician could prevail on a publicity rights claim. 264

E. PARODY AND ELECTION LAW

When the Pete Wilson presidential campaign noticed the parody Talley and Pace had established at "wilson96.org," its lawyers threatened the pranksters with criminal charges of violating federal election laws. 265 However, federal election law currently covers only fraudulent misrepresentation of campaign authority made by an actual employee or agent of a federal candidate. 266 Thus, while the law would apply if operatives from one candidate's campaign played "dirty tricks" on another's, 267 the law is silent on

263 Paulsen, 299 N.Y.S.2d at 507-08.

264 One interesting question that deserves further consideration is whether the treatment of politicians under the right of publicity doctrine might evolve as more and more politicians participate in product advertisements upon leaving office. Recent examples include Bob Dole (Visa and Air France), Ann Richards (Doritos), Mario Cuomo (Doritos), Dan Quayle (Lay's Potato Chips), Geraldine Ferraro (Pepsi), and Mikhail Gorbachev (Pizza Hut). See Robert P. Laurence, Politicos Get Their Share of Huckster Pie, SAN DIEGO UNION & TRIB., Jan. 13, 1998, at E6 ("We've come to expect the loser of an election to make more than the winner . . ."). With politicians capitalizing on the commercial value of their publicity rights, perhaps the courts will be willing to grant more protection to their images.

265 See Letter from Brooks Talley to the author, supra note 117.

266 The statute reads:

No person who is a candidate for Federal office or an employee or agent of such a candidate shall—(1) fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof . . . .


267 See, e.g., Grimes v. Smith, 585 F. Supp. 1084, 1086-88 (N.D. Ind. 1984) (accusing defendant of organizing a conspiracy to pay an individual with the same surname of his political opponent to seek the same office), aff'd 776 F.2d 1359 (7th Cir. 1985); Tomei v. Finley, 512 F. Supp. 695, 696 (N.D. Ill. 1981) (enjoining defendant's use of the acronym "REP" to represent his newly-formed Representation for Every Person party in a township election); United States v. Inesco, 365 F. Supp. 1308, 1310 (M.D. Fla. 1973) (recounting defendant's distribution of bumper stickers reading "McGOVERN-GUNTER" where Gunter was his opponent in a congressional election); People v. Duryea, 351 N.Y.S.2d 978, 981-82
the role of unaffiliated individuals, such as the parodists at issue here. The parodists might be liable under common law or criminal fraud, but such efforts are also entitled to significant—though not absolute—First Amendment protection, given the Supreme Court’s fear that subjecting candidates and campaigns to potential liability may chill robust political debate.

The discussion of political affairs is among the most carefully protected of all forms of speech. This proposition reflects our nation’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” As a result, restrictions on political expression require the state to demonstrate a compelling interest sufficient to justify limitations on First Amendment freedoms. Since the threat of government sanctions may unnecessarily deter desirable expression, any such regulation must be narrowly drawn so that its effect is no greater than absolutely necessary to achieve the compelling state interest.

However, preventing fraud, false advertising, libel, and election disorder can all serve as legitimate state concerns. When a statute’s value to the public far outweighs any infringement of free speech rights, such laws may be upheld. Courts typically


Talley and Pace were not acting as employees or agents of any presidential candidate; in fact, both are avowed Libertarians and thus equal opportunity offenders. See Cross, supra note 12 (indicating that Pace and Talley had created parodies that mocked Democrats and Republicans alike).


See Talley v. California, 362 U.S. 60, 63-64 (1960).

undertake such a balancing test\textsuperscript{275} or employ the "actual malice" standard\textsuperscript{276} when campaign speech is targeted by the state. Both doctrines allow the courts to accommodate the public's interest in free expression in determining the legitimacy of the state's interest in controlling and protecting the electoral process.

Furthermore, these sites cannot be banned merely because they are anonymous political statements\textsuperscript{277}. Anonymous speech has played an important role in our nation's political history,\textsuperscript{278} and often provides the only opportunity for a speaker to avoid retaliation, social ostracism, or other private sanctions.\textsuperscript{279} Thus, the government cannot force a parodist to place his name or political affiliation on his Web site, even if his anonymity does spark curiosity or confusion as to the site's true source.\textsuperscript{280}

In our hypothetical case, the same protections that shield speech against privacy and publicity tort claims would apply to protect Web sites from undue restrictions imposed by election laws. Because parody can function as protected political expression, it must be tolerated even at the risk of allowing some misrepresentations of fact to seep into the electoral process. Yet although election laws cannot be too restrictive, speech that would otherwise be actionable does not gain immunity merely because it is made within the context of an election. As such, I turn now to the issue of whether so-called "core political speech"\textsuperscript{281} might be entitled to broader First Amendment protection than speech that merely comments on other social or cultural issues.

\textsuperscript{275} See, e.g., id. at 443 ("Trial courts are well advised to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the enactment of legislation when its constitutionality is under attack.").


\textsuperscript{278} The best example of this is, of course, THE FEDERALIST.

\textsuperscript{279} See McIntyre, 115 S. Ct. at 1516.

\textsuperscript{280} Cf. ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997) (finding a Georgia statute not narrowly tailored to achieve the end of fraud protection because it encompassed Internet transmissions that—although they may have falsely identified the sender—were not fraudulent under the criminal code).

\textsuperscript{281} McIntyre, 115 S. Ct. at 1519.
F. DOES POLITICAL SPEECH MERIT SPECIAL PROTECTION?

Ask Americans on the street why we have the First Amendment and most would probably mention the importance of allowing free discourse and debate over public issues and the qualifications of candidates. According to the Supreme Court, the Constitution's guarantee of freedom of speech—particularly political speech—was intended "to assure [the] unfettered interchange of ideas." However, on occasion it becomes necessary to break out the fetters so that the democratic process can thrive. The Supreme Court has long recognized the vital role of political discourse in determining the future of our nation. For example, in 1995, the Court declared, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." Thus, "[p]reserving the integrity of the electoral process, preventing corruption, and 'sustain(ing) the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." Hence, some restrictions on political expression can be justified. For example, an individual's free speech rights do not entitle him to infringe a candidate's intellectual property rights. Preventing marketplace confusion and creating incentives for innovation are important economic policies; even the benefits of free and unfettered exchange rarely trump these vital state interests.

While characterizing speech as "political" may appeal to one's conception of why we need the First Amendment in the first place,

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282 Cf. New York Times Co. v. Sullivan, 376 U.S. 254, 296-97 (1964) (Black, J., concurring) ("[F]reedom to discuss public affairs and public officials is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion.").


284 McIntyre, 115 S. Ct. at 1519.


it is dangerous to categorize different forms of speech according to content. Allowing a court to pass on the merits of a particular idea or assertion, particularly an unpopular one, gives judges control over what the people see, hear, and think. Therefore, we allow restrictions on certain broad categories of speech that are undesirable in one way or another based on content—yet we generally do not make determinations based on the speaker’s viewpoint. As a result, it is doubtful whether such distinctions between political speech and other forms of expression can justify affording a stronger shield to speech that can be characterized as “political.”

This issue has been a difficult one for the Supreme Court to resolve. For example, in its most recent relevant decision, R.A.V. v. City of St. Paul, the Court endorsed a categorical approach to regulating speech, explaining that restrictions are only permissible on certain categories of speech that are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” These categories can be regulated because of their distinctively proscribable content (e.g., obscenity, commercial speech, etc.). However, within these proscribable categories, the government may not discriminate on the basis of content. For example, a state may prohibit obscenity which is patently offensive in its prurience, but it may not ban only obscene political messages. Likewise, although a state may proscribe verbal threats that tend to provoke violence, it may not forbid only that subcategory of hate speech which insults “on the basis of race, color, creed, religion or gender.” However, this analysis suggests that political obscenity and bias-motivated messages may be regulated, so long as the entire constitutionally proscribable category of speech is similarly restrained. Thus, there is no “special protection” for certain subcategories of expression, such as political speech, so long

288 Id. at 383 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
289 See id. at 383-84.
290 See id. at 388; see also Kucharek v. Hanaway, 902 F.2d 513, 517 (7th Cir. 1990) (“The state is permitted to suppress obscenity but it is not permitted to distort the marketplace of erotic discourse by suppressing only that obscenity which conveys a disfavored message.”).
291 R.A.V., 505 U.S. at 380.
as the restriction on the category is, as a whole, permissible. Despite its obvious social value, political speech is subject to the same time, place, and manner restrictions as are other forms of social commentary. In fact, as Justice White noted in his concurring opinion in R.A.V., in some settings political speech may actually be entitled to less constitutional protection than even so-called "fighting words."

R.A.V. suggests that within certain contexts, a plea of "political speech" will not exempt offensive expression from state regulation. Broad prophylactic measures that restrict free expression can be tolerated so long as they are narrowly tailored to further the state's compelling interest and nothing more. Hence, an artist's photographic enlargement of a fifty dollar Federal Reserve note can violate counterfeiting laws—despite the fact that the artist replaced the portrait of President Grant with that of Nixon in an attempt at political satire. In the Hustler case, Jerry Falwell's mother (assuming she were not also considered a public figure) would likely have had a successful cause of action for emotional distress, defamation, or libel—even though the mock advertisement also lampooned a political activist. Furthermore, an anti-nuclear activist can be enjoined from selling "Mutant of Omaha" T-shirts that display a design confusingly similar to the Mutual of Omaha trademark. And a court can strip an abortion foe of Planned Parenthood's domain name when his use is likely to cause confusion among Net users. So long as alternative avenues of expression that do not conflict with compelling state interests remain available, restrictions such as these do not deprive the public of the benefit of these political ideas.

Of course, none of the above cases surrounded a campaign for the presidency of the United States. However, each did involve

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293 R.A.V., 505 U.S. at 406 n.8 (White, J., concurring).
295 Hustler Mag., Inc. v. Falwell, 485 U.S. 46 (1988); see supra notes 222-225 and accompanying text.
discussions of politicians and controversial public policy issues that certainly would have been no less deserving of First Amendment protection—had they not implicated other compelling state interests. The Supreme Court has established that “even though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that command the same respect.” 298 What is more, the Court has also suggested that speech regarding the election of candidates (i.e., political advertisements) may be subject to greater restrictions than speech related to other issues of public concern because of the state’s interest in purging corruption from the electoral process. 299

Therefore, under all manifestations of trademark law, the “parody defense” earns no additional potency merely because the victim is a politician. 300 The analysis remains the same. As a result, the fact situation in a hypothetical Dole v. Talley lawsuit is analogous to Planned Parenthood Federation of America, Inc. v. Bucc. Like Planned Parenthood, Senator Dole would likely have, at the very least, a valid trademark claim to the domain address that contained his name. Thus, likelihood of confusion may provide courts with ample justification to stamp out political parody on the Web.

IV. HOW IS THE INTERNET DIFFERENT FROM OTHER MEDIA?

Every medium that transmits ideas and expression has special characteristics that raise unique legal questions. Signs on public property “constitute a clutter and visual blight.” 301 Broadcast


300 However, the defense is strengthened against some privacy tort claims when the victim is a public figure. See supra Section III.D.

301 Taxpayers for Vincent, 466 U.S. at 794.
frequencies are a "scarce resource [that] must be portioned out among applicants," to prevent certain voices from being barred from the airways. Even oral solicitation of votes can be suspect when it occurs in close proximity to a polling site. The Court has long recognized that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." With regard to the Internet, the same properties that make the medium so valuable and exciting also raise the potential for abuse and misuse.

What is so novel about the Net that it should require refining and redesigning existing legal rules? First, the Internet "provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions." On the Internet, the start-up and operating costs of mass political speech are significantly less than what would be required to reach a similar audience through traditional media. Second, the Internet is a relative newcomer to the telecommunications scene, and thus most of its users still remain relatively unfamiliar with its protocol. This factor increases the likelihood that Web users will face confusion as they surf through cyberspace. Third, unlike visual and verbal trademarks, domain names are a scarce resource. Each individual address can be used by one and only one Web site. As a result, parties

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307 The universe of possible words from which trademarks might be selected is rather enormous and unlikely to become depleted in the near future. As a result, most commentators believe in the assumption that "marks are fungible and their number infinite." Stephen L. Carter, The Trouble with Trademark, 99 YALE L.J. 759, 770 (1990) (citing William M. Landes & Richard A. Posner, Trademark Law: An Economic Perspective, 30 J.L. & ECON. 265, 274 (1987)); see also Coca-Cola Co. v. Old Dominion Beverage Corp., 271 F. 600, 604 (4th Cir. 1921) (noting that though the court refused to allow the defendant to employ the plaintiff's mark, "[a]ll the rest of infinity is open" for the defendant's use). But cf. Carter, supra, at 788 (arguing that the assumption that marks are fungible and infinite does not hold for all categories of trademarks, and concluding that the "legal protection of marks impoverishes the available market language").
308 The proposals to add additional top-level domains may help mitigate this problem. See infra notes 342-345 and accompanying text. For example, Apple Computer could register "apple.com" and Apple Records could employ "apple.biz." However, so long as ".com" remains
who employ similar marks are forced into direct competition for Web traffic, even if their messages or markets are entirely distinct. Finally, the World Wide Web is not a "pervasive" medium like broadcasting; it does not invade the home and confront the viewer. Rather, the user has to seek out information through a time-consuming process of typing and clicking if he is to enjoy the benefits of cyberspace communication.

These factors, taken together, have generated a hypersensitivity among courts\textsuperscript{309} and legislatures,\textsuperscript{310} both eager to promote traditional, regulated, controlled discourse over this new medium. Reflecting a fear that cyberspace is chaotic and uncontrollable, legal institutions have kept a close watch on the development of the Internet.

By affording individual citizens of limited means the ability to reach a world-wide audience, the World Wide Web significantly furthers the democratization of political and social discourse.\textsuperscript{311} Although the relative absence of government regulation over this medium has "unquestionably produced a kind of chaos," the benefits of free and unfettered exchange generally outweigh the costs of cacophony.\textsuperscript{312} The political parody problem reflects the government's fear that "too much speech occurs in that medium,

the dominant top-level domain, "com" addresses will remain the most desirable, and the controversies over which party is entitled to "apple.com" will continue.

\textsuperscript{309} See supra notes 25-28 and accompanying text.

\textsuperscript{310} See, e.g., Communications Decency Act, 47 U.S.C. § 223(a)-(h) (Supp. 1996), invalidated in part by Reno v. ACLU, 117 S. Ct. 2329 (1997); GA. CODE ANN. § 16-9-93.1 (1981) (criminalizing the transmission of data through a computer network if such data uses a name, trade name, trademark, logo, seal, or copyrighted symbol to falsely identify the person), invalidated by ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997); Internet Freedom and Child Protection Act of 1997, H.R. 774, 105th Cong. §§ 1-3 (requiring Internet service providers to make screening software available to all customers); Federal Internet Privacy Protection Act of 1997, H.R. 1367, 105th Cong. §§ 1-2 (providing legal remedies for cases in which confidential records are made available through the Internet by federal agencies); Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. §§ 1-5.


\textsuperscript{312} ACLU v. Reno, 929 F. Supp. at 883.
and that speech there is too available to the participants." 313 Chaos within the electoral process destroys the Internet's promise of enhanced political discourse. Thus, without any mechanism for centralized control, the Internet may well remain a "vast wasteland" of cacophony: Too many speakers may well result in no one being heard.

Furthermore, because most Web traffic today consists of Internet neophytes, serious potential exists for confusion in cyberspace. For those worried about Internet confusion, however, parody is far from the most serious concern. The more severe obstacle is fraud in Internet commerce. 314 Partly in response to the (rarely litigated) predicament of fraudulent Web sites masquerading as legitimate commercial enterprises, courts have been wary of unauthorized trademark use. Thus, judges have broadly construed the "in commerce" doctrine to encompass mere registration of a domain address as a commercial use within the reach of the Lanham Act. 315 They have characterized Internet users as relatively unsophisticated with regard to the new medium, in order to demonstrate that confusion is bound to occur. 316 Finally, they have recognized that an "excessive delay" in accessing Internet information "disrupts the 'flow' on the Internet and stifles both 'hedonistic' and 'goal-directed' browsing." 317 Because these delays lengthen the period between a user's attempt to access a page and her realization that what she found was not what she was looking for, at least one court has found that delays of a few seconds can increase the likelihood of consumer confusion. 318

Such sweeping interpretations of existing law can help to enjoin improperly motivated domain appropriations, such as speculative cyber-squatting and domain-hijacking. However, these broad

313 Id. at 881 (emphasis in original).
318 See Bucci, 42 U.S.P.Q.2d (BNA) at 1438.
doctrines threaten to stifle legitimate, desirable uses as well. By assuming that Internet activity inherently involves a "use in commerce," and by presuming likelihood of confusion as a result of delays and a supposed lack of user sophistication, the courts have been moving towards a rule that unauthorized trademark use on the Internet is an automatic violation of the Lanham Act. 319 Perhaps, as a public policy objective, this is desirable. It is doubtful, however, that manipulating existing trademark infringement, dilution, and unfair competition doctrine (and perhaps other areas of law in the future) is the proper way to achieve this goal. Thus, finessing trademark principles to extend the reach of the courts to every domain name controversy presents a question of "whether new wine can be poured into an old bottle." 320 The 1946 Lanham Act does not necessarily solve every domain name controversy; it is imperative that courts recognize this fact.

Moreover, due to netizens' reliance on mnemonic domain names, Web publishers often compete for visitors based not on what each has to sell or say, but rather due to their cyber-proximity to their neighbors—the fact that two sites' domain names may differ by as little as a single character. Individual domain names are a scarce resource. A party obtains exclusive use rights for each individual domain name it registers. As a result, World Wide Web expression is unique in that one speaker's expression can interfere with that of his competitor. For example, many visitors to the parody Dole site have stumbled upon it while in search of the official campaign home page. Inevitably, some of them never reached the real thing, either due to confusion or frustration. Compare this form of expression to a Saturday Night Live skit: A viewer may watch a television ad parody that appears similar to the real thing; however, the telecast merely adds to the total amount of political propaganda the viewer will encounter during the campaign. It does not prevent him in any way from viewing actual campaign ads in

319 Cf. Thomas F. Pressur & James R. Barney, Trademarks as Metatags: Infringement or Fair Use?, AIPLA Q.J. (forthcoming 1998) (arguing that some courts are propagating a rule that all unauthorized trademark use is deceptive per se).
320 United States v. LaMacchia, 871 F. Supp. 535, 536, 33 U.S.P.Q.2d (BNA) 1978, 1978 (D. Mass. 1994); see also Oram, supra note 6 (arguing that the economic principles underlying trademark law suggest that its application to certain domain name controversies is somewhat dubious).
other contexts. The candidate remains able to reach that viewer to the same degree and extent. In contrast, in the online world, parties are in constant competition for visitors, represented on their Web-counters as "hits." The existence of a parody site may reduce the number of "hits" the official campaign Web site receives. Thus, a party's control over a similar-sounding domain name can have a significant impact on the extent to which another speaker is able to get his message out.

Finally, the World Wide Web is fundamentally different from traditional forms of communications media, particularly television broadcasting (which currently accounts for most candidate political speech). Internet communications do not "'invade' the individual's home or appear on one's computer screen unbidden." Rather, users must hunt for information through a "series of affirmative steps more deliberate and directed than merely turning a dial." In doing so, they undertake significant search costs in order to find specific information. Domain names, like trade-

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321 A "hit" occurs each time a visitor accesses a different file on a Web page.

322 For example, Steven C. Brodsky, a member of Outreach Judaism, a national organization dedicated to fighting the group Jews for Jesus, established a Web site at "jewsforjesus.org." The site advised visitors to follow a link to the Web site of Outreach Judaism, "to learn more about how the Jews for Jesus cult is founded upon deceit and distortion of fact." Brodsky acknowledged that his intent in creating the site was "to intercept potential converts before they have a chance to see the obscene garbage on the real J4J site." Thus, Brodsky was attempting to keep Web users from viewing Jews for Jesus's message. Jews for Jesus, whose official Web site was located at "jews-for-jesus.org," filed suit, alleging, inter alia, trademark infringement. See Jews for Jesus Are Asking Exactly Who's For Jesus, NAT'L L.J., Feb. 16, 1998, at A27; see also Jews for Jesus v. Brodsky, Civ. No. 98-274 (AJL), 1998 WL 111676 (D.N.J. Mar. 6, 1998) (granting a preliminary injunction to restrain Brodsky from using the domain name).

323 See Pew Research Ctr., supra note 56 (describing the role television plays in the electoral process). Similarly, in the New York Senate race between Geraldine Ferraro and Sen. Alphonse D'Amato (R-NY), a Republican political consultant registered and created a Web site at "ferraro.com." The site urged visitors to "Vote D'Amato!" before forwarding them to the official D'Amato campaign site. See Sorensen, supra note 104. Similar to Brosky's effort, the mock site was intended to prevent viewers from accessing information about Ferraro and instead forced them to encounter D'Amato's message.


325 See Frank H. Easterbrook, Cyberspace and the Law of the Horse, 1996 U. CHI. LEGAL F. 207, 212 (1996) (noting that the process by which users find official Web sites is "costly and can be avoided by correct allocation in the first place").
marks, convey information that allows Net users to limit the scope of their investigations. Yet, when this source-denoting information is unreliable, it is the netizens—as well as the Web site operators—who bear the costs of difficult searches. Hence, it becomes more difficult for speakers to reach their desired audiences and tougher for the user to find what she is looking for.

All communications media are not created equal. Courts and legislatures must appreciate the distinctive qualities of each specific medium, and must therefore tailor legal solutions to address these specific peculiarities. In the absence of adequate and efficient legal rules, however, private parties will pursue their own private solutions, through the aid of social networks and technological innovations. In Part V, I analyze potential legal, social, and technical solutions that might help minimize the negative effects of unfettered political chaos in cyberspace.

V. POTENTIAL SOLUTIONS

When emerging technologies create new social problems, victims can resort to three different kinds of responses. They might seek legal solutions by following traditional judicial, legislative, or administrative paths. They can harness social forces to circumvent the problem or to exert pressure on the offending behavior. Or, alternatively, victims may resort to self-help in the form of technological counterattacks. Judges and legislators should keep in mind that social and technological solutions, as well as adminis-

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328 There are numerous "costs of confusion" involved in searching the Web. Among these are: the cost of developing more advanced search engines and better indexed Web directories, books that help users find specific sites, and the additional time users must spend online because their searches take longer (including the hourly charges most service providers charge for Internet access).
329 One alternative to government policy-making is the virtual community model. This model suggests an arrangement in which consumers, online providers, and governmental bodies work together to develop an integrated, cost-benefit approach that considers the impact of each player's role on the overall system. See Byron F. Marchant, On-Line on the Internet: First Amendment and Intellectual Property Uncertainties in the On-Line World, 39 HOW. L.J. 477, 500-02 (1996).
330 See generally ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 123-136 (1991) (arguing that social norms can be used to achieve order and control without resorting to law).
trative and legislative responses, are legitimate options for addressing these developing issues.

A. LEGAL REMEDIES

A campaign faced with an offensive Web parody may choose to pursue any of a number of legal solutions. In Part III, I considered potential legal claims that could be maintained to enjoin the use of unauthorized domain names. However, judicial remedies are often not very realistic, given their costs (both in time and dollars), the numerous other priorities faced by political candidates, and the negative press coverage such action would likely provoke. Perhaps the preferred legal solutions require the involvement of administrative agencies, such as the Federal Communications Commission (FCC) or the Federal Election Commission (FEC). Such administrative actions, however, must still pass muster with the First Amendment.

There are many possible administrative solutions. For example, Congress could grant the FCC the authority to make ad hoc determinations as to which parties are entitled to specific domain names. Under such a regime, if an applicant requested a domain that contained a registered trademark, the trademark owner would have a certain number of days to oppose the application. Such a policy could be implemented in either of two ways: by stripping NSI (or its successor) of its authority and undertaking the responsibility itself, or by granting NSI legal immunity on the condition that it adopt appropriate procedures and requirements. Since the Patent and Trademark Office already uses similar procedures to determine whether new trademark registration applications infringe existing marks, such a policy would likely be upheld as a constitutional time, place, or manner restriction. This alternative serves the compelling state interest of reducing consumer

331 Alternatively, the FCC might be advised to delegate the responsibility to the Patent and Trademark Office, given its expertise in trademark disputes.
332 Of course, NSI (or its successor) would probably demand federal funding to develop such a system, as this program would likely be extremely costly.
confusion as to source or sponsorship. Likewise, the plan is also
narrowly tailored, for it only prevents unauthorized use of marks
as domain names where the mark serves a source-denoting
function. It is essential, however, that such a policy forbid only
registration of domain names that potential Web visitors would
likely find confusing. This may require an expensive registration-
by-registration analysis, similar to that currently used for trade-
mark registration. Thus, “dole96.org” would likely be restricted,
but “no-dole96.org” or “dole-parody.org” would not.

This response can be considered analogous to the FCC’s scheme
of awarding licenses to those broadcasters the Commission believes
best serve the public interest. Under Red Lion, this system is
constitutional because it involves the allocation of a scarce resource
by a government agency that has the right to attach conditions to
its use. Thus, the FCC, NSF, or NSI could require that the
“dole96.org” domain address only be used to promote a presidential
campaign for a candidate named Dole. This restriction leaves open
numerous alternative avenues for expression by other groups and
individuals, as there would still remain a myriad of domain names
that parodists, political opponents, and even outside groups of Dole
supporters could use in disseminating their messages.

Alternatively, NSI (or its successor) might establish arbitration
proceedings in which parties contesting the ownership of a
particular domain name could sit down together and negotiate a
compromise. By bringing the parties together, NSI could help
substantially reduce litigation costs by having a neutral arbitrator

broadcast frequencies are allocated among competing applicants “in a manner responsive to
the public ‘convenience, interest, or necessity’”) (quoting Radio Act of 1927, § 4, 44 Stat.
1163). But cf. Easterbrook, supra note 326, at 212-13 (suggesting that the FCC has failed
in its effort to allocate broadcasting licenses via the public interest formula and urging that
domain names be spared from similar treatment).

335 Examples of acceptable addresses might include: “dole-parody.com,” “no-dole.com,”
“friends-of-dole.org,” “veterans-for-dole.com,” etc. However, such a system creates a
substantial problem for Web parodists, who, it will be remembered, must simultaneously
create the impression that the site both is, and is not, the official campaign home page. If
a parody site is required to employ a domain name such as “dole-parody.com,” visitors
would immediately recognize the parody for what it is, leaving the parodists unable to instanta-
neously perplex their audiences.

(discussing the social costs of private negotiation).
decide the dispute. Either way, there is much that government can do to ensure that Web addresses are used in the manner most consistent with the public interest.

Finally, the Federal Elections Commission could solve the problem itself by establishing a common host for all official candidate sites. The FEC could develop a site located at, for example, “www.election.gov,” and assign candidates space on its own server. Thus, the Dole campaign could have its home page at “www.election.gov/dole,” with the Clinton campaign at “www.election.gov/clinton,” and so forth. In addition, the home page at “www.election.gov” might contain hypertext links to each candidate in every race, so that by accessing the FEC election home page, visitors could jump to the site of the candidate of their choice.

Once the FEC site became established and well-publicized, voters would know to look for official candidate home pages at “www.election.gov.” Again, this solution could also be expected to be upheld as constitutional, for it serves the compelling state interest of informing the electorate. Of course, the FEC would have to allow every registered candidate equal access, regardless of their viewpoint, political party, or likelihood of winning. In this context, government action seems an appropriate instrument for enabling the citizenry to make informed electoral choices.

B. COLLECTIVE SOLUTIONS

Alternatively, a number of extra-governmental solutions could effectively address the problem. Efforts to solve this dilemma could be led, for example, by a coalition of disgruntled campaign staffers or perhaps by organizations dedicated to providing the public with election information, such as the League of Women Voters or the California Voter Foundation. In fact, such efforts have already

337 Alternatively, the addresses could be “dole.election.gov,” “clinton.election.gov,” or “perot.election.gov,” etc.

338 However, the FEC might choose to allocate space only to candidates who have gained access to the ballot in a certain number of states. Such a scheme would be similar to that established for public financing of presidential campaigns, in which funding is based on ballot access and the party’s past ability to achieve a minimum number of votes in the previous election. This system was upheld in Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam).
begun: In 1996, various public interest groups published Internet directories which listed and linked to officially-sponsored candidate sites. In the future, popular search engines such as Yahoo! might list candidate home pages, or better yet, offer individual voters online sample ballots that link to all of the candidates in their own districts. Alternatively, the candidates themselves might collectively establish a Web site containing links to each of their individual campaign home pages. Once established and promoted, these sites would assist voters in accessing the information they are looking for, thereby reducing their reliance on domain names.

The International Ad Hoc Committee's (IAHC) response to the dilemma of multiple legitimate trademark owners seeking the same domain name might well address the political parody issue as well. In response to cases in which two or more organizations with the rights to identical trademarks for different product classes or geographical areas seek to register the same domain name, the IAHC has proposed the creation of additional generic top-level domains (gTLD's), including "firm," "store," "arts," "info," and "rec." This change would allow companies to share common


If a user can enter his zip code and get a listing of all the movies playing in his area, see MovieLink (modified daily) <http://www.movielink.com>, or all the television shows on that night, see TV Guide Entertainment Network, TVgen (modified weekly) <http://www.tvguide.com>, one could definitely create a Web site that accepted a user's zip code and produced a sample ballot with links to all the candidates' Web sites.

For example, all of the candidates running for a particular Senate seat might agree to establish a Web site at, say, "www.ohio-senate.com," which then would link to each of the individual campaign home pages.

Recall the same example discussed earlier: Fidelity Investments and Fidelity National both sought "fidelity.com." See supra note 101.

second-level domains, while each address would have a distinct top-level suffix.\textsuperscript{344} Granted, to date the “.com” dominion has become “an international marketplace teaming with cyberspace activity” and the “.org” designation is next in line in terms of its desirability.\textsuperscript{345} However, given the rapid growth and structural change now taking place on the Internet, users are likely to soon become familiar with and adapt to the new gTLD’s, hopefully without much consumer confusion.

In the context of political campaigns, the InterNIC could propagate a top-level domain such as “.campaign”—or perhaps for particular races, “.prez,” “.senate,” “.congress,” etc.—and restrict registration to legitimate candidates.\textsuperscript{346} These new hierarchical domain levels would represent the InterNIC’s stamp of approval that a particular Web page is indeed the official site of a legitimate candidate.

The most basic private solution is simply to allow parties to bargain among themselves for particular domain names.\textsuperscript{347} So long as property rights are clearly defined, parties can bid for them in a developed aftermarket.\textsuperscript{348} To promote bargaining, the InterNIC could develop mechanisms or procedures to help domain name owners buy and sell addresses. This would reduce transaction costs by bringing parties together for mutually-beneficial exchanges.\textsuperscript{349}

\textsuperscript{344} Thus, one of the Fidelities could take “fidelity.com” while the other settled for “fidelity.biz.” This often happens today, as many companies settle for “.org” addresses if the “.com” address is already taken. Yet the “.org” suffix generally implies non-profit status. Few would think to look for the McDonald’s home page at “www.mcdonalds.org.” Yet, once citizens become accustomed to the “.biz” suffix, it might well become as desirable as “.com.”

\textsuperscript{345} It may be difficult to determine which candidates are legitimate. Obviously, ballot access would not provide an appropriate test, as many candidates will desire Web sites before officially declaring their candidacies, and in order to obtain their party’s nomination. This is one of many practical issues the InterNIC would have to struggle with in developing a plan to deal with these issues.

\textsuperscript{346} See Easterbrook, supra note 326, at 213-16.

\textsuperscript{347} See id.

\textsuperscript{348} These markets already exist—where else—on the Internet. For a list of domain name brokers on the Web, see Yahoo!, Yahoo! – Business and Economy:Companies:Internet Services:Domain Registration:Brokerages (visited Mar. 20, 1998) <http://www.yahoo.com/Business_and_Economy/Companies/Internet_Services/Domain_Registration/Brokerages/>
However, traditional bargaining problems, such as the possibility of bilateral monopolies and the significant likelihood that political opponents might refuse to negotiate in good faith, remain considerable. Still, governmental or privately-created organizations could strive to solve these difficulties.

C. TECHNOLOGICAL RESPONSES

There are two categories of technology-based responses to the parody problem. First, the spoofed campaign itself could attempt to exploit new Internet technologies to distinguish its Web site from the parody, so that visitors would have no doubt as to which one was the real thing. Currently, there are only so many things you can do with a Web page, and most can be achieved by an Internet novice. The great majority of 1996 candidate sites contained little more than a few pictures, a handful of position statements, and an occasional form that visitors could fill out to get more information or to join an e-mail distribution list. As the Internet matures, however, Web sites will soon include such features as two-way video-conferencing, real-time audio Webcasting, and live animated graphics. However, design and maintenance of these complicated Web functions is certain to be more time consuming and expensive. Thus, only well-funded organizations will be able to employ such technologies. This will present campaigns with the opportunity to distinguish themselves from the cheap knock-offs. Just as few individuals have the ability or resources to create a professionally-looked television commercial, high-quality Web sites may be similarly difficult to duplicate in the near future.

Second, the industry could modify Web browsers and/or software plug-ins to incorporate site identification methods, such as the
certificate system developed to authenticate merchants' identities for credit card purchases.\textsuperscript{352} This feature would allow users to verify that a Web page is in fact a product of the acclaimed source. Unfortunately, since anonymous speech cannot be outlawed except in very limited situations,\textsuperscript{353} there is probably no way to legally obligate Web site operators to identify themselves. Yet, if major commercial and non-profit sites utilize this device to assure netizens that their sites are legitimate, these online social norms may well make it customary for visitors to check the authenticity of Web sites.\textsuperscript{354} Such a system would provide users with an additional and theoretically superior source-denoting tool, thereby reducing the likelihood of cyberspace confusion.

\section*{VI. CONCLUSION}

Parody is obviously a valuable technique for political expression. Throughout the history of our nation, this expressive device has been utilized as an entertaining and attention-grabbing form of social commentary. Parody can also be highly effective. One need

\begin{footnotesize}
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\item \textsuperscript{353} See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (holding that the freedom to publish anonymously is protected by the First Amendment).
\item \textsuperscript{354} Even if a Web site operator does not initially desire to participate in the site identification system, if the Web community as a whole begins to adopt the site identification system, there may be social pressures on non-participants to join the system. Once a majority of Web sites adopt site identification methods, and browsers can be configured to signal or avoid sites that do not identify themselves, the non-participants will have an incentive to identify themselves, for if they do not they will lose viewers. This is similar to the system of social control generated by the advent of the V-chip, which may be used to coerce television broadcasters into rating their programs. Once the V-chip becomes commonplace in American society, it can be used to screen out programs that the broadcasters refuse to rate. This creates incentives for broadcasters to rate their programs, as they will soon realize that their own ratings will fall if they refuse to participate in the system. See J.M. Balkin, Media Filters, the V-chip, and the Foundations of Broadcast Regulation, 45 DUKE L.J. 1131, 1164 (1996).
\end{itemize}
\end{footnotesize}
only consider the success of *Saturday Night Live* in portraying Gerald Ford as a bumbling fool, Jimmy Carter as a technical wizard, and Ross Perot as a fast-talking, cliché-wielding crackpot to recognize the power of parody and satire. However, in many instances, the victims of parody find this method of poking fun to be no joke at all. There is a fine line between amusing social commentary and confusing the general public. Courts are often called upon to determine whether such efforts have induced actionable harms, regardless of their entertainment and social value.

As a medium for social intercourse, the Internet is far from ready to assume its role as the savior of American democracy. Despite the promise of low-cost, worldwide political dialogue, there is currently too much chaos in cyberspace to allow an individual to effectively promote political ideas using the World Wide Web alone. Perhaps the Net will never attain its anticipated position as the epicenter of political discourse. Yet, given the Internet's growing importance in American culture and the fact that using it is a bargain as compared to the cost of television advertising, politicians are unlikely to end their courtship of netizens any time in the near future. Thus, a political campaign will be forced to deal with the parodies, the attacks, the domain-hijackers, and the cybersquatters. Given current trends, however, by the 2000 election, the law may be squarely on the politician's side.

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558 Cf. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 86-88 (1960) (decrying the failure of radio communication to "cultivate[] those qualities of taste, of reasoned judgment, of integrity, of loyalty, of mutual understanding upon which the enterprise of self-government depends" because it became too engaged in making money).
Most likely, it will not be a parody case that determines the boundaries of free speech on the Internet. Rather, the Supreme Court's decision in *Reno v. ACLU* will probably set the stage for numerous lower court decisions that determine who can stop what types of online behavior. However, while halting the dissemination of child pornography is certainly a laudable goal, there is significant danger in allowing this decision alone to define the limits of Internet speech. What may be appropriate paternalism in one context can have damaging effects in another. When legal rules are fashioned too broadly, they may later be construed to burden certain forms of speech or behavior never contemplated by those who designed them. Furthermore, not every problem requires a legal remedy; in the absence of legal rules, individuals will pursue their own private and collective solutions. Particularly where judges and legislators are unfamiliar with the medium, they should defer to society and technology for the answers.

For now, there is little cause for alarm. The hypothetical case put forth in this Article would probably never be litigated in the real world. Even if it were, as noted throughout this Article, judges retain enormous flexibility to manipulate legal rules in order to reach just outcomes and to protect free speech. Nevertheless, at least with respect to trademark issues, Internet law is clearly headed in a disturbing direction. Under current doctrine, merely registering a domain name can trigger the Lanham Act's "in commerce" requirement. Moreover, Internet users are generally assumed to be unsophisticated and easily victimized by online confusion. While these rules may help courts punish cybersquatters, one can also extend these precedents to cases in which significant free speech rights are at stake. Although the privacy, publicity, and election laws have yet to undergo similar refinement to allow them to reach Internet abuses, similar dangers exist in these contexts as well. Broad interpretation and manipulation of existing legal rules can provide judges with a wider net that might help them catch more wrongdoers; however, it is imperative that authorities take into account the innocent victims that newly-expanded legal doctrines will inevitably snare.

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359 See supra Section III.A.
Perhaps the parody problem is just a pothole along the Information Superhighway. Coase, of course, would tell us that when legal rights are clearly defined, the parties will simply bargain their disputes away. However, the issue does highlight the Internet’s predicament: too much speech, too much chaos, and too many lawyers who think they have all the answers. Legal remedies and administrative intervention may or may not be an appropriate way to deal with these issues. Thomas Jefferson once warned that “laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed ... institutions must advance also, and keep pace with the times.”

Yet at what point do we abandon our faith in the capability of our existing institutions to keep pace with technological advances? These problems are not easy; simple answers will likely turn out to be setbacks, not solutions. Thus, rather than make unwise ad hoc decisions, judges and legislators must give serious consideration to the consequences of the legal rules they create. Having done so, they should be willing to defer to non-legal solutions until they can be sure that the laws they make will not produce such unfortunate effects.

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360 See generally Coase, supra note 336 (proclaiming the virtues of private bargaining).