TRADEMARKS AND POLITICAL SPEECH

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I. INTRODUCTION

A slogan is a phrase used to advertise or promote a product, service, political candidate, or organization. Political candidates rely on slogans to promote themselves as the better choice against their opponents, and they frequently use previously trademarked slogans in order to advance their message. However, when a trademark holder's phrase or slogan becomes the repeated catchphrase associated with a candidate or political cause, that trademark holder may rightly become concerned.[1]

In most cases involving political use of trademarked slogans, courts repeatedly have ruled in favor of politicians. The courts have stated that politicians used the trademark in a noncommercial manner and, thus, their

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[1] *See* John D. Shakow, *Just Steal It: Political Sloganeering and the Rights of Trademark Holders*, 14 J.L & POL.199 (1998).

use maintains the value of free speech and the marketplace of ideas. Along similar lines, the courts have also denied trademark protection for political slogans created by politicians during a campaign. These slogans are seen as expressive phrases, detached from commercial means, and consequently are disqualified from trademark protection. That distinction is not correct and should be re-evaluated. The use of trademarks by politicians in their speeches, as well as the creation of original slogans during the course of their campaigns, correspond to the use of marketing strategies that look for the support needed for a certain politician to prevail in a particular election. The relationship between trademarks and political speech is clearly a tense one because trademark holders do not get the protection needed in the political scenario.

Courts have acted in accordance to the belief that the Constitution prohibits any restriction on political speech, unless a party can prove a compelling state interest to the contrary. However, this philosophy assumes that political speech has inherent democratic value that advances the principles of government and of the democratic process.[2] By extending First Amendment protection to incidental speech in support of the democratic process, courts must consider the way it interprets First Amendment rights.[3] Courts have not confronted a major struggle in their restriction of obscene, libelous, scandalous, or misleading political speech, since these types of speech cause harm more often than good. Said reasoning should also be applied to trademark plagiarism in political speech.[4] It is not the same to occasionally use a known trademark to express a particular idea, as it is to use it as a promotional slogan for a politician. By repeatedly using it as a catchphrase, people will associate the trademark with the politician and seeing that the motivation behind the use is purely commercial, it should not be awarded with the overwhelming First Amendment protection.

Another view states that political slogans are commercial speech rather than political discourse. It presumes that political slogans have minimal informational value and that politicians choose to adopt a commercial mark for its associative and market power rather than for its content.[5] In fact, many politicians seek trademark protection for their original slogans so that they may obtain the legal means by which to market them as a product that warrants consumer support.

In cases of political trademarks, courts have applied First Amendment considerations too broadly. They have not restricted political speech in relation to trademarks because of their emphasis on freedom of political speech; they have not considered the notion that the current political speech

[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

is not the one the Constitution intended to protect. The use of trademarks in political speech corresponds to political marketing strategies, and the courts currently do not invoke the Lanham Act to give trademark holders the resources needed to act against infringers.[6] Due to the fact that politicians have now begun to claim trademark protection as a result of the positive impact these slogans have had and because of their commercial value to their campaigns, the law should consider granting trademark protection to political speech. There is a risk that the courts may see political speech as immune to corruption since almost all speech could be considered political. However, protecting all types of political speech could open the door to an outright ban on any law that limits speech, which could dangerously disable government and society.[7] In that sense, courts should differentiate each particular type of political speech in order to distinguish the purpose of the issue in question and to see whether any restrictions should be applied, if any, and in what circumstances.

This article will discuss two (2) related issues concerning political speech. First, this article will consider the use of trademarked slogans in political speech. Second, it will examine the lack of trademark protection for original political slogans. In the second part of this work, we will discuss the background of these two issues and of the laws surrounding them. In the third part, we will discuss, in depth, the arguments in favor and against the maintenance of current laws, which include First Amendment considerations and the distinctions between commercial and noncommercial speech. In the fourth part, on the other hand, we will examine the differences between political campaigns and advertising campaigns, the application of trademark law, and the proposal of possible changes in these laws. Moreover, the remaining part of this work will be dedicated to explaining the necessity to change current laws and to set forth our conclusions summing up our main theses.

The purpose of the political slogan, as well as the commercial slogan, is trying to sell a product, the politician himself. The distinction made between the two types of speeches is artificial, since both the politician and the business are competing for people's support. Both sell and offer services. The politician sells his talents and ideas, and people support him in the same way that they buy Adidas tennis shoes.

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[6] Lanham Act (U.S. Trademark Act), 15 U.S.C. §§ 1051-1141.
[7] Shakow, *supra* note 1.

II. BACKGROUND

A. The Problem of Trademark Usage in Political Speech

The courts have constantly resolved that politicians' use of trademarks in their speeches does not constitute infringement. For example, the conservative interest group Concerned Woman for America (CWA) registered its "Putting Families First" slogan in 1995, and sought to enjoin the Democratic National Committee (DNC) from using "Families First" in brochures and speeches during the 1996 National Convention.[8] CWA argued that the DNC's use of their phrase diluted the impact of the brand and confused voters.[9] However, the court denied the injunction and stated that the DNC's use created little likelihood of confusion and was, therefore, not actionable under federal law.[10] Additionally, the federal anti-dilution policy specifically excludes noncommercial speech.[11]

In another example of trademark law, MasterCard International sued then presidential candidate, Ralph Nader, for copyright and trademark infringement based on Nader's use of an ad similar to MasterCard's "Priceless" campaign.[12] The court ruled that Nader's ad was sufficiently transformative from MasterCard's ads, and that the ad had in fact "a political noncommercial purpose." [13]

Similarly, when an Ohio gubernatorial candidate borrowed the "AFLAC duck" in order to portray his opponent in a negative light in an Internet campaign, the court denied the preliminary injunction sought against him.[14] The court stated that even though the public may associate the candidate's cartoon with the trademarked AFLAC duck, the cartoon, as a political message, is shielded by both the Constitution and the statutory exemption.[15]

During the 1980s, the Reagan administration Strategic Defense Initiative became known as "Star Wars." When the creator of the *Star Wars* film franchise sued the defendants, the court ruled that the plaintiff's trademark was only protected against those who sought to attach the words to products or services that competed with the plaintiff in the marketplace, or against those who diluted the value of the words by engaging in a non-

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[8] Benjamin Sheffner, *The Democrats Can Put "Families First," Judge Rules*, ROLL CALL, Aug. 26, 1996.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] MasterCard Int'l Inc. v Nader 2000 Primary Comm., Inc., 2004 WL 434404, 2004 U.S. DIST. LEXIS 3644 (S.D.N.Y. 2004).
[13] *Id.*
[14] American Family Life Insurance Co. v. Hagan, 266 F. Supp. 2d 682(N.D. Ohio 2002).
[15] *Id.*

competing trade.[16] Since the defendants had not affixed the plaintiff's trademark to any goods or services for sale, and since they were not in competition with plaintiff, they were not penalized for infringement.[17] However, if the politician's objective is to sell his image and to obtain support from the citizens; then, in this case, Reagan and George Lucas were both competing for the same thing: the attention and support of the public.

In addition to these examples, many other infringement cases have been brought against political candidates. Trademark holders do not often oppose the sporadic use of their trademarked material in politicians' communications; however, when a trademark holder's property, in the form of a phrase or slogan, becomes the repeated catchphrase associated with a candidate or political cause, trademark holders become concerned.[18] In a world controlled by the media, a politician's sloganeering is the most important part in his or her campaign.[19] As the message spreads, there is a possibility that it can cause great harm to the politician and to the trademarked material, unless the politician has control of the message.[20] Corporations routinely invest a fortune into crafting a positive corporate image, slogans, and *persona*.[21] Politicians seek to capitalize on this value when they take someone else's slogan for their own use.[22]

Candidates are attracted to well-known trademarks in large part because these slogans inspire goodwill.[23] Politicians use known slogans or trademarks in their efforts to connect with the electorate. The popularity and effectiveness of these slogans among the public will continue to motivate their incorporation in politicians' campaigns. Notwithstanding, courts should evaluate the use given to a particular slogan by the politician, so it can determine if it should be restricted in order to protect a trademark holder.

B. Insufficient Trademark Protection of Original Political Slogans

The Lanham Act defines a trademark as "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others."[24] Slogans can be divided into two main

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[16] Lucasfilm, Ltd. v. High Frontier, 622 F. Supp. 931 (1985).
[17] *Id.*
[18] Shakow, *supra* note 1.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] 15 U.S.C. § 1127 (Supp. I 1995).

categories: political slogans and commercial slogans.[25] A political slogan is designed to influence the political opinions of the public and to steer them towards a certain candidate or policy. In contrast, a commercial slogan serves to remind the consumer of a specific brand and to influence his or her future purchases. While the specific persuasive goals may be different in these two (2) categories, the purpose of both slogans is to inspire a certain response from the audience. A slogan is considered a mark when it reminds consumers of its producer rather than the product that is being advertised.[26] Political slogans fit into this mold because their objective is to remind people, not only of a particular message of the politician, but also of the politician himself. In that sense, the politician is using the slogan to market himself, to get the support needed to prevail in the election, and to obtain the economic support needed to finance the campaign.

In many instances, slogans are short sentences or phrases that capture the brand essence, personality, and positioning of a company, distinguishing them from their competitors. Similarly, political slogans capture the essence, viewpoint, and message of a politician and serve to distinguish him from his competitors. Marketing experts know that the best way for a product or a candidate to be remembered is through a slogan or platform that is succinct and easy to remember.[27] A great slogan can also be trademarked for use on products such as clothing, mugs, and other campaign articles. With the evolution of media and political campaigns, future candidates must decide whether or not to seek trademark protection for their original slogans.[28] Not only may candidates use these slogans for their products, but also to prevent the use of variations on a good slogan by other candidates.[29] Marketing strategies apply to both political and commercial speech due to the fact that their goal is to generate a commercial transaction; one, by the profit that his or her ideas generate by prevailing in the election, and the other, by experiencing an increase in sales.

Political slogans can boost the involvement of citizens in a political movement. The accessibility and prevalence of these slogans in the media can make it easier for the electorate to become motivated and involved in the political process because they feel as if they are a part of the campaign. In a democratic process as well as in any marketing campaign, it is very important for the majority to feel passionate and to identify with a spirit of

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[25] Lisa P. Ramsey, *Intellectual Property rights in advertising*, 12 MICH. TELECOMM. TECH. L. REV. 189 (2006).
[26] *Id*.
[27] Sebastian Gibson, *The Marketing of Candidates Using Trademarks and Campaign Slogans in California and the U.S.*, (Oct. 17, 2008), http://www.articlesbase.com/intellectual-property-articles/the-marketing-of-candidates-using-trademarks-and-campaign-slogans-in-california-and-the-us-607721.html.
[28] *Id*.
[29] *Id*.

involvement and support. Without this feeling of investment, the electorate would be overcome by apathy, which would consequently lead to lower political participation and to a greater sense of detachment among the public.

Political slogans are very important to the campaigning process. Aside from acting as a source identifier for the politician, they also serve as a tool to finance the campaign itself. The economic structure of a campaign relies upon contributions; that is, people donate to a campaign when they identify with its message, which is promoted through a slogan. This slogan can motivate people to contribute to the campaign and to buy certain goods that serve to advertise the slogan. Without these messages, people would not get involved, and as a result, not finance the candidate's campaign.

The law does not currently permit candidates to trademark their slogans, because of the First Amendment considerations previously discussed. But, political slogans are part of the economy and they are a commercial expression that is needed to finance a campaign. A political campaign is analogous to a commercial campaign because both are constructed in accordance to marketing strategies. The political slogan, like the commercial slogan, is trying to sell a product, in this case, the politician.

III. THE USUAL EXPLANATIONS FOR MAINTAINING THE STATUS QUO

A. First Amendment Considerations

The First Amendment prohibits the creation of any law that seeks to restrict speech.[30] In determining whether a law unduly restricts speech, courts have balanced the interests of the speaker against the interests of the government.[31] The courts' rulings have shown that trademark rights do not entitle the owner to quash the unauthorized use of a mark by another who is communicating ideas or expressing a point of view.[32] When an unauthorized use of another's mark is part of a message and does not serve to identify a source, the protection of the First Amendment applies completely. However, is a slogan not a source identifier, attached to an ideological content that makes the consumer think of the producer or the promoter?

In *Rogers v. Grimaldi*, the Court of Appeals for the Second Circuit determined that the interest in preventing consumer confusion outweighed the concern of free expression alleged by the filmmakers.[33] The court noted that the expressive element of film titles, portraying Rogers' name, even when she was not in the movie, generally afforded them more protection than ordinary commercial labels, but held that a misleading title with

[30] Shakow, *supra* note 1.
[31] *Id.*
[32] *Id.*
[33] Rogers v. Grimaldi, 875 F.2d. 994 (2d Cir. 1989).

absolutely no artistic relevance cannot be justified as a protection of free expression.[34]

However, because political speech is considered to be at the core of the First Amendment and has traditionally been awarded with the greatest amount of protection, courts must apply the strictest scrutiny when balancing the rights of the parties involved. In that sense, to acquire trademark protection for a political slogan and to consider the use of trademarked material in political speech to be infringement, the party must demonstrate that there is a compelling state interest that justifies a restriction of speech. Courts have not distinguished between all kinds of political speech; they have simply made a broad interpretation dictating that almost anything political should be awarded First Amendment protection without evaluating the individual circumstances. If they evaluate each circumstance, in order to see if the First Amendment protection fully applies, the practice of politicians appropriating another's slogan to promote themselves *commercially* should not be one of those circumstances when one acknowledges that the use employed by the politician relates to marketing strategies and not to the dissemination of ideas.

The principle that gives the broadest protection to political speech responds to the view that political speech forwards the democratic process and is relevant to self-government purposes.[35] However, to include a speech that is antithetical to the democratic process within the protection of the First Amendment contradicts the principles upon which the Amendment is based.[36] For example, incidental speech, which encourages people to violate existing laws, should not be protected. In this sense, not all political speech should be immune from the trademark holders' rights, particularly when the use of the trademark is related to speech that does not represent the ideals that the Constitution intended to protect.[37] As mentioned above, courts have restricted obscene political speech, libelous political speech, and even misleading political speech against First Amendment arguments. Therefore, plagiarism of political speech should similarly not be awarded protection under the First Amendment.[38]

In *Tomei v. Finley*, the District Court for the Northern District of Illinois issued a preliminary injunction because of the strong likelihood of confusion resulting from the use of a political party of an acronym designed to deceive voters into thinking the candidate belonged to the opposing political party.[39] According to this decision, cases must be analyzed based on

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[34] *Id*.
[35] Shakow, *supra* note 1.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] Tomei v. Finley, 512 F. Supp. 695 (N.D. Ill. 1981).

the possible harm to the parties involved, instead of the type of speech. When the harm experienced by trademark holders outweighs the use of the trademark in the speech, the argument of free speech should yield and the restriction must be permitted. Our point is that the duplicity in political slogans, due to its lack of trademark protection, would lead to confusing people, creating an unnecessary burden on them when trying to differentiate between campaigns.

In *San Francisco Arts & Athletics, Inc. v. US Olympic Committee*, the Supreme Court prohibited the use of the word "Olympic" by a gay rights advocacy group, began to promote an international "Gay Olympic Games" in order to enhance the image of the gay community.[40] In order to finance the games, the group started selling paraphernalia which contained the word "Olympic Games".[41] The U.S. Olympic Committee (U.S.O.C.) attempted to block any use of the term "Olympic" because Congress had granted them the exclusive rights to use the word.[42] The court asserted that the gay group's use of the term "Olympic" could harm the U.S.O.C. by dulling the distinction and commercial value of the mark, and they also argued that the use of the word was intended to convey a political message.[43] This case established that the expressive use of a word cannot be separated from its commercial value.[44] This means that the courts have been willing to protect the rights of trademark holders against infringement, even when the infringer attempts to convey a political message.[45]

What the court recognized in *San Francisco Arts & Athletics*, is what we are trying to argue in relation to the unrestricted political use of another's trademark. The expressions made by the politicians using the trademark may harm the commercial value of the slogan; as mentioned earlier, it is difficult to detach the expressive part from the commercial value especially when the politician rests on the reasoning that he is using the trademark for communicational purposes when in reality he is using it to take advantage of the market power of the trademark.

There are circumstances in which First Amendment considerations should prevail, such as when the use of the trademark comprises the sole mean of political expression. However, it is difficult to identify a circumstance when the use of a well-known slogan, as "Just Do It", is the only way the politician is able to communicate his message.[46] Therefore, we reiterate our position that when a trademark becomes the campaign slogan

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[40] San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1986).
[41] *Id*.
[42] *Id*,
[43] *Id*.
[44] Shakow, *supra* note 1.
[45] *Id*.
[46] *Id*.

of a politician, the harm caused by the trademark infringement should trump the First Amendment protection.

B. Noncommercial Speech against Commercial Speech

The Lanham Act defines "use in commerce" as "the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark."[47] Congress drafted the "use in commerce" definition narrowly to include only uses likely to establish a connection between a mark and a product or service in the minds of consumers.[48] This is exactly what a politician does by creating a slogan that will help people identify him or her. The Supreme Court has held that "core" commercial speech is a speech that does "no more than propose a commercial transaction."[49] However, some messages simultaneously propose a commercial transaction and address social, political or other issues of public interest and may be deemed "commercial speech" so that they are subjected to lesser First Amendment protection.[50] The courts have devised a three-part test to be applied in cases of mixed messages in commercial speech: "(1) whether the communication is an advertisement; (2) whether it refers to a specific product or service; and (3) whether the speaker has an economic motivation for the speech. If all three factors are present, there is 'strong support' for the conclusion that the speech is commercial."[51] If the primary purpose of the speech is "informational," as opposed to "commercial," full First Amendment protection applies.[52] However, in this test the court does not consider that even the purest political expression could suffice it.

The Supreme Court has recognized that books, movies, religious literature, and even political speech need to generate money in order to disseminate, but that the rights of the speaker are not lost merely because compensation is received. Political speech has traditionally been perceived as noncommercial; therefore, because the Lanham Act requires the infringer to have used the mark "in commerce," the courts have repeatedly resolved that the use of trademark in political speech does not constitute infringement. This principle is based on the view that a commercial trademark holder would have difficulty demonstrating that the use of the trademarked slogan

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[47] 15 U.S.C. § 1127 (Supp. I 1995).
[48] Stacey L. Dogan and Mark A. Lemley, *Grounding Trademark Law through Trademark Use*, 92 IOWA L. REV. 1669 (2007).
[49] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).
[50] *Id*.
[51] Procter & Gamble v. Amway Corp., 242 F.3d 539 (5th Cir. 2001) (summarizing factors to determine whether speech is commercial originally presented in Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983)).
[52] *Id.*

by the politician is likely to cause confusion or to deceive the consumers.[53] The principle that establishes that political speech is noncommercial also proves problematic for politicians seeking trademark protection on their own original slogans. But, as explained, the repeated use of a well-known trademark in political speech may harm its commercial value. Consumers may get confused when seeing or hearing the slogan. Should they think of the politician or the business? With the confusion of the consumer, the trademark could lose its distinctiveness, which was one of the reasons it received protection in the first place.

Use of the commercial trademarks in political speech responds to the intent of the politician to gain support based on the popularity of the slogan. Politicians do not appropriate a popular slogan because of the expressive content of the slogan; on the contrary, they do so for the market power of the slogan. In that sense, the infringement of the politician on another's trademark is purely commercial. Therefore, consequences must be accordingly applied. In a sense, an invisible line of comparison is drawn between this kind of political speech and commercial speech. This kind of political speech responds to market demands; therefore, the distinction made between political and commercial speech becomes arbitrary and confusing. As previously discussed, this kind of political speech is not the type of speech that the Constitution intended to protect. Plagiarism of another's trademark for commercial consideration should be restricted in order to show respect to the rights given by law to the trademark holders. Again, this assumes that the politician uses a well-known commercial trademark as the slogan in his or her campaign in order to take advantage of the goodwill and brand identity associated with that trademark, and to sell him or herself as the product people want to support.

Political slogans in a campaign are a good example of hook marketing because the most deserving ones work. Politicians often seek trademark protection for their logos and slogans in order to give the campaign an "exclusive right to use the mark for those goods and services listed."[54] These goods range from baby bottles, mouse pads, and lapel pins to "political fund-raising services."[55] Many campaigns view the sale of these items as an important component of their fund-raising. Plus, with the rise of the Internet, these products can make campaigns more easily identifiable.[56] "The advent of the Internet means that there is a greater volume of fraudulent activity going on that victimizes campaigns," since anyone "with an e-mail list and a blast server can essentially steal money from the donors and the

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[53] Shakow, *supra* note 1.
[54] Sarah Wheaton, *Vote for Me ™*, THE CAUCUS: THE POLITICS AND GOVERNMENT BLOG OF THE TIMES (Oct. 18, 2007), http://thecaucus.blogs.nytimes.com/2007/10/18/vote-for-metm/.
[55] *Id.*
[56] *Id.*

campaign."[57] In that sense, the main reason to have a good slogan is economic, rather than expressive. The slogan helps people associate a particular politician with a particular message, and gives people an opportunity to make an informed decision as to which campaign they would rather support.

The efficacy and purpose of a political slogan is no different than that of a commercial slogan, so each should qualify for the same trademark protection. After all, the politician sells his or her own *persona* and cause as a product. A merchant earns a living by merchandising a product and by gaining the support of the consumers; the politician earns his or her way in politics by gaining the support of their constituents. By not giving trademark protection to original political slogans, the politician loses the means to fulfill his or her objectives to be distinguished among opponents by promoting his or her product.

IV. NEW ALTERNATIVES

A. Is a Commercial Campaign a Better Analogy for a Political Campaign?

As previously discussed, considering the commercial aspect of political speech led to a comparison between political and commercial campaigns. Political campaigns use the same powerful tools as businesses to build enduring relationships, raise money, track news, and organize campaigns.[58] Moreover, political campaigns are embracing the same trends as businesses; they are harnessing the power of the Business Web in order to deepen relationships, among other strategies.[59]

Similarly, political candidates work hand–in-hand with advertisement agencies in order to construct an effective media campaign to promote themselves as a product. The principles employed in a campaign are those that have proven their effectiveness in the market. These marketing strategies are implemented in accordance with the objective of merchandising the politician. They serve to emphasize his or her strengths, to outline his or her campaign platform, to weaken political opponents and to enhance his or her public image. These marketing strategies are mostly employed during the political season, when the media becomes saturated with political and commercial advertising. As time passes, the success of a

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[57] *Id.* (citing interviewee Marc Elias).
[58] *Salesforce.com Introduces Campaignforce, New Salesforce Political Campaigns Edition* , MANAGING AUTOMATION, (May 16, 2007), http://www.managingautomation.com/maonline/news/product/read/Salesforcecom_Introduces_Campaignforce_New_Salesforce_Political_Campaigns_Edition_28774?page=1.
[59] *Id.*

political candidate depends more and more upon the effectiveness of his or her media campaign.

The distinction between political speech and commercial speech should be re-evaluated according to the previously mentioned conditions. The law has fallen behind in comparison to the progress that society and marketing have made. The important role played by the media in political campaigns could raise concern insofar the political process is becoming more and more a battle of advertisements instead of a battle of ideas. Nevertheless, the political process has always been that way in one way or another. The market forces of advertisements and promotion have always guided it. The problem is that nowadays, people are more aware of it, as a consequence of the proliferation of the media. Notwithstanding all these, courts are still in denial of reality and keep maintaining the difference between political and commercial speech. Even in a free market system, there is no such thing as a speech containing only ideas, because whether we like it or not, ideas always have economic content behind them and by not recognizing this, the system is basing itself on a fantasy instead of reality.

B. Application of Trademark Law in Political Context

Trademark laws establish that the producer of a commercial product has the right to prevent others from using his or her product in order to take advantage of the quality and goodwill acquired as a consequence of the loyalty and support of its consumers. Additionally, the anti-dilution statutes protect trademarks from any use that would diminish the distinguishing quality of the mark.[60]

1. Trademark Use in Political Speech

If Bob Dole had been elected and used "Just Don't Do It" throughout the term of his administration, the public would have likely stopped associating "Just Do It" uniquely with Nike and its shoes.[61] Instead of thinking of Nike immediately, consumers may picture Dole or Tiger Woods when they hear the popular slogan.[62] This means that Nike's trademark is losing value as it becomes blurred.[63]

A trademark may also become diluted if it is tarnished.[64] If an infringer associates a mark with something unwholesome or that somehow undermines the positive image of a trademark, the original trademark value

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[60] *See* Lanham Act (U.S. Trademark Act), 15 U.S.C. §§ 1051-1141.
[61] *Id.*
[62] Shakow, *supra* note 1.
[63] *Id.*
[64] 15 U.S.C. § 1125.

has been reduced.[65] By reducing the commercial appeal of the mark, the infringer may not have confused the public, but he or she has certainly caused its owner some damage. This is clearly applicable to political candidates as well. Association with some political philosophies, when forced on a commercial actor, may hurt the commercial prospects of the actor's goods.[66] For example, if Nike's phrase had become associated in the consumers' minds with teenage drug abuse due to repeated references in Dole's speeches, Nike's sales may have suffered. Certainly, the return on Nike's investment in "Just Do It" would be diminished.[67] However, while dilution can be stopped by a lawsuit in a commercial case, the law does not currently have a resource to enact consequences against the dilution of a political slogan.

As discussed above, when politicians co-opt commercial trademarks and transform them into slogans, it is because of the associative and market power of the mark.[68] Even when the intent of the politicians may not be to harm the mark, their intent is clearly to take advantage of and benefit from it. They want to attract voters by associating the well-known slogan with their own *persona*, and that should be considered a trademark violation. The politician seeks a specific public response through the use of another's slogan.

In this sense, even when the law does not recognize the use of a trademark slogan or mark in political speech as commercial, the principles that apply to trademark law do not coincide with the actual application of the law. People do not necessarily know the specifications of the law and they do not analyze whether the trademarks are used in a commercial or noncommercial way; they simply associate the known trademarked slogan with the message conveyed by the politician. The law has drawn a line between political and commercial speech which in reality does not exist. Consequently, it is not in accordance to the perception of the consumer what trademark law intends to address. By association, people could reasonably presume that the owner of the mark is sponsoring the politician's campaign. As a result, if the business' consumers disagree with the politician's message, they could stop supporting the brand and buying their products. Even when the use of a trademark by a particular politician does not fall under the definition of infringement of the Lanham Act, the trademark holder can still suffer the damages that trademark law intends to prevent. Politicians have many tools to express their views and messages; they do not need to use a specific slogan to accomplish their objective, nor is the public served by ignoring the rights of a trademark owner.

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[65] Shakow, *supra* note 1.
[66] *Id.*
[67] *Id.*
[68] Shakow, *supra* note 1.

Courts should not continue to categorize the use of trademarks as commercial or noncommercial, because the average person cannot recognize the difference between the two (2) categories. The law should respond in accordance to the damages inflicted, and should create a balance between the interests of the parties involved. The law should prevent and protect against possible damages, and in this case it can actually cause more harm than good.

2. Trademark Protection for Political Slogans

A political slogan is the way in which a politician reminds voters of his or her particular message. The purpose of the slogan is no different than that of a commercial slogan. In both cases, its purpose is to gain the sponsorship and loyalty of the public, to distinguish the product from its competitors, to remind the consumer or voter of a specific brand or politician, and to influence the audience in their future purchases or votes.

The Lanham Act rejects a slogan if its first use was not in commerce, and the Act does not consider that political slogans are used in commerce.[69] However, the politician uses the slogan to market him or herself and to sell the goods by using the slogan for his or her campaign, meaning that the slogan is, in fact, being used in commerce. Many commercial slogans were first heard in other contexts and did not acquire trademark status until the producer of a commercial good decided to attach the phrase to a product or brand. Political slogans are also used on a variety of commercial products (*e.g.* shirts, mugs, etc.) as a source identifier. By allowing others to merchandise goods with the political slogan of a particular politician, the law allows others to gain profit at the expense of the popularity of said politician. People purchase commercial items that contain the political slogan to show support for the politician, his or her message, and the campaign.

Lack of political trademarks also leads to public confusion in relation to the political message. In the case of *United We Stand for America*, the court ruled that if different organizations were permitted to employ the same trade name when endorsing candidates, voters would be unable to derive any significance from an endorsement because they would not know whether the endorsement came from the organization whose objectives they shared or from another organization using the same name.[70] This reasoning should be extended to political slogans. The same potential confusion could result from two (2) opposing candidates who use the same slogan in a campaign; voters would not understand the different positions and would have trouble identifying the candidate they want to support.

In the recent mayoral election of San Francisco, one of the candidates used the slogan "Together We Can," which seems like a harmless enough

[69] Lanham Act (U.S. Trademark Act), 15 U.S.C. §§ 1051–1141.
[70] United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc., 128 F.3d 86 (1997).

slogan.[71] However, when formulating the slogan, the candidate considered that San Francisco voters were fed up with divisions within the board of supervisors, with clamorous disputes between the board and the mayor, and with the city's homeless problem, which some have called insoluble.[72] The other candidate was presenting himself as a leftist, and was often portrayed as a creator of divisions and political factions. Each word in the slogan targets something in the political landscape; for example, "together" suggests that the other candidate is divisive.[73] What if the other candidate, aware of his reputation, decided to use the same "Together We Can" slogan in order to get more votes? Would the current trademark law be fair to those voters who may get confused by the similar slogans?

In many instances, a political slogan serves not just as a marketing tool but also as a representation of a politician's ideals. Thus, the slogan becomes vital to the politician because it is his or her beliefs, platform, and legacy. The use of those political slogans does not end with the campaign; their relevancy lasts, at least, throughout the career of the politician.[74] After all, politics do not end when a campaign ends. In America, governing is just as political as running for office.[75] Lawmakers and executives must constantly garner votes, build coalitions, and muster public support.[76] A politician must be everywhere at once; similarly, some slogans demonstrate their strength through expansion and saturation.[77] When this strength is shown in a way that the only thing associated with the slogan is the politician, it means that the slogan has acquired the sufficient status, or a secondary meaning, to be considered for trademark protection.

The constant lack of restrictions on political slogans by the media could cause distortion and change in the message that identifies a politician and his campaign, thus confusing the supporters of the politician while hurting his or her reputation and career. Since the slogan functions as a source identifier, the political message correlates directly with the politician. Protecting political slogans is a way of granting individuals exclusive rights to their property. Slogan infringement deprives the owner of his or her right to control the message. In addition, it creates unfair competition, as profits can be diverted from their rightful owner as a result of slogan plagiarism on merchandise and as an impetus for donations.

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[71] Tamim Ansary, Do Slogans Matter? (Originally published in the political column section of-the now extinct- MSN Encarta encyclopedia, on file with the University of Puerto Rico Business Law Journal).
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

C. Possible Changes to the Law

1. Use of Another Trademark in Political Speech

If a politician appropriates another's trademark, it should be viewed as infringement. As noted above, a politician's motivations to incorporate a trademark into his or her campaign does not necessarily serve a democratic purpose. As a result, First Amendment protection should not apply in certain cases. The use of the trademark by the politician must be viewed as analogous to a commercial trademark. In other words, the politician must use the trademarked slogan as the slogan of the campaign in order for the use to qualify as an infringement. The politician could use the trademark as incidental to his speech, but should not be able to use it as the main slogan that represents his or her political message. The power and influence that trademarks have acquired over the years could not have been imagined when drafting the Constitution; in this case, the law must evolve along with society. The electorate is not well served when a politician intends to benefit, not from his own creativity, but from the popularity of a well-known mark. Therefore, just as the courts recognize that obscene, libelous, or misleading political speech should be restricted, so should political speech that infringes upon a trademark belonging to another.

Taking this into consideration, the legal sanction to penalize the politician's infringement should be economic. In that sense, even when the use of a trademarked slogan may confuse people, the debate will not be censored. The penalty will be issued after the debate, not before, which will be the case if an injunction is used to prohibit the use of the slogan in the speech.

2. Trademark Protection for Political Slogans

The United States Patent and Trademark Office (U.S.P.T.O.) has strict regulations regarding whether or not a slogan can become a registered mark. In its simplest format, the decision depends upon whether the slogan is being used in the same manner as the mark, or whether the slogan is inherently distinctive and has developed what the law refers to as a "secondary meaning."[78] These laws could be adjusted in order to allow politicians to seek trademark protection for their slogans under certain circumstances. A politician should not necessarily be allowed to get trademark protection for the multiple slogans he or she intends to use throughout a campaign. In order to acquire trademark protection, the politician must prove that the slogan has acquired a secondary meaning. He or she must be able to demonstrate that the slogan has instant and universal association with the campaign; if

[78] 15 U.S.C. § 1127 (Supp. I 1995).

the slogan is thus used as a source identifier, it deserves to be rewarded with the protection. The politician must prove the strength of his or her slogan in order to demonstrate that its relevance would transcend the electoral period, because of the overwhelming association that people have made with the slogan. By acquiring trademark protection for the slogans, the politician should have access to the resources granted by the Lanham Act in order to seek legal action against infringers. The politician should also own exclusive rights to sell commercial merchandise containing the slogan; it should not be permitted that others enrich themselves at the expense of the politician's popularity.

For example, if Hillary Clinton or John McCain had attempted to use the "Yes We Can" slogan in their campaigns, President Obama would have been granted the economic remedies provided by law for trademark infringement. This is a slogan that, in accordance to the principles outlined above, should deserve trademark protection. "Yes We Can" is easily and instantly identified with Obama, and other people should not be able to benefit from Obama's popularity by using his slogan. However, if an opponent started to use "No We Can't," that should be considered a tolerable use as part of a political debate. This example constitutes circular reasoning; the opponent alludes to Obama's slogan in order to establish his or her own campaign in opposition to Obama. Voters would not be confused, because they would understand that the contradicting slogans belonged to different candidates.

V. DO WE REALLY NEED A CHANGE?

It is important to begin enacting changes in trademark law in order to address the problems outlined above. Courts have blindly ruled in favor of political speech, without considering whether they should define the kinds of political speech that merit First Amendment protection. If political speech continues to be wholly and absolutely protected against any kind of attack, and if political speech is not subject to any limitation, then political exception could easily become the new rule.[79] Almost all speech could be considered political, but most of that political speech could also be commercial. Protecting political speech entirely could lead to an outright ban on any law that limits speech, which would be dangerous to both government and society.[80] If the ultimate goal of free political speech is the discovery of political truth, and if not, arguably, every example of political speech contributes to this discovery, then not all political speech needs to be protected in order to further the objectives of the First Amendment.[81]

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[79] Shakow, *supra* note 1.
[80] *Id.*
[81] *Id.*

There is a strong public interest in protecting trademarks because investments in trademarks made by private companies help lower costs for the consumer.[82] In today's information-saturated society, the function of effective and exclusive use of trademark is enormously valuable. Consumers can distinguish between producers, identify the products and services with which they have had positive relationships in the past, and maintain associations with products whose trademarks reflect those positive relationships.[83] Trademarked slogans are not political discourse, they are political nicknames; the vigilant protection of trademark would impose only an incidental and indirect restriction on political speech.[84]

The United States has a strong public policy regarding intellectual property. A person's creations are often some of his or her most valuable assets, and the country has always acknowledged the importance of the ownership rights over these creations. We must, therefore, continue to safekeep those rights. People invest many resources in the development of their work, and these efforts ultimately benefit the economy at large. The United States should further prioritize the protection of rights to intellectual property, including trademarks, and should not permit that these trademarks lose value as a result of infringement. If current trademark laws do not change, trademarks could then lose value to both the individual and the national economy. Additionally, the infringement of political trademarks could result in voter disenfranchising and political alienation as a result of a confused electorate.

The protection of intellectual property rights should also expand in order to protect political slogans. These aspects of political speech constitute an area of intellectual property that is currently unprotected by both copyright law and trademark law.

VI. CONCLUSION

The objective of this work is to create a debate and to question a treatment of law that has long been taken for granted: the view that political speech deserves the greatest amount of protection, even when it behaves more analogous to commercial speech; or that the commercial content should not be present in the political speech. This article intended to demonstrate that the fundamentals on the actual treatment of the law do not correspond to the reality of the political world and should therefore be re-examined.

We argue that the First Amendment could tolerate restrictions in the political scenario. To this end, the current law is unfair to those trademark

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[82] *Id.*
[83] *Id.*
[84] *Id.*

holders whose rights are infringed by politicians who appropriate their trademarks in order to take advantage of their market power. This type of trademark use should be seen as commercial, not political, because the politician uses the slogan to market him or herself as a product in order to gain consumer loyalty.

In the same way, the denial of trademark protection to original political slogans responds to an arbitrary distinction between this kind of political speech and commercial speech. The process surrounding political slogans is analogous to that of commercial slogans, and follows marketing and economic principles. A political slogan is a marketing tool used to promote the politician; since the slogan serves as a source identifier, trademark law should also apply in this context.

The law should change according to the needs and development of society. The proliferation of the media increases the necessity to protect intellectual property, by both protecting a trademark from political infringement and by granting trademark protection to original political slogans. The United States has long been an active promoter of intellectual property; these intellectual property rights should extend to this kind of political speech.