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Tea Party v. Tea Party: Using Intellectual Property Law to Seize Control of a National Political Movement¹

STEVEN R. KOCHHEISER

As city streets across America became flooded with thousands of protestors dressed like Samuel Adams and Paul Revere before the November 2010 election, leaders of the Tea Party had already traded in their Revolutionary War costumes for pinstripe suits in an effort to seize control over the fledgling political movement. One of the main weapons in this struggle for power has been the assertion of intellectual property rights associated with the Tea Party.² The stakes are particularly high heading into the 2012 presidential election as Tea Party groups continue to try to influence candidate platforms and political discourse by using various tactics like hosting debates.³ The use of the Tea Party name and intellectual property will be essential for those seeking to impact the outcome of the 2012 election. This Comment will explore the growing importance of intellectual property in political movements and organizations like the Tea Party.

Intellectual property has become a “general-purpose device” for individuals to use when “they want the state to suppress speech they do not like . . . not merely to protect their legitimate economic interests but because

1. This Comment explores an issue first addressed in an article that I co-authored with intellectual property attorney Christopher Ott of Vorys, Sater, Seymour and Pease LLP that was published on the *Congress Blog* of the Washington D.C. newspaper *The Hill* one week before the November 2010 election. The article, entitled *Who Owns the Tea Party?*, attempted to raise awareness of the growing use of intellectual property in the Tea Party movement and the implications for political organizations. See Christopher Ott & Steven Kochheiser, *Who Owns the Tea Party? The Intersection of Politics and Intellectual Property Law*, THE HILL, Congress Blog (Oct. 27, 2010, 2:39 PM), <http://thehill.com/blogs/congress-blog/judicial/126119-who-owns-the-tea-party-the-intersection-of-politics-and-intellectual-property-law>. This Comment expands upon this theme.

2. *See id.*

3. The Tea Party Express co-sponsored a debate along with CNN for Republican presidential candidates on September 12, 2011 in front of an audience of over one thousand Tea Party activists. Jeff Zeleny & Ashley Parker, *Perry is Target as Republican Candidates Take Aim*, N.Y. TIMES, Sept. 13, 2011, at A13, available at <http://www.nytimes.com/2011/09/13/us/politics/13debate.html>. The debate particularly sparked controversy following a discussion about mandatory HPV vaccinations in Texas promoted by Gov. Rick Perry. *Id.*

of aesthetic and political disagreements.”⁴ Three battles among various elements of the Tea Party movement—one national and two on the state level in Florida and Nevada—are particularly illustrative of the issues raised by intellectual property in political campaigns and movements.⁵ These disputes involve not only traditional intellectual property issues, such as trademark and copyright, but also related issues, including state party name statutes and Internet domain registration.⁶

The Tea Party movement is a “loose coalition of local groups that has sprouted across the country,” consisting of many “first-time activists” and connected by a name that refers to the Boston Tea Party protest of British taxation during the Revolutionary War era.⁷ The decentralized nature of the Tea Party movement has empowered many without significant political or leadership experience to shape the policy and ideological objectives of the various local groups such as the “9-12 Delaware Patriots” or the “Louisiana Tea Party Foundation.”⁸ As these groups attempt to determine the future of the movement, clashes of ego and ideology have provided fertile ground for legal disputes concerning the rights to Tea Party intellectual property.

Using intellectual property to secure power and control of a national political movement is not a new phenomenon. A similar legal battle was fought between two factions of the “United We Stand America” campaign started by Ross Perot’s presidential candidacy in 1992.⁹ The *Wall Street Journal* even compared the Tea Party movement to the “United We Stand America” movement: “Interviews with more than a dozen newly minted tea-party volunteers suggest the movement is starting to resemble what Ross Perot harnessed in the early 1990s”¹⁰ Just as that political movement triggered a legal civil war among its followers over intellectual property, similar legal disputes have emerged across the country involving the intellectual property of the Tea Party.

In this Comment, I seek to create awareness of the use of intellectual property law as a device to assert control and power over fledgling political movements and organizations. First, I will address both traditional intellectual property issues of trademark and copyright law that have

4. Eileen Hintz Rumfelt, *Political Speech: Priceless—Mastercard v. Nader and the Intersection of Intellectual Property and Free Speech*, 55 EMORY L.J. 389, 391 (2006).

5. See *infra* Part III.

6. See *infra* Part III.

7. Gary Fields, *Tea-Party Drive Steeped in Political Novices*, WALL ST. J., Feb. 20, 2010, at A4, available at <http://online.wsj.com/article/SB10001424052748704511304575075331410704288.html> (describing the Tea Party movement as a “loose coalition” of many new activists).

8. *Id.*

9. *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86 (2d. Cir. 1997).

10. Fields, *supra* note 7.

impacted all political organizations as well as the more recent issue of Internet domain names.¹¹ Next, I will discuss several cases and legal disputes involving the Tea Party that are illustrative of how these intellectual property issues arise in the political context.¹² Finally, I will survey state statutes that regulate the use of political party names and the potential for these statutes to impact the future of political movements like the Tea Party.¹³

I. INTELLECTUAL PROPERTY AND POLITICS

Intellectual property disputes have increasingly become an important aspect of political campaigns and movements as politicians attempt to market their ideas to voters using familiar terms or labels, creating an interesting conflict between First Amendment principles and protection of intellectual property. In 2002, candidate for Governor of Ohio, Tim Hagan, released an Internet ad called “TaftQuack” which featured a quacking duck to mock incumbent Governor Bob Taft and used an image similar to that of AFLAC’s popular duck.¹⁴ AFLAC sued, seeking an injunction against the use of the character under trademark and copyright law.¹⁵ In 2000, Ralph Nader similarly released an Internet and television ad using the theme from the MasterCard “Priceless” campaign.¹⁶ MasterCard also sued under trademark and copyright law.¹⁷ Both courts ruled in favor of the political candidates, but one scholar has argued that either case could have received a very different outcome due to the “difficulties in applying intellectual property principles in the First Amendment arena” involving political speech.¹⁸ It is not surprising that two of the most common areas for litigation involving political organizations, including the Tea Party, are copyright and trademark law. This is largely due to the fact that in a “consumer-driven society,” politicians frequently use brand icons and consumer images to reach voters in a political field in which “the line between politics and entertainment is often blurred” with celebrities becoming candidates.¹⁹ As the use of domain names becomes an important

11. *See infra* Part II.

12. *See infra* Part II.

13. *See infra* Part III.

14. *Am. Family Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682 (N.D. Ohio 2002).

15. *Id.* at 685.

16. *MasterCard Int’l, Inc. v. Nader 2000 Primary Comm., Inc.*, 2004 U.S. Dist. LEXIS 3644 (S.D.N.Y. Mar. 8, 2004).

17. *Id.* at *1.

18. Rumfelt, *supra* note 4, at 391.

19. *Id.* at 389-90.

aspect of many political campaigns in the Internet age, this presents a third front in the use of intellectual property in the political context.

A. Trademark Law

One of the most common intellectual property issues facing fledgling political organizations like the Tea Party involves disputes regarding trademark use. A trademark is “any word, name, symbol, or device or any combination thereof” used by a corporation to identify and distinguish the source of its goods[,]” as codified in the Lanham Act of 1946, which seeks to protect commercial interests.²⁰ Trademark law seeks to protect market competition as well as “safeguarding consumers against confusion among brands and ensuring a company’s ability to capitalize on the reputation created by its investment in a brand.”²¹ An interesting dispute regarding trademark use emerged in the 1990s from the political movement started by Ross Perot, which has been compared to the present Tea Party movement.²²

In *United We Stand America, Inc. v. United We Stand, America New York, Inc.*,²³ the Second Circuit applied the Lanham Act’s prohibition against trademark infringement in a case involving two non-profit political organizations.²⁴ In 1992, Ross Perot’s presidential campaign used the service mark “United We Stand America” and after the campaign the rights to the mark were assigned to United We Stand America, Inc. (“United”), a D.C. corporation that then filed with the Patent and Trademark Office for registration which became effective in 1994.²⁵ At the same time, another individual who had worked for the Perot campaign established United We Stand, America New York, Inc. (“UWSANY”).²⁶ In 1994, United sued UWSANY and its founder for trademark infringement under the Lanham Act.²⁷

The court first held that the Lanham Act applied to political activities as “services” under section 1114(1)(a), prohibiting unauthorized use of a trademark in connection with the sale, distribution, or advertising of goods or services if “such use is likely to cause confusion.”²⁸ The court determined that “UWSANY was incorporated ‘to solicit, collect and

20. *Id.* at 392 (quoting 15 U.S.C. § 1127 (2000) (West 2011)); see Lanham Act, 15 U.S.C. §§ 1051-1127 (West 2011).

21. Rumpfelt, *supra* note 4, at 392.

22. See Fields, *supra* note 7.

23. 128 F.3d 86 (1997).

24. *Id.* at 90.

25. *Id.* at 88.

26. *Id.*

27. *Id.*

28. *United We Stand*, 128 F.3d at 89 (quoting 15 U.S.C. § 1114(1)(a) (West 2011)).

otherwise raise money' in support of the presidential candidacy of Ross Perot . . . [and provide] services characteristically rendered by a political party to and for its members, adherents, and candidates. Although not undertaken for profit, they unquestionably render a service."²⁹ Use of the same trade name would likely have created "catastrophic" confusion among voters regarding which group endorsed which candidate.³⁰ Notably, the court determined that use of this mark by UWSANY was not protected by the First Amendment because it was not used as commentary but rather as a "source identifier" to "associate itself with the political movement that sponsored the Ross Perot campaign."³¹ The court determined that this is exactly the type of activity the Lanham Act sought to prohibit and risked creating significant "consumer confusion."³² *United We Stand America* serves as an important precedent by applying trademark law to a political movement like the Tea Party and demonstrates the importance of intellectual property as some of these groups seek to expand and legitimize themselves as leaders of the Tea Party movement.

B. Copyright Law

Although not as prevalent of an issue as trademark law, copyright law has been used to protect political interests. Following her successful campaign in the 2010 Republican primary for U.S. Senator from Nevada, Tea Party candidate Sharron Angle removed her campaign website, but the Nevada Democratic Party soon reposted her website as therealsharronangle.com, claiming it exposed the so-called Tea Party Republican's extreme views.³³ By early July 2010, Angle threatened to sue.³⁴ Legal commentators predicted that such a suit would result in a complicated legal battle, potentially blazing new territory in First Amendment and copyright jurisprudence.³⁵

Copyright law attempts to "encourage rather than impede independent creation" by providing protection of a finite duration that offers economic benefits but more importantly "stimulate[s] artistic creativity in order to advance the general public welfare."³⁶ Disputes regarding copyright law are not unusual in modern political campaigns, frequently involving

29. *Id.* at 90.

30. *Id.*

31. *Id.* at 93.

32. *Id.*

33. Edward M. Peñalver & Sonia K. Katyal, *The Fair Use Senator: Can Harry Reid really post Sharron Angle's old campaign Web site?*, SLATE (July 9, 2010), <http://www.slate.com/id/2260061>.

34. *Id.*

35. *Id.*

36. Rumfelt, *supra* note 4, at 395-96.

unauthorized use of copyrighted music and images in political campaigns. In 2008, Jackson Browne sued John McCain and the Ohio Republican Party for copyright infringement for playing “Running on Empty” without permission in an Internet and television commercial.³⁷ Despite these cases involving copyright, according to one scholar, “[p]olitical disputes are generally less prevalent in the copyright context, with fair use considerations arising primarily in the context of news commentary and analysis.”³⁸ Still, as these cases have indicated, disputes can arise in the political context as a result of aggressive attempts to reach voters that violate copyright law. Similar attempts to reach voters in the Internet age have resulted in the emergence of intellectual property disputes over domain names.

C. Domain Names

The Tea Party movement has also produced a number of disputes regarding use of domain names as many groups compete for the spotlight, seeking a memorable and relevant domain. The importance of domain names was demonstrated in 2004 when a man named Kerry Edwards, owner of the domain www.kerryedwards.com, tried to auction the domain name during the candidacy of John Kerry and John Edwards.³⁹ While some courts have applied trademark law principles to use of domain names to protect trademark owners, many disputes involving the Tea Party and domain name use have taken place in the context of arbitration under the Uniform Domain-Name Dispute-Resolution Policy (“UDRP”).⁴⁰ The Internet Corporation for Assigned Names and Numbers (“ICANN”) regulates domain names under the UDRP which provides for arbitration of disputes regarding use and possession of domain names.⁴¹ Beyond arbitration under the UDRP, federal and state laws may also provide a cause of action for bad faith uses of domain names including the practices of cybersquatting and cyberfraud.⁴² Scholars, however, are skeptical of the

37. David C. Johnston, *The Singer Did Not Approve This Message: Analyzing the Unauthorized Use of Copyrighted Music in Political Advertisements in Jackson Browne v. John McCain*, 27 CARDOZO ARTS & ENT. L.J. 687-88 (2010); Ben Sisario, *Jackson Browne Sues Over McCain Ad*, N.Y. TIMES, Aug. 15, 2008, available at http://www.nytimes.com/2008/08/16/arts/16arts-JACKSONBROWN_BR.html.

38. Rumpfelt, *supra* note 4, at 407.

39. Jacqueline Lipton, *Who Owns “Hillary.com”? Political Speech and the First Amendment in Cyberspace*, 49 B.C. L. REV. 55, 55-56 (2008).

40. Rumpfelt, *supra* note 4, at 406-07; see *infra* Part III.a.iii.

41. *Uniform Domain Name Dispute Resolution Policy*, ICANN (Oct. 24, 1999), available at <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>.

42. See 15 U.S.C.S. § 1125(d); CAL. ELEC. CODE §§ 18320-18323 (West 2010) (California Political Cyberfraud Abatement Act).

applicability of this statute to political cybersquatting due to the difficulty of securing a trademark interest in a politician's name or campaign.⁴³

The UDRP is “extremely popular . . . because it is implemented under a private contract between domain name registrants and domain name registrars and hence has a more global reach than domestic legislation.”⁴⁴ The mandatory arbitration is described as “fast, inexpensive, and largely [consisting of] online procedures.”⁴⁵ Under UDRP Paragraph 4(a), one must assert that the respondent's domain name is “identical or confusingly similar” to the complainant's trademark, that the respondent has “no rights or legitimate interests in respect of the domain name[,]” and that the domain name has been “registered and is being used in bad faith.”⁴⁶ If arbitrators find the registration occurred under bad faith and had no legitimate purpose, they may transfer or cancel the domain name.⁴⁷ For this reason, trademark law is particularly important for claims to specific domain names. Arbitrators have found sufficient common law trademark interests for the personal names of politicians like Hillary Clinton, but not for former Lieutenant Governor of Maryland Kathleen Kennedy Townsend or celebrities like Bruce Springsteen.⁴⁸ Similarly, Tea Party Patriots, Inc., one of the Tea Party organizations that most aggressively uses intellectual property to gain control over the movement, has also received mixed results in UDRP arbitration attempts to secure domain names.

II. TEA PARTY V. TEA PARTY

A. *Tea Party Patriots, Inc.*

Perhaps the most aggressive organization attempting to use intellectual property to seize control of the Tea Party is the national umbrella organization, Tea Party Patriots, Inc. Contrary to the “open source” nature of the national Tea Party movement, Tea Party Patriots, Inc. explicitly asserts its intellectual property rights on the “Terms and Conditions” of its website, stating: “[Tea Party Patriots] aggressively enforces its intellectual property rights to the fullest extent of the law.”⁴⁹ It was reported in October

43. Lipton, *supra* note 39, at 63.

44. *Id.* at 61.

45. *Id.* at 61.

46. *Uniform Domain Name Dispute Resolution Policy*, *supra* note 41.

47. *Id.*

48. Lipton, *supra* note 39, at 66, 88.

49. *Terms and Conditions*, TEA PARTY PATRIOTS, Arts. 6-7, <http://www.teapartypatriots.org/privacy-policy> (last updated Sept. 25, 2010); Ben Smith, *Tea Party Civil War*, POLITICO (Nov. 12, 2009), http://www.politico.com/blogs/bensmith/1109/Tea_Party_civil_war.html (quoting Eric Odom, organizer of Tax Day Tea Party as describing movement as having an “‘open source’ feel.”).

2010 that the Tea Party Patriots' legal counsel, FSB FisherBroyles, which also represents American Express, Morgan Stanley, and Porsche, had contacted the customized products retailer Zazzle.com to stop selling a local group's Tea Party bumper stickers based on a claim of trademark infringement.⁵⁰ The national Tea Party umbrella organization has used intellectual property to not only control the activities of local Tea Party groups, but also to assert control over the national movement.⁵¹ This fight for intellectual property in the Tea Party movement contradicted the beliefs of many members.⁵² Eric Odom, an organizer of the Tax Day Tea Party, stated that "[N]one of this reflects the original nature of the 'open source' feel of the Tea Party Movement and presents a dangerous situation for the movement as a whole . . . Talk of intellectual property, movement ownership and legal threats as a response do not belong in this movement."⁵³

1. *Tea Party Patriots, Inc. v. Kremer*

Just as the Tea Party movement was gaining momentum, a "civil war" erupted when Amy Kremer, a founder and former board member of Tea Party Patriots, was sued by the Tea Party Patriots board for continued use of its intellectual property after she had been removed from the board.⁵⁴ Tea Party Patriots, an umbrella organization claiming affiliation with over three thousand local groups, started on a social networking site in April 2009 and within a month had hired a lawyer to register the group's name as a trademark.⁵⁵ Around the same time, Tea Party Express was formed.⁵⁶ It originally started as a national bus tour, but focused more on raising money for candidates and engineering campaigns while the Tea Party Patriots sought to "remain nonpartisan and issues-based, never endorsing specific candidates."⁵⁷ By August 2009, the Tea Party Patriots incorporated with a four-person board, including Amy Kremer, a former flight attendant and co-founder of the group.⁵⁸ Almost immediately, Ms. Kremer began discussing

50. Zachary Roth, *The Tea Party's Strange New War*, THE DAILY BEAST (Oct. 1, 2010), <http://www.thedailybeast.com/blogs-and-stories/2010-10-01/the-tea-party-patriots-trademark-war/>.

51. *See id.*

52. *See* Smith, *supra* note 49.

53. *Id.*

54. *Id.*

55. Douglas A. Blackmon, et al., *Birth of a Movement: Tea Party Arose From Conservatives Steeped in Crisis*, WALL ST. J., Oct. 29, 2010, at A1, available at <http://online.wsj.com/article/SB10001424052702304173704575578332725182228.html> (brackets in original).

56. *Id.*

57. *Id.*

58. *Id.*

hiring her own lawyer and claiming ownership of the intellectual property of the Tea Party Patriots herself.⁵⁹ She was voted off the board and then joined Tea Party Express, eventually serving as its chair.⁶⁰ Ms. Kremer and the board of Tea Party Patriots later filed a lawsuit and countersuit against each other in Cobb County Superior Court in Georgia, seeking control of the group's intellectual property under Georgia state law.⁶¹

In its complaint, Tea Party Patriots, Inc. sought “declaratory judgment that it is the sole owner and has sole control of, and that Kremer has no ownership in or control of, [Tea Party Patriots’] intellectual property, including its Mark and the Websites.”⁶² The group also alleged that Kremer converted their assets by changing passwords and preventing access to the group’s contact list and website and sought injunctive relief.⁶³ Kremer filed a counterclaim that alleged misappropriation and conversion resulting from “Tea Party Patriots, Inc.’s assumption of control of [her intellectual property] for its own use and purposes [constituting] dominion wrongfully asserted over Amy Kremer’s property in denial of or inconsistent with her proprietary rights.”⁶⁴ The two parties are currently conducting discovery, a process that has lasted for over a year.⁶⁵

2. Trademark: Tea Party Patriots

The dispute between the Tea Party Patriots and Kremer has extended beyond Georgia to the United States Patent and Trademark Office. Although the Tea Party Patriots applied for the trademark of “Tea Party Patriots” in July 2009 when Kremer was a leader of the group, Kremer filed a Notice of Opposition to the application on Sept. 22, 2010.⁶⁶ Kremer

59. *Id.*

60. Blackmon, et al., *supra* note 55; *About*, TEA PARTY EXPRESS, <http://www.teapartyexpress.org/about/> (last visited Nov. 2, 2011) (noting that Amy Kremer is Co-Chairman of the Tea Party Express).

61. Tea Party Patriots, Inc. v. Kremer, No. 09-1-10603-99 (Cobb. County Super. Ct., Ga. Oct. 28, 2009).

62. Complaint at 22-24, *Kremer*, No. 09-1-10603-99 (Cobb. County Super. Ct., Ga. Oct. 28, 2009), available at <http://www.cobbsuperiorcourtclerk.org/courts/docAltiffFS.asp?tiffFile=T3186800&pagesFile=7&currPage=1&cfm=20090171369&blocked=N>.

63. *Id.* ¶ 31, at 34-35.

64. Amy Kremer’s Answer, Defenses, and Countercls. ¶ 15-16, *Kremer*, No. 09-1-10603-99 (Cobb County Super. Ct., Ga. Jan. 7, 2010), available at <http://www.cobbsuperiorcourtclerk.org/courts/docAltiffFS.asp?tiffFile=T3254187&pagesFile=15&currPage=1&cfm=20100002893&blocked=N>.

65. Order to Extend Disc., *Kremer*, No. 09-1-10603-99 (Cobb County Super. Ct., Ga. Jan. 21, 2011), available at <http://www.cobbsuperiorcourtclerk.org/courts/docAltiffFS.asp?tiffFile=T3649369&pagesFile=2&currPage=1&cfm=20110008864&blocked=N> (ordering discovery extended to Mar. 31, 2011); Order to Extend Disc., *Kremer*, No. 09-1-10603-99 (Cobb County Super. Ct., Ga. May 13, 2011), available at <http://www.cobbsuperiorcourtclerk.org/courts/docAltiffFS.asp?tiffFile=T3775168&pagesFile=2&currPage=1&cfm=20110080595&blocked=N> (ordering discovery extended to Aug. 31, 2011).

66. Notice of Opp’n., *Kremer v. Tea Party Patriots, Inc.*, App. No. 77777712 (T.T.A.B. Sept. 22, 2010), available at <http://tabvue.uspto.gov/tabvue/v?pno=91196576&pty=OPP&eno=1>.

alleged that her use of the mark in commerce predated that of Tea Party Patriots, that the group's use of the mark is confusingly similar to her use as it is identical, that the group is not the rightful owner of the mark, and that the group's conduct has caused the mark to lose significance.⁶⁷ The matter is currently pending before the Trademark Trial and Appeal Board.⁶⁸

This is not the first time the Tea Party Patriots have challenged a trademark application. On December 23, 2009, Tea Party Patriots, Inc. filed opposition to the trademark application by Barry Cole of Wichita, Kansas for use of "Teaparty Patriot" in the sale of hats, garments, jewelry, and novelty license plate frames, claiming it was a "senior user" of the mark which was also "confusingly similar."⁶⁹ Tea Party Patriots, Inc., however, filed a withdrawal of opposition and their opposition was dismissed with prejudice by the Trademark Trial and Appeal Board.⁷⁰

3. Domain Name: Tea Party Patriots

Tea Party Patriots, Inc. has recently succeeded in securing the transfer of six domain names through arbitration in one claim while losing two other claims for a total of four domain names. The group registered the domain name teapartypatriots.org on March 10, 2009, in addition to the domains registered by Amy Kremer including teapartypatriots.us, teapartypatriots.net, and teapartypatriots.info on April 13, 2009.⁷¹

On March 12, 2010, the organization successfully secured transfer of teapartypatriotspac.com and .org, teapartypatriotaction.com and .org, and teapartypatriotsaction.com and .org following arbitration.⁷² The panel found that Tea Party Patriots had established common law rights to the Tea Party Patriots mark as its websites and forums attract thousands of visitors, with over 118,000 website members, and that the domain names were confusingly similar to this mark the group has rights in.⁷³ Interestingly, the panel rejected the respondent's contention that he had rights or legitimate

67. *Id.*

68. *Id.*

69. Notice of Opp'n, Tea Party Patriots, Inc. v. Cole, App. No. 77720078 (T.T.A.B. Dec. 23, 2009), available at <http://ttabvue.uspto.gov/ttabvue/v?pno=91193147&pty=OPP&eno=1>.

70. Withdrawal of Opp'n., Cole, App. No. 77720078 (T.T.A.B. Nov. 23, 2010), available at <http://ttabvue.uspto.gov/ttabvue/v?pno=91193147&pty=OPP&eno=1>.

71. Tea Party Patriots, Inc. v. Hoyt Enter's. LLC, No. FA1005001326333 (Nat. Arb. Forum July 9, 2010) (McCormick, Arb.), available at <http://domains.adrforum.com/domains/decisions/1326333.htm>; WHOIS Results for teapartypatriots.us, NETWORK SOLUTIONS, <http://www.networksolutions.com/whois-search/teapartypatriots.us> (created on April 14, 2009 by Amy Kremer) (last updated Apr. 29, 2011).

72. Tea Party Patriots, Inc. v. Lyle, No. FA 1001001302969 (Nat. Arb. Forum Mar. 12, 2010) (Einhorn, Yachin, Arb.), available at <http://domains.adrforum.com/domains/decisions/1302969.htm>.

73. *Id.*

interests in the Tea Party Patriots mark as he was a Tea Party activist and had “cohabitated for over seven years” with Amy Kremer and therefore her action in the Georgia superior court made this claim outside the scope of the UDRP arbitration.⁷⁴ Finally, the panel found that not only did use by the current domain holder as a “pay-per-click web site[] [not] establish legitimate rights or interests[,]” but it also constituted bad faith, along with the confusingly similar domain names, as it profited from the goodwill associated with the mark.⁷⁵ Thus, the panel determined that transfer of the domain names to the Tea Party Patriots was appropriate, particularly because the respondent was only using them as a pay-per-click site that generated profits based on attempts to reach the website of the Tea Party Patriots.⁷⁶ Since this victory, however, the group has failed to succeed in its claims to transfer other domains in two separate arbitrations.

Later, the Tea Party Patriots failed to secure the transfer of the domain name teaparty-patriots.com on March 15, 2010, as the claim did not address abusive domain registration but rather general trademark law, which is outside the scope of the UDRP.⁷⁷ The Tea Party Patriots also lost a claim for domain names teapartypatriotslive.com and teapartypatriots.com on July 9, 2010.⁷⁸ The respondent operated a Tea Party radio show (which frequently featured Amy Kremer) that the Tea Party Patriots promoted and supported, as both parties’ sites were linked to each other until November 2009 when the Tea Party Patriots began to operate a radio show of its own.⁷⁹ The panel determined that the “[r]espondent clearly [had] rights and legitimate interests in the disputed domain names[,]” as his radio show had become commonly known by the domain names and no evidence was provided that he “wrongfully appropriated” the Tea Party Patriots mark.⁸⁰

B. South Florida Tea Party v. Tea Party

In August 2009, attorney Fred O’Neal registered a political party named “Tea Party” with the Florida Secretary of State, purportedly standing for the acronym “Taxed Enough Already.”⁸¹ This move angered many Tea Party

74. *Id.*

75. *Id.*

76. *See id.*

77. *Tea Party Patriots, Inc. v. Ulti-Media LLC*, No. FA1001001305291 (Nat. Arb. Forum Mar. 15, 2010) (Manoff, Arb.), available at <http://domains.adrforum.com/domains/decisions/1305291.htm>.

78. *Hoyt Enter’s. LLC*, *supra* note 71.

79. *Id.*

80. *Id.*

81. Division of Elections, *Committee Tracking System*, FLA. DEPT. OF STATE, <http://election.dos.state.fl.us/committees/ComDetail.asp?account=50730> (last visited Mar. 5, 2011); Jane

activists, who accused O’Neil of attempting to “‘hijack’ the movement and confuse the public”—thereby splitting the vote in favor of Democrats—so they sued O’Neil in federal court.⁸² Although a trial date had been set for December 2010 in the United States District Court for the Southern District of Florida, Judge Kenneth Marra granted the plaintiffs’ motion for voluntary dismissal without prejudice on November 22, 2010.⁸³ Still, this dispute reveals many of the potential intellectual property issues facing emerging political groups like the Tea Parties.

On January 19, 2010, the South Florida Tea Party, Inc. along with a number of other Tea Party groups and individual activists filed a lawsuit in federal court against the Tea Party, a registered Florida political party.⁸⁴ In their complaint, the plaintiffs sought declaratory judgment that would set forth that their “use of the phrase ‘Tea Party’ [was] not an infringement of any trademark or other intellectual property right[.]”⁸⁵ They also sought to set forth that the “[d]efendants [did] not have exclusive intellectual property rights in the phrase ‘Tea Party’ as used in the political field[,] and . . . [that they] shall not make any false associations between their political party” and the Tea Party movement.⁸⁶ They alleged that declaratory judgment was appropriate because litigation was imminent, citing numerous demands and threats received from Fred O’Neal via email correspondence as well as the fact that the public was being confused and misled regarding the affiliation of the Tea Party political party and national movement.⁸⁷ They claimed that these threats had placed them in fear of being sued for trademark infringement and for violation of Florida’s state party name statute, section 103.081 discussed below, which gives registered parties intellectual

Sutton, *Court to Hear Suit Over “Tea Party” Name*, REUTERS, Apr. 14, 2010, available at <http://www.reuters.com/article/2010/04/14/us-teaparty-idUSTRE63D3TU20100414>.

82. Sutton, *supra* note 81; see also Mark Leibovich, N.Y. TIMES, Jan. 10, 2010, at 29, available at <http://query.nytimes.com/gst/fullpage.html?res=9D03E1D61630F933A25752C0A9669D8B63> (“Fred O’Neal, an Orlando lawyer, recently registered an official Tea Party with Florida’s Secretary of State. ‘We are not the placard-waving, funny-hat-wearing people,’ said O’Neal, an election law specialist who says he was an ‘Ed Muskie Democrat’ in his college days. ‘We are willing to do the political dirty work.’”).

83. Order Setting Trial Date & Disc. Deadlines, Referring Case to Mediation & Referring Disc. Motions to United States Magistrate Judge, *South Florida Tea Party, Inc. v. Tea Party*, No. 10-80062-CIV-MARRA/JOHNSON (S.D. Fla., 2010); Final Order of Dismissal, *South Florida Tea Party, Inc.*, No. 10-80062-CIV-MARRA/JOHNSON (S.D. Fla. Nov. 22, 2010), available at <http://www.scribd.com/Orlando%20Tea%20Party>.

84. Complaint For Declaratory Relief Non-Infringement of Trademark “Tea Party,” *South Florida Tea Party, Inc.*, No. 10-80062-CIV-MARRA/JOHNSON (S.D. Fla. Jan. 19, 2010).

85. *Id.*

86. *Id.*

87. *Id.* ¶¶ 28-45.

property rights to their names.⁸⁸ They also claimed that the defendants' conduct amounted to "False Association under the Lanham Act" because they falsely suggested association with the Tea Party movement thereby confusing the public, despite the fact that the Tea Party movement sought to reform the Republican Party, not run third-party candidates.⁸⁹

The plaintiffs then filed an amended complaint, in which the number of plaintiffs rose from six to thirty-four, adding individual activists as well as groups, such as the Port Huron Tea Party from Michigan.⁹⁰ Their legal argument also expanded to include freedom of speech and right of association arguments under the First Amendment as well as an argument that section 103.081 is "inconsistent or frustrates the objective of the Lanham Act" by allowing an individual to register a political party and then "claim a monopoly" of the use of that name, regardless of existing rights.⁹¹ The defendants responded that no actual dispute existed because no threats were made and that the plaintiffs lacked standing to sue.⁹²

This demonstrates the potential intellectual property issues in fledgling political organizations like the Tea Party movement involving trademark, copyright, state statutes regulating the use of party names, and website domain names. While judicial consideration of these issues would have been interesting, given the highly emotional rhetoric and lack of national or state party leadership, disputes between groups to claim ownership over intellectual property of this movement are likely to increase. Thus, it is critical that members of the Tea Party movement and other fledgling political groups keep themselves abreast of the potential intellectual property issues involved.

C. Tea Party of Nevada

While the tea party groups in Nevada were busy protesting, Scott Ashjian, a man described as a "Vegas character," registered the party name "Tea Party of Nevada" and ran as its candidate for the United States Senate, triggering two lawsuits that were filed against him by Republican operatives

88. *Id.* ¶¶ 46-52 (bringing claim for declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202).

89. Complaint For Declaratory Relief Non-Infringement of Trademark "Tea Party," *South Florida Tea Party, Inc.*, No. 10-80062-CIV-MARRA/JOHNSON, ¶¶ 53-59 (bringing claim for False Association under the Lanham Act, 15 U.S.C. § 1125).

90. First Amended Complaint, *South Florida Tea Party, Inc.*, No. 10-80062-CV (S.D. Fla. 2010).

91. *Id.* ¶¶ 105-27.

92. Defendants' Motion to Dismiss Plaintiffs' Amended Complaint at 2, *South Florida Tea Party, Inc.*, No. 10-80062-CV (S.D. Fla., 2010).

and Tea Party movement members.⁹³ In a race that featured Republican candidate Sharron Angle, considered the “standard-bearer for the tea-party faithful,” and Democrat Senate Majority Leader Harry Reid, the entrance of someone under the Tea Party banner with little or no connection to the mainstream movement caused quite a stir.⁹⁴ He was sued by a fellow third-party candidate, Tim Fasano of the Independent American Party, as well as a collection of supposed Republican operatives and Tea Party movement activists to remove his name from the ballot for failure to satisfy statutory requirements.⁹⁵ The Supreme Court of Nevada rejected all challenges to Ashjian’s candidacy and his name and party remained on the ballot.⁹⁶ Although he ultimately only received approximately 5,000 votes, or one percent of the total vote, in an election where the margin of victory was approximately 40,000 votes between Reid and Angle, his use of Tea Party as a party name still was controversial and cause for anxiety by a major party candidate.⁹⁷

III. STATE PARTY NAME STATUTES

As the Tea Party disputes in Florida and Nevada illustrate, while Tea Party movement supporters are busy protesting in the streets or holding “tea parties,” political opportunists may utilize state party name statutes to register a party name reflecting the movement to legitimize their role as a leader of the movement. This is not a new tactic. In 1896, a New York state appellate court determined that the party name “National Democratic Party” was substantially the same name as the well-established “Democratic Party” and infringed upon its proper use of the party name, potentially misleading voters.⁹⁸ A similar dispute occurred in Colorado in 1912 when individuals attempted to file to run for office as members of the Progressive

93. Michael Phillips, *Election 2010: Vegas Maverick Is a Wild Card --- Republicans, Tea-Party Faithful Fear Unorthodox Candidate Will Help Tilt Race to Democrat*, WALL ST. J., Sept. 28, 2010, at A6; see Ed Vogel, *Tea Party Candidate Is Sued*, LAS VEGAS REV. J., Mar. 23, 2010, at 1B.

94. See Phillips, *supra* note 93.

95. *Burdish v. Miller*, No. 56893 (Nev. Oct. 6, 2010) (order dismissing petition for a writ of mandamus as moot as absentee ballots had already been cast); *Burdish v. Miller*, No. 56795 (Nev. Oct. 6, 2010) (order dismissing appeal seeking injunctive relief as moot); *Fasano v. Ashjian*, No. 56040 (Nev. Oct. 28, 2010) (order dismissing appeal as moot).

96. Doug McMurdo, *Effort to Get Ashjian Off Ballot Goes Nowhere*, LAS VEGAS REV. J., Oct. 29, 2010, at 3B.

97. *General Election Results*, LAS VEGAS REV. J., Nov. 4, 2010, at B4 (providing election results as Harry Reid (D) 361, 655 (50%), Sharron Angle (R) 320,996 (45%), Scott Ashjian (TPN) 5,805 (1%), Timothy Fasano (IAP) 3,180 (0%), all other votes totaling 28,194); Laura Myers, *Ashjian Not Leaving Race*, LAS VEGAS REV. J., Oct. 1, 2010, at 1B (describing secret meeting between Angle and Ashjian to convince Ashjian to leave race).

98. *In re Greene*, 41 N.Y.S. 177 (N.Y. App. Div. 1896).

Party when that party had already nominated candidates for the same office.⁹⁹

Many states, from Alaska to Florida, have enacted statutes prohibiting the use of political party or organizational names that are similar to existing political parties with the goal of preventing voter confusion.¹⁰⁰ These statutes ban the use of established or registered party names over a spectrum of activities generally designed to avoid misleading names or campaign materials.¹⁰¹ Some states like Ohio simply enable the Secretary of State, the head state elections official, to refuse to recognize parties that violate this statute.¹⁰² Others, like Oregon, give political parties and their members exclusive rights to the use of the party names.¹⁰³ Nevada prohibits solicitation of contributions “for any organization the title of which incorporates the name, or any form of the name, of any political party in this state” without prior approval.¹⁰⁴ States like Texas,¹⁰⁵ Indiana,¹⁰⁶ and Minnesota¹⁰⁷ even prohibit use of names no longer used by a political party. Florida provides an example of fairly expansive rights to political party names.¹⁰⁸ Section 103.081 of the Florida Statutes prohibits the unauthorized use of registered party names or symbols in political advertising or in connection with any “club, group, association, or organization . . .”¹⁰⁹ This statute is at issue in the South Florida Tea Party, which could potentially require a court to address the constitutionality of the application of this statute.¹¹⁰

99. *McBroom v. Brown*, 53 Colo. 412, 413 (1912).

100. ALASKA STAT. § 15.30.025(b) (2011); FLA. STAT. ANN. § 103.081 (LexisNexis 2011).

101. *See* ALASKA STAT. § 15.30.025(b) (2011); *see also* FLA. STAT. ANN. § 103.081.

102. OHIO REV. CODE ANN. § 3517.01(A)(1) (LexisNexis 2011) (“No such group of electors shall assume a name or designation that is similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election.”).

103. OR. REV. STAT. ANN. § 248.010 (LexisNexis 2009) (“Each major political party and minor political party, its nominated candidates and its members and officers shall have the exclusive right to use the whole party name or any part of it.”); *Libertarian Party of Or. v. Roberts*, 750 P.2d 1147, 1150 (1988) (holding that under this statute, “[r]ecognized political parties and their candidates and members have the exclusive right to use their party’s name.”).

104. NEV. REV. STAT. ANN. § 293.820 (LexisNexis 2011).

105. TEX. ELEC. CODE ANN. § 161.002(b) (LexisNexis 2011) (“A party may not select for its name a name previously assumed by another existing party.”).

106. IND. CODE ANN. § 3-6-3-6(a) (LexisNexis 2008) (“[A] political party shall be known by the political party’s new name, and the party has all the rights it had under its former name.”).

107. MINN. STAT. ANN. § 202A.11 (LexisNexis 2010) (“A major political party which has adopted a party name is entitled to the exclusive use of that name for the designation of its candidates on all ballots, and no candidate of any other political party is entitled to have printed on a ballot as a party designation any part of that name.”).

108. FLA. STAT. ANN. § 103.081.

109. *Id.* at § 103.081(2).

110. First Amended Complaint ¶¶ 105-27, *South Florida Tea Party, Inc.*, No. 10-80062-CV (S.D. Fla. Feb. 17, 2010).

The Supreme Court of the United States has held that the constitutional right of like-minded voters to pursue common political ends by creating parties is protected as an associational right under the First and Fourteenth Amendments.¹¹¹ The Supreme Court has “required any severe restriction to” this right “be narrowly drawn to advance a state interest of compelling importance.”¹¹² This standard was applied in *Norman v. Reed*, an appeal from a Supreme Court of Illinois ruling that barred the use of the party name Harold Washington Party in a Cook County race as a party with the same name had previously existed in another part of Chicago, even though the previous party had approved of the new use of the party name.¹¹³

The Illinois statute had provided that new political parties “shall not bear the same name as, nor included the name of any established political party[.]”¹¹⁴ The Supreme Court of the United States held that states have an interest in preventing “misrepresentation and electoral confusion” resulting from multiple parties using the same or similar names.¹¹⁵ But the Court said that the state could simply require candidates to get formal permission to use the established party name from party leaders rather than barring other candidates from running using the party name, providing “a simple expedient for fostering an informed electorate without suppressing the growth of small parties.”¹¹⁶ Ultimately, the state may not act in a way that “sweeps broader than necessary to advance electoral order” and thereby violate the First Amendment right of political association.¹¹⁷

This constitutional standard has also been applied in state courts to party name statutes. In *Freedom Socialist Party v. Bradbury*,¹¹⁸ the court of appeals of Oregon considered whether the state could prohibit the Freedom Socialist Party from using their name on the ballot because it was too similar to the Socialist Party of Oregon.¹¹⁹ Under Oregon Revised Statutes section 248.010, political parties were prohibited from using similar names.¹²⁰ The court held that this was unconstitutional under the First Amendment to the U.S. Constitution.¹²¹ Although the court recognized the state interest in preventing voter confusion, the burden on First Amendment

111. *Norman v. Reed*, 502 U.S. 279, 288-89 (1992); *see also* *Crawford v. Marion Co. Election Bd.*, 553 U.S. 181, 190 (2008).

112. *Norman*, 502 U.S. at 289; *see Crawford*, 553 U.S. at 191.

113. *Norman*, 502 U.S. at 282, 288-91.

114. *Id.* at 285 (quoting ILL. REV. STAT., ch. 46, 10-5 (1989)).

115. *Id.* at 290.

116. *Id.*

117. *Id.*

118. 48 P.3d 199 (Or. Ct. App. 2002).

119. *Freedom Socialist Party v. Bradbury*, 48 P.3d 199, 200-01 (2002).

120. *Id.* at 200.

121. *Id.* at 203.

rights was too severe since it prevented the important indication of “socialist” to voters.¹²²

IV. CONCLUSION

The rise of the Tea Party movement has coincided with the growing importance of intellectual property in political organizations. In fledgling groups like the Tea Party, it provides aspiring leaders with much-needed control over the movement’s image and ability to communicate its message to voters. While these leaders still use traditional forms of intellectual property law such as copyright and trademark law, newer forms of intellectual property such as domain names are becoming a greater source of dispute in the Internet age.¹²³ State party name statutes also provide a significant means of controlling the name of the group as a legitimate political party and the ability of voters to identify a group as associated with that movement.¹²⁴ Leaders of fledgling political movements should learn from the legal disputes of the Tea Party and seek to better understand the use of the intellectual property law for the purpose of seizing power and control over a political movement.¹²⁵

122. *Id.* at 203-04.

123. *See supra* Part II.

124. *See supra* Part III.

125. *See supra* Part II.