Election Law Blog

The law of politics and the politics of law: election law, campaign finance, legislation, voting rights, initiatives, redistricting, and the Supreme Court nomination process
Rick Hasen's web log

« "ACORN, former workers vow to fight Nevada charges" | Main | Would Coleman File a Cert Petition if He Loses in the Minnesota Supreme Court? »

June 04, 2009

SANDERSON: ANALYSIS OF BILL CLINTON'S CYBERSQUATTING LOSS

Matthew Sanderson, who has written this *Election Law Journal* article on political cybersquatting, has written this guest post:

> Nearly a decade ago, President Bill Clinton signed into law the Anticybersquatting Consumer Protection Act and took aim at the practices of "cybersquatters"--individuals who buy-up web domains that evoke others' famous or trademarked names. Now the cybersquatters appear to be exacting some revenge on Mr. Clinton.
>
> Joseph Culligan, a man who reportedly owns over 500 candidate-related domain names and who once offered PresidentHatch.com to U.S. Senator Orrin Hatch for $45,000, purchased WilliamClinton.com, WilliamJClinton.com, and PresidentBillClinton.com. He then linked each of the sites to the Republican National Committee's webpage. In an opinion issued earlier this week, a National Arbitration Forum ("NAF") panelist rebuffed Mr. Clinton's attempt to claim the domains. The opinion and result are notable for three reasons.
>
> First, Mr. Clinton's domain-name complaint failed under factual circumstances that were nearly identical to those surrounding his wife's previous, successful domain-name claim. As readers may recall, a 2005 NAF panel ruled in favor of then-Senator Hillary Clinton after HillaryClinton.com was nabbed by a serial cybersquatter. The divergent outcomes were partially the result of a significant procedural difference: Mr. Clinton's cybersquatter replied to the complaint, whereas Mrs. Clinton was fortunate to have a no-show respondent. Although Mr. Clinton and Mrs. Clinton were each obliged to make out a prima facie claim, Mrs. Clinton obviously benefitted from the absence of a rebuttal.
>
> Second, Mr. Clinton's case is noteworthy because he successfully demonstrated commercial rights in his name, but failed to show the cybersquatter's "bad faith" in registering the domains. This is unusual for a political cybersquatting case. All domain-name arbitration complaints must show:
>
> * a domain name is identical or confusingly similar to the complainant's trademark;
> * the cybersquatter has no rights or legitimate interests in the contested domain name; and
> * the cybersquatter registered or used the contested domain name(s) in bad faith.
>
> Typically, a politician's highest hurdle in these proceedings is showing that his name is a common law mark due to its "secondary meaning" as an identifier of goods and services. But Mr. Clinton's history as a best-selling author gave him a stronger claim than most to commercial rights in his name. Thus, the NAF panelist "[r]eluctantly" concluded that Mr. Clinton had a common law mark in his name after noting his earlier decision in a

similar case involving Rolling Stones singer Mick Jagger. Mr. Clinton's claim still fell short, however, because the panelist inexplicably found a lack of "bad faith" by the cybersquatter. Past panels have found "bad faith" present where the cybersquatter: (1) engaged in a pattern of cybersquatting; (2) held a domain passively; (3) linked to a competitor's website; (4) registered a domain with actual or constructive knowledge that the domain included another's mark; or (5) failed to put forward a logical explanation for use of another's mark. All of these elements would seem to be present here, as the cybersquatter has held over 500 candidate-related domain names, offered to sell a domain to another politician under similar circumstances, used the contested domains only to link to the Republican Party's website, and purposely registered another's famous name without explanation. Nevertheless, after offering only conclusory statements like "Respondent has adequately rebutted any inference of bad faith" and "Complainant failed to meet the burden of proof of bad faith registration," the NAF panelist found no "bad faith" and denied Mr. Clinton's claim. Mr. Clinton cleared the usually outcome-determinative "trademark" obstacle, only to be tripped up elsewhere without so much as an explanation why.

Third, Mr. Clinton's domain-name case is notable because it was denied by the NAF, which had previously been seen as a relatively complainant-friendly forum in political cybersquatting disputes. Hopefully for candidates and political entities, this opinion is not a trendsetter at NAF. As I have outlined in articles here, here, and here, politicos already have difficulty using existing preventive and remedial measures to solve their cybersquatting problems.

Perhaps more than anything, Mr. Clinton's case is significant because it highlights the current system's inadequacy in reliably resolving political cybersquatting issues and the need for a new generic top-level domain, ".pol".

Mr. Sanderson is a political law attorney with the Washington, D.C. law firm Caplin & Drysdale, Chartered.

Posted by Rick Hasen at June 4, 2009 07:42 AM