

Signposts to Oblivion? Meta-Tags Signal the Judiciary to Stop Commercial Internet Regulation and Yield to the Electronic Marketplace

Craig K. Weaver*

I. INTRODUCTION TO THE META-TAG DISPUTE

Location, Location, Location. Even in cyberspace,¹ these are still the three most important factors in running a successful business. Just ask Carl Oppedahl, the Internet-savvy lawyer and partner in the Oppedahl & Larson law firm.² His firm maintains a well known legal page on the World Wide Web.³ Mr. Oppedahl will occasionally enter his firm's name into various "search engine" indexes to make sure users can easily find and access his firm's Web site.⁴ Mr. Oppedahl, like most Web site managers, is concerned with the location and visibility of his Web site on these indexes.⁵

On one of his location checks, Mr. Oppedahl entered the words "Oppedahl" and "Larson" into a popular search engine, AltaVista, and

* Cofounder, Minstrel Music Network, <<http://www.m2n.com>>, B.B.A., University of Michigan; J.D., Seattle University School of Law, Class of 1999. The author would like to thank Todd A. Weaver, his brother and the heart and soul of M2N, whose vision inspired this Comment. In addition, the author thanks Michael T. Morgan for his belief and the rest of the Weaver family for their support.

1. The term "cyberspace" was first used by the author William Gibson in his novel *Neuromancer* and has come to represent the global network of computers commonly known as the Internet. WILLIAM GIBSON, *NEUROMANCER* 51 (1984).

2. See Carl S. Kaplan, *Hidden Meta-Tag Detours Take Litigants to a New Area of Law*, N.Y. TIMES ON THE WEB, *CyberTimes* (Aug. 28, 1997) <<http://search.nytimes.com/books/search/bin/fastweb?getdoc+cyber-lib+16886+0++me9/18/97>>.

3. See *id.* Oppedahl & Larson's Web address is <<http://www.patents.com>>.

4. See Elizabeth Gardner, *Trademark Battles Simmer Behind Sites*, *WEBWEEK*, Aug. 25, 1997, at 1, 45. Search engines are on-line indexes that allow Internet users to identify Internet resources (on the Web, FTP servers, and the Usenet) based upon specific criteria. John M. Mrsich & Meeka Jun, *Terms You Need to Know: Search Engines*, 3 No. 7 *MULTIMEDIA & WEB STRATEGIST* 3 (1997).

5. "Getting a good listing in those indexes is crucial for a small business and will become more crucial as E-commerce takes off." Eamonn Sullivan, *Escaping from Search Engine Hell*, *PC WEEK*, Sept. 22, 1997, at 33.

up popped a hit list of many Web sites that met the search criteria.⁶ Among Oppedahl & Larson's listed entries were links to three Web sites that Mr. Oppedahl knew were unaffiliated with his firm.⁷ The three mysterious URLs⁸ were <<http://www.advancedconcepts.com>>, <<http://www.proweb.com>>, and <<http://www.codeteam.com>>.⁹ Upon inspection of the HTML code,¹⁰ Mr. Oppedahl discovered that each suspect Web page had concealed his firm's name eight times in their hidden programming text through a series of programming techniques.¹¹ The main technique utilized by the three aforementioned Web sites was to refer to "Oppedahl" and "Larson" in the "Meta-Tag" portion of their underlying source code.¹²

Meta-Tags, in essence, are signposts that notify search engines of the content of Web sites and facilitate keyword matches. They are "embedded descriptive text that is hidden to the viewer of the page but readable by search engines."¹³ After discovering the Meta-Tags, Oppedahl & Larson brought an action for federal unfair competition, federal trademark dilution, common law unfair competition, and common law trademark infringement in the District Court of Colorado against Advanced Concepts, Code Team - LBK, Inc., Professional Website Development, and the respective Web site administrators.¹⁴ The main allegation underlying all four causes of action is that the

6. See Kaplan, *supra* note 2, at 45. AltaVista, located at <<http://www.altavista.com>>, is one of a number of search engines available on the World Wide Web.

7. See Kaplan, *supra* note 2, at 45.

8. A URL (Uniform Resource Locator) as defined at <<http://www.whatis.com>> is the address of a file (resource) available on the Internet. The type of resource depends on the Internet application protocol. On the World Wide Web (which uses the Hypertext Transfer Protocol), some examples of URLs are: <<http://www.m2n.com>>, <<http://www.whatis.com>>, <<http://www.law.seattleu.edu>>, and <<http://www.usdoj.gov>>.

9. See Kaplan, *supra* note 2, at 45.

10. Hypertext Markup Language (HTML) as defined at <<http://www.whatis.com>> consists of "markup" symbols or codes inserted in a file intended for display on a World Wide Web browser. The markup tells the web browser how to display a Web page's words and images for the user. Every Web site's HTML programming code can be viewed by selecting the "Page Source" option on the Netscape Navigator[®] Web browser or the "Source" option on the Internet Explorer[®] Web browser.

11. See Kaplan, *supra* note 2, at 45.

12. See *id.*

13. Guy Alvarez, *A Beginner's Guide to Search Engines and Directories*, 11 No. 2 MARKET-ING FOR LAWYERS 5, 7 (1997). "Search engines build their databases by deploying robotic software that scans home pages. The robot looks for words that match the searcher's request. The first place the robot looks when it scan a Web site's home page is the 'Meta' tag line. . . ." *Id.*

14. See Complaint, *Oppedahl & Larson v. Advanced Concepts*, No. 97-CV-1592 (D. Colo. filed July 23, 1997). A copy of the complaint is available on Oppedahl & Larson's Intellectual Property Law web server (visited Sept. 16, 1998) <<http://www.patents.com/ac/complain.shtm>>.

defendant's use of "Oppedahl" and "Larson" in their Meta-Tag code caused their Web sites to be confusingly listed on AltaVista's index, resulting in damage to plaintiff's business, goodwill, reputation, and profits.¹⁵ Oppedahl & Larson insinuated that the only motivation for the allegedly infringing Web sites including "Oppedahl" and "Larson" in their Meta-Tags was to impermissibly use Oppedahl & Larson's good name to attract users.¹⁶

Mr. Oppedahl's case is a microcosm of potential Meta-Tag disputes and, therefore, is an excellent place to begin analyzing the judiciary's optimal role in regulating Meta-Tag activity. Not only is this the first case to be filed solely on the Meta-Tag issue,¹⁷ but it is also likely to be the most blatant example of such abuse. The alleged infringing sites have no affiliation whatsoever with Oppedahl & Larson, competitive or otherwise.¹⁸ This lack of affiliation leads to the obvious conclusion that the "infringing" Meta-Tags are in place solely to benefit from Oppedahl & Larson's name in an effort to gain search engine exposure. While the *Oppedahl & Larson v. Advanced Concepts* case was ultimately settled out of court,¹⁹ its facts illustrate the conceptual legal questions posed by Meta-Tag technology.

Oppedahl & Larson is a sign of the electronic times. The judiciary must first define its role in setting the boundaries of the Internet as a fledgling commercial medium before a decision on Meta-Tag regulation can be reached. For electronic commerce to thrive, users need to feel that there is order on the Internet. Without the guiding hand of the courts, this order cannot be achieved. Ironically, established laws and judicial regulation simultaneously threaten the innovation, experimentation, and unique culture that makes the Internet so attractive to both users and commercial investors. It is imperative in this, the early morn of electronic commerce, that the judiciary pick its battles carefully to encourage, rather than stifle, the

15. *See id.*

16. *See id.*

17. *See* Gardner, *supra* note 4, at 45. The Northern District Court of California granted an injunction that implicates Meta-Tags against a defendant who infringed the protected marks PLAYBOY and PLAYMATE. *Playboy Enter. Inc. v. Calvin Designer Label*, 985 F. Supp. 1218, 1220-21 (N.D. Cal. 1997). However, the defendant in that case used the protected marks in domain names both in the visible text of the Web pages and in their Meta-Tags. *See id.* While the court did issue an injunction against the defendant's continued use of the marks in their Meta-Tag code, no decision was reached on the Meta-Tag issue specifically. *See id.* at 1221-22.

18. *See* Complaint, *supra* note 14.

19. *Oppedahl & Larson v. Advanced Concepts*, No. 97-CV-1592 (D. Colo. filed July 23, 1997) (case closed Feb. 9, 1998). A timeline following the disposition of this case is available on Oppedahl & Larson's Intellectual Property Law web server (visited Sept. 16, 1998) <<http://www.patents.com/ac/index.sht>>.

development of the electronic marketplace. The next stretch of the information superhighway travels right between the Scylla of jurisprudential apathy and the Charybdis of judicial activism. The success of the Internet depends, in no small part, on the judiciary's ability to navigate this stretch of road.

Meta-Tags are not just signals embedded in programming code, they also signal an important juncture for the judiciary on the information superhighway. Courts have already decided to err on the side of regulation when dealing with another harbinger of increased Internet litigation, domain name infringement.²⁰ However, judicial involvement in domain name disputes should not dictate judicial regulation of Meta-Tag abuse. Each unique legal problem posed by Internet technology should be treated like the next fork in the road. Only then can the judiciary ensure the correct balance between indifference and interference.

The judiciary is in a position to support the growth of electronic commerce by exercising prudence when deciding Meta-Tag disputes. Courts should realize that the current source of trademark law, the Lanham Act,²¹ does not address the unique nature and function of Meta-Tags. While domain names are *visible* addresses used specifically for locating sites on the World Wide Web, Meta-Tags are *invisible* programming protocols used to facilitate private search engine indexing.²² Because the relevant test for trademark infringement is the public's likelihood of confusion,²³ this visibility distinction makes all the difference in the world. The Lanham Act was simply not enacted to regulate invisible programming code and should therefore not be used for that purpose. Because there is no law addressing the unique nature of Meta-Tags, courts should defer to the marketplace until a legislative body decides to tailor a law specifically targeted at the problems they create.

20. A domain name, as described at <<http://www.whatis.com>>, locates an organization or entity on the Internet. On the Web, the domain name is that part of the Uniform Resource Locator (URL) that tells a domain name server using the DNS (domain name system) whether and where to forward a request for a Web page. Courts have found trademark infringement in a number of cases where "cybersquatters" register an established company's trademark as their own proprietary domain name. See, e.g., *Intermatic Inc. v. Toepfen*, 947 F. Supp. 1227 (N.D. Ill. 1996).

21. 15 U.S.C. § 1051 *et seq.* (1998).

22. See Alvarez, *supra* note 13, at 7.

23. See, e.g., *Dr. Seuss Enter. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997). "Likelihood of confusion is the basic test for both common law trademark infringement and federal statutory trademark infringement." *Id.* at 1403.

The focus of this Comment is not merely to analyze the role of the judiciary in Meta-Tag litigation specifically, but also to use Meta-Tags as a lens with which to examine the potential effect of judicial activism on Internet commerce in general. The first portion of this analysis focuses on the applicability of federal trademark infringement and dilution laws in Meta-Tag abuse suits. The next portion of the article evaluates why market regulation of Meta-Tag abuse is the correct course of action, in the short-term, for ensuring the growth of electronic commerce. The article concludes with a description of potential long-term regulation alternatives and analyzes the practicality of each.

II. META-TAG SUITS—THE FIRST SIGN OF COMMERCIAL LITIGATION ON THE INTERNET?

It is no coincidence that one of the first significant commercial disputes on the Internet is in the Meta-Tag context. Even though President Clinton in his *A Framework for Global Electronic Commerce*²⁴ predicted that "commerce on the Internet could total tens of billions of dollars by the turn of the century,"²⁵ the Internet's primary purpose continues to be communication and information retrieval.²⁶ Not surprisingly, most substantive Internet litigation to date has dealt with issues pertaining to the legality of making certain images and speech publicly accessible.²⁷ However, as a new commercial dawn is breaking and President Clinton's prediction is coming to fruition, the first commercial Internet litigation has emerged in the arena of trademark law.²⁸

24. WILLIAM J. CLINTON AND ALBERT GORE, JR., *A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE* (The White House ed., 1997) [hereinafter *FRAMEWORK*].

25. *Id.* at 2.

26. See *Reno v. ACLU*, 521 U.S. 844 (1997). "The Internet is 'a unique and wholly new medium of worldwide human communication.'" *Id.* at 2334 (citing *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

27. See *id.* In *Reno v. ACLU*, the Supreme Court of the United States held that the provisions of the Communications Decency Act (CDA) barring indecency on the Internet were unconstitutional. *Id.* at 2350. Other types of Internet claims include: defamation, violations of privacy, libel, slander, and breach of security. See Byron F. Marchant, *On-Line on the Internet: First Amendment and Intellectual Property Uncertainties in the On-Line World*, 39 *HOW. L.J.* 477, 491 (1996).

28. Many disputes have arisen when a Web designer registers a domain name that may confuse a user as to the origin of the site. An example of a famous domain name dispute occurred when *Wired* magazine writer Joshua Quittner registered the domain "mcdonalds.com" and invited his readers to e-mail him at: romald@mcdonalds.com. This particular dispute was settled amicably out of court. See Neal J. Friedman & Kevin Siebert, *The Name is Not Always the Same*, 20 *SEATTLE U. L. REV.* 631, 646 (1997).

Domain name and Meta-Tag disputes are the first manifestations of the inevitable onslaught of commercial litigation that Internet technology will create. As companies begin to use the World Wide Web to facilitate business transactions rather than to facilitate information gathering like advertising, commercial Internet disputes are certain to multiply exponentially. Courts have already decided to regulate domain name infringement through the provisions of the Lanham Act,²⁹ rather than allowing either the marketplace or Network Solutions, Inc. (NSI), a private domain name provider, to correct the problem.³⁰ Courts now must decide whether the hidden programming text at issue in Meta-Tag suits is analogous to the visible addresses at issue in domain name disputes. This determination will dictate whether the Lanham Act's "likelihood of confusion" test is applicable in the Meta-Tag context.

The argument that Meta-Tags confuse users is presumably fueled by the concern that Internet-savvy companies are able to use them to siphon users from their direct competitors. At first blush, this concern seems well-founded in that Meta-Tag disputes are more likely to arise between companies competing in similar markets than between totally unrelated companies.³¹ For example, the District Court for the Eastern District of Louisiana granted Insituform Technologies' request for an injunction against National EnviroTech Group, which embedded Insituform's name in its Meta-Tag code.³² The companies are direct competitors in the trenchless pipeline market.³³ As part of the ruling, National EnviroTech must also ensure that the search engines stop routing queries intended for Insituform to its own site.³⁴ An empirical example of commercial Meta-Tag use, where no dispute has yet ensued, can be seen when "D-I-S-N-E-Y" is entered into the AltaVista search engine and the first two sites listed in the search results are for travel agencies.³⁵ A similar situation prompted the

29. See, e.g., *MTV Networks v. Curry*, 867 F. Supp. 202 (S.D.N.Y. 1994).

30. See generally Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475 (1997).

31. This is part of the reason why *Oppedahl & Larson* is such a remarkable case. The fact that the alleged infringers have no competitive correlation with the plaintiff illustrates the fact that companies are using familiar marks as Meta-Tags solely to garner more Internet traffic.

32. See *Insituform Tech., Inc. v. Nat'l EnviroTech*, No. 97-2064 (E.D. La. Aug. 27, 1997) (order granting injunction).

33. Compare <<http://www.insituform.com>> with <<http://www.nationalliner.com>>.

34. See John Fontana, *Trademark Trickery*, TECHWIRE, Sept. 29, 1997.

35. See Wendy R. Liebowitz, *Firm Sues for Invisible Use of Its Trademark on 'Net*, NAT'L L. J., Sept. 8, 1997, at A7.

Web directory InfoSpace to voluntarily pull its competitor WorldPages' name from its Meta-Tag code after it received threatening e-mails from WorldPages' president.³⁶ The InfoSpace example illustrates an interesting phenomenon, because after removing the "infringing" Meta-Tag, they simply put WorldPages' name in the visible text of their Web site, achieving the same result.³⁷

While it is tempting to use trademark law to regulate Meta-Tag usage in blatant abuse cases like *Oppedahl & Larson*, the effectiveness of the Lanham Act becomes suspect when Meta-Tag suits involve companies in direct competition. Courts should be wary of the effectiveness of trademark law whenever the "fair use"³⁸ trademark infringement defense becomes applicable.³⁹ If the Lanham Act governed Meta-Tag disputes, PepsiCo. could not be certain whether its inclusion of COCA-COLA in its Meta-Tag code constitutes infringement. While this criticism of the Lanham Act's "fair use" provision is not unique to the context of the Internet, it does take on an added significance in cyberspace. When the likely remedy for a Meta-Tag suit is a court order mandating one word be deleted from a HTML program, the time and expense of a "fair use" determination at trial is more than prohibitive, it is nonsensical. When companies in direct competition, like InfoSpace and WorldPages,⁴⁰ are embroiled in a Meta-Tag dispute, courts should recognize that a trademark infringement action is fruitless.

The Second Circuit realized this fruitlessness when it stated that "attempting to apply established trademark law in the fast-developing world of the Internet is somewhat like trying to board a moving bus . . ." ⁴¹ Perhaps courts should heed this warning and exercise restraint when Meta-Tag suits between competitors appear. More importantly, perhaps this warning will help courts realize that many of the problems

36. See Gardner, *supra* note 4, at 45.

37. See *id.* While not as effective as including the names in the Meta-Tag code, visible text is also used by some search engines to make keyword matches.

38. These "fair use" questions in the competitive context are not the focus of this Comment, however, because they beg the broader question of whether Meta-Tag abuse is even a wrong that trademark law, either state or federal, is meant to, or more importantly should, address. If Congress never anticipated the problems raised by Meta-Tag abuse, it does not seem proper to analogize Meta-Tag abuse to previous trademark infringement cases.

39. See, e.g., *The New Kids on the Block v. News America Pub'g, Inc.*, 971 F.2d 302 (9th Cir. 1992). "The 'fair use' defense, in essence, forbids a trademark registrant to appropriate a descriptive term for his exclusive use and so prevent others from accurately describing a characteristic of their goods." *Id.* at 306.

40. See Gardner, *supra* note 4, at 45.

41. *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997).

caused by the electronic marketplace should be resolved by the marketplace and not by judicial intervention.

III. FEDERAL TRADEMARK INFRINGEMENT AND DILUTION AND STATE UNFAIR COMPETITION LAWS: THE CURRENT ALTERNATIVES FOR COMBATING META-TAG ABUSE

Before settling the case, Oppedahl & Larson sought redress for their Meta-Tag grievance by stating three traditional Lanham Act claims. Their Complaint alleges that the defendants' use of the registered mark OPPEDAHL & LARSON in their Meta-Tag code constituted federal trademark infringement, federal unfair competition, and federal trademark dilution.⁴² The following analysis sets the groundwork for the next section which details the reasons why federal courts should construe trademark law narrowly and leave Meta-Tag abuse to market regulation.

A. Federal Trademark Infringement

To prove trademark infringement, a plaintiff must show that the defendant's use of his or her mark is likely to cause consumer confusion as to the source or sponsorship of the defendant's goods or services.⁴³ Each of the United States Courts of Appeals has developed its own multifactor test for determining the requisite likelihood of confusion for trademark infringement.⁴⁴ For example, the factors used by the Tenth Circuit, the circuit in which *Oppedahl & Larson* was filed, to determine likelihood of confusion are as follows:

- (a) the degree of similarity between the marks;
- (b) the intent of the alleged infringer in adopting its mark;
- (c) the relation in use and the manner of marketing between the goods or services marketed by the competing parties;
- (d) the degree of care likely to be exercised by purchasers;
- (e) evidence of actual confusion; and

42. See Complaint, *supra* note 14. In the interests of uniformity and conciseness, this Comment narrows its focus to an analysis of how Meta-Tag causes of action should be resolved under current federal trademark law schemes.

The Colorado common law trademark causes of action pleaded in *Oppedahl & Larson's* complaint are predicated on a "likelihood to deceive ordinary customer" test. See, e.g., *Driverless Car Co. v. Glessner-Thornberry Driverless Car Co.*, 264 P. 653, 654 (Colo. 1928). This author chose to focus on federal trademark claim analysis in the belief that state trademark claims would be analyzed and disposed of in a manner consistent with their federal counterparts.

43. See, e.g., *Quality Inns Int'l Inc. v. McDonald's Corp.*, 695 F. Supp. 198 (D. Md. 1988).

44. See 3 J.T. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 24.06[4] (3d ed. rev. 1995).

- (f) the strength or weakness of the marks.⁴⁵

Because these factors are interrelated, no one factor is dispositive.⁴⁶ It is, however, not the purpose of this Comment to parse through the various factors. It is sufficient for the present analysis to note that “likelihood of confusion” is the basic test for trademark infringement.⁴⁷

When analyzing a Meta-Tag claim, it is important to realize that the likelihood of confusion requirement has a broad scope. In addition to “point-of-sale” confusion, “pre-sale” and “post-sale” confusion are also actionable.⁴⁸ Point-of-sale confusion is exactly what it sounds like: A purchaser is confused as to what he or she is buying at the time he or she is buying it.⁴⁹ The fact that the “likelihood of confusion” requirement’s scope is broader than mere “point-of-sale” confusion is important in Meta-Tag cases because Meta-Tags (arguably) cause confusion on search engines, not on the registered mark holder’s Web site.

Confusion on search engines, while obviously not “point-of-sale” confusion, can be seen as “pre-sale” confusion. “Pre-sale” confusion was discussed in *Blockbuster Entertainment v. Laylco*,⁵⁰ where the court stated the fact “that a customer would recognize that Video Busters is not connected to Blockbuster after entry into a Video Buster store . . . is unimportant. The critical issue is the degree to which Video Busters might attract potential customers based on its mark’s similarity to the Blockbuster name.”⁵¹ Because Meta-Tags are meant to attract users, this case can certainly be used to argue that Meta-Tag abuse creates “pre-sale” confusion that is actionable in a federal trademark infringement case.

There is, however, an all-important difference between the *Blockbuster* case and Meta-Tag abuse cases. In *Blockbuster*, the disputed mark was visible.⁵² The mark led consumers to Video Buster, instead of Blockbuster, because they were confused when they saw the similar trademark.⁵³ Users viewing “tainted” indexes brought

45. *First Savings Bank v. First Bank System Inc.*, 101 F.3d 645, 652 (10th Cir. 1996).

46. *See id.*

47. *See MCCARTHY*, *supra* note 44, at § 23.01[1].

48. *See* Jeffrey R. Kuester & Peter A. Nieves, *Hyperlinks, Frames and Meta-Tags: An Intellectual Property Analysis*, 38 IDEA J.L. & TECH. 243, 248 (1998).

49. *See id.*

50. 869 F. Supp. 505 (E.D. Mich. 1994).

51. *Id.* at 513.

52. *Id.* at 508.

53. *Id.*

on by Meta-Tag abuse, on the other hand, have never seen the allegedly infringing mark. Meta-Tag abuse cases are thus more analogous to the proverbial "tree falling in the woods with no one around," than to *Blockbuster*, where a potential buyer can be misled by similar visible trademarks. This is not to say that Meta-Tag abuse should be encouraged or condoned. It is merely to say that trademark law and judicial regulation are not the best means by which to combat such abuse, because premature legal interference can upset the global and self-regulatory nature of the Internet.

B. Federal Unfair Competition

Unfair competition claims overlap with trademark infringement claims in that they both include "likelihood of confusion" tests.⁵⁴ The different categories of federal unfair competition that exist under the Lanham Act include passing off,⁵⁵ false advertising,⁵⁶ and false designation of origin.⁵⁷ The applicable rules of each claim are discussed below.

1. False Advertising

A "false advertising" unfair competition claim is somewhat different than either the "passing off" or "false designation of origin" claims discussed below. The "false advertising" section of the Lanham Act specifically prohibits the use of a "false or misleading description of fact, or false or misleading representation of fact [in] commercial advertising or promotion [which] misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services or commercial activities."⁵⁸ To establish a cause of action for false advertising, the plaintiff must show either that the allegedly infringing statement is literally false, or that it is likely to deceive or confuse customers.⁵⁹ False advertising claims are thus predicated on a statement or assertion that confuses customers.

Because Meta-Tags are not assertions, they should not be construed as advertising, as defined in the "false advertising" context. Meta-Tags are simply programming code, in place to interface with

54. See, e.g., *Data Concepts, Inc. v. Digital Consulting, Inc.*, 150 F.3d 620 (6th Cir. 1998); *Kendall-Jackson Winery, Ltd. v. Ernest & Julio Gallo Winery*, 150 F.3d 1042 (9th Cir. 1998); *Pappan Enter., Inc. v. Hardee's Food Systems, Inc.*, 143 F.3d 800 (3d Cir. 1998).

55. 15 U.S.C. § 1125(a)(1)(A) (1998).

56. 15 U.S.C. § 1125(a)(1)(B) (1998).

57. 15 U.S.C. § 1125(a)(1) (1998).

58. 15 U.S.C. § 1125(c) (1998).

59. See *Nat'l Basketball Ass'n v. Motorola Inc.*, 105 F.3d 841, 855 (2d Cir. 1997).

search engine software. They should be characterized as such and courts should refrain from labeling them as a statement or assertion. If courts begin to characterize Meta-Tags as statements and not as programming code, they open the door to judicial censorship of functional programming language under the auspices of regulating content.

2. Passing Off and False Designation of Origin

Unlike trademark infringement, "passing off" provides a cause of action for unfair competition even though the plaintiff's goods or services are not federally registered.⁶⁰ The requirements for a federal unfair competition "passing off" claim are: (1) an association of origin by the consumer between the mark and the first user, and (2) a likelihood of consumer confusion when the mark is applied to the second user's good or service.⁶¹ "Passing off" and "false designation of origin" claims are difficult to distinguish in that they both make confusion between goods or services actionable⁶² and any differences between the two are not important for the purposes of this Comment. What is important for Meta-Tag abuse analysis is the fact that both claims have "likelihood of confusion" elements.

The Tenth Circuit Court of Appeals states that likelihood of confusion in unfair competition claims occurs "when consumers make an incorrect mental association between the involved commercial products or their producers."⁶³ Again, this test presupposes the condition that the consumer actually *sees* the word or term that falsely designates the origin of a good or service.⁶⁴ The author of this Comment found no instance in the history of Lanham Act trademark protection jurisprudence where the public was found likely to be confused by the use of a mark completely hidden from the public's view. It seems improbable that consumers can make an "incorrect mental association," when they cannot even see the word that is supposed to create that mental association.⁶⁵

60. See *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 168 (2d Cir. 1991).

61. See *Forschner Group, Inc. v. Arrow Trading Co. Inc.*, 904 F. Supp. 1409, 1417 (S.D.N.Y. 1995), *aff'd*, 124 F.3d 402 (2d Cir. 1997).

62. *Compare Coach Leatherware Co.*, 933 F.2d 162, with *American Rolex Watch Corp. v. Ricoh Time Corp.*, 491 F.2d 877 (2d Cir. 1974).

63. *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 966 (10th Cir. 1996) (citing *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 564 (1987) (Brennan, J., dissenting)).

64. See 15 U.S.C. § 1125(a) (1998).

65. *Cardtoons*, 95 F.3d at 966.

The visibility issue has been peripherally addressed by the Second Circuit Court of Appeals. In *American Rolex Watch Corp. v. Ricoh Time Corp.*,⁶⁶ the Second Circuit held that the use of a mark on a watch was not violative of § 43(a) of the Lanham Act because the “trident” mark on the defendant’s watches, even though it looked much like the plaintiff’s “crown” mark, was very small, especially in comparison with the defendant’s trade name RICOH which was prominently displayed on every watch sold.⁶⁷ The Court of Appeals did not find unfair competition in *American Rolex* because the mark was small, albeit visible, and the watch was otherwise labeled in a nonconfusing manner.⁶⁸

American Rolex can be analogized to the Meta-Tag situation. The Second Circuit balanced the impact of the small “trident” against the prominently marked trade name “Ricoh.” In Meta-Tag disputes, courts should balance the impact of an *invisible* word against the impact of the graphical identification visible on the Web site behind the link. Taking this argument to its logical conclusion, courts should never base an infringement case solely on Meta-Tag abuse, but should focus on the content of the visible text and graphics on the Web page itself. When a Meta-Tag plaintiff, like Oppedahl & Larson, pleads only that a defendant’s Meta-Tags are the source of the alleged infringement,⁶⁹ courts should follow the logic of *American Rolex* and direct a verdict for the defendants.

Courts have still not addressed an infringement or unfair competition claim solely predicated on Meta-Tag abuse. While it is true that the Northern District Court of California, in *Playboy Enterprises, Inc. v. Calvin Designer Label*,⁷⁰ enjoined a defendant from using the protected marks PLAYBOY or PLAYMATE in its Meta-Tag code, it did so in conjunction with orders against continued use of the marks in the defendant’s domain names and visible Web page text.⁷¹ No court has, to date, decided a case solely based on Meta-Tag abuse. That type of case would hinge entirely on the invisible mark’s ability to confuse the public and the court’s determination that extra listings on a search engine index list can cause the requisite confusion in the public. Courts should be aware of the distinction between the visible text of Web sites and invisible Meta-Tags and the

66. 491 F.2d 877 (2d Cir. 1974).

67. *Id.* at 879.

68. *Id.*

69. See Complaint, *supra* note 14.

70. 985 F. Supp. 1218, 1219 (N.D. Cal. 1997).

71. See *id.*

potential for each to confuse the public. Because Meta-Tag abuse is conceptually different than traditional trademark infringement, it should be treated *sui generis* by the courts.

3. Federal Dilution

The third way in which a plaintiff can recover on a Meta-Tag abuse claim is under a federal dilution claim. On January 16, 1996, the Lanham Act was amended to encompass trademark dilution.⁷² The amendment defines dilution as “the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception.”⁷³

The amendment, if applied in the Meta-Tag context, would require courts to decide that the extra inclusion of links on a search engine index page inhibits the ability of trademarks to identify or distinguish goods and services.

In making this assessment, courts cannot turn to the language of the Lanham Act, because it does not specify how dilution occurs or how it may be detected and measured.⁷⁴ State dilution statutes can be used to help define what constitutes dilution, however. While courts applying state dilution statutes recognize two distinct types of dilution,⁷⁵ this Comment focuses only on the type of dilution known as “blurring.”⁷⁶

In *Panavision Intern. v. Toeppen*,⁷⁷ the Central District Court of California stated that blurring “‘involves a whittling away’ of the selling power and value of a trademark by unauthorized use of the mark.”⁷⁸ Protecting famous marks against blurring prevents individuals who have seen both the junior and senior marks from associating the two with each other, thereby diluting the power of the senior mark

72. 15 U.S.C. § 1127 (1996).

73. *Id.*

74. See Kuester & Nieves, *supra* note 48, at 251.

75. The two recognized types of dilution are “tarnishment” and “blurring.” Dilution through tarnishment “generally arises when the plaintiff’s trademark is linked to products of shoddy quality or is portrayed in an unwholesome or unsavory context likely to evoke unflattering thought about the owner’s product.” *Deere & Co. v. MTD Prod., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994). Because a Meta-Tag is merely programming code used as an index tool and really has no positive or negative connotations, this Comment will focus on “blurring” dilution exclusively.

76. See, e.g., *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1031 (2d Cir. 1989).

77. 945 F. Supp. 1296 (C.D. Cal. 1996).

78. *Id.* at 1304.

to "identify and distinguish" its goods and services.⁷⁹ The association between the senior and junior marks reaches "blurring" status when the similarities between the two marks become so great as to cause confusion.⁸⁰ While a Meta-Tag and a senior mark can in some cases be virtually the same (e.g., OPPEDAHL and LARSON and OPPEDAHL & LARSON), there will still be no association unless the user sees the Meta-Tag. Invisible Meta-Tags simply do not have the ability to make a mark like COCA-COLA less effective in identifying or distinguishing its fine carbonated beverage from its competitors.

Meta-Tag abuse is one of many unique problems that has originated entirely from Internet technology. Courts should therefore address the problem *sui generis* and should not attempt to judicially regulate it using trademark laws enacted before Meta-Tags were even invented. Even cases of Meta-Tag abuse as blatant as *Oppedahl & Larson* should simply not be regulated by the judiciary at this time. Because Meta-Tags are an entirely new phenomenon, courts should find the Lanham Act inapplicable in Meta-Tag abuse cases and should let technology and the market deal with the problem.

IV. WHY THE CURRENT ALTERNATIVES ARE UNSATISFACTORY FOR SOLVING COMMERCIAL INTERNET DISPUTES

There are essentially two reasons why the current alternatives for redress in Meta-Tag disputes are unsatisfactory. The first is that trademark law is ill-equipped to govern Meta-Tag disputes because of the unique nature and function of search engine indexing on the World Wide Web. The second is that the global nature of the Internet militates against the use of one country's trademark law to settle commercial disputes, let alone the common law of specific states.

A. *The Unique World of Search Engine Indexing*

Meta-Tag abuse is undoubtedly occurring on the World Wide Web and needs to be addressed. The first question, however, is whether trademark law is the correct vehicle for addressing the problem. There are a multitude of reasons to conclude that it is not.

Trademark law is designed to protect the owners of a mark. While Oppedahl & Larson contend that defendants' Meta-Tag use of their mark detracts from its value, the extent of the detraction appears negligible. Search engines utilize Meta-Tags for building a content

79. *Ringling Bros. Inc. v. Utah Div. of Travel Dev.*, 955 F. Supp. 605, 615 (E.D. Va. 1997) (in comparing preamendment Lanham Act analysis to state "blurring" dilution).

80. *Mead Data Cent.*, 875 F.2d at 1031.

database so that the search engine will list those sites whose Meta-Tags match the keywords entered by the user.⁸¹ The defendants' use of "Oppedahl" and "Larson" in their Meta-Tags does not preclude users from accessing Oppedahl & Larson's Web page.⁸² Users are also unlikely to be confused as to the origin of the defendants' Web pages, because there are no overt references to Oppedahl & Larson.⁸³ While the inclusion of excess sites on a returned search index list may dilute the impact of a site's listing on an index, the inclusion does not dilute the ability of a mark to identify its corresponding site once the user accesses it.

This situation is distinguishable from domain name trademark infringement cases where a visible URL is the centerpiece of the litigation. The case of *Intermatic Inc. v. Toeppen*,⁸⁴ is an excellent example of the differences between Meta-Tag disputes and domain name disputes. The defendant, Toeppen, registered approximately 240 domain names without seeking permission from the entities that had previously used the names he registered.⁸⁵ The plaintiff, Intermatic, sued under both trademark infringement and unfair competition, alleging a likelihood of confusion and requesting an injunction against the defendant's continued control over the domain name.⁸⁶ The court denied Intermatic's summary judgment motion as to its infringement claim, but granted summary judgment as to its dilution claim.⁸⁷ The court's motivation for granting the summary judgment on the dilution claim was that "dilution of Intermatic's mark is likely to occur because the domain name appears on the web page and is included on every page that is printed from the web page."⁸⁸ Since Meta-Tags are *never* visible, they are entirely different from domain names. Therefore, the fact that the defendant in *Playboy*⁸⁹ was enjoined from continuing Meta-Tag abuse can, and should, be seen as ancillary relief that was

81. See Alvarez, *supra* note 13, at 7.

82. All sites with "Oppedahl" or "Larson" in their Meta-Tags will be returned by the search engine. Each entry returned will have a brief description of what the attached Web site contains. Users can either narrow the search they have initiated by selecting another keyword or they can directly access any listed site. This process, while difficult to explain, is simple to understand in practice. Altavista, <<http://www.altavista.com>>, and Infoseek, <<http://www.infoseek.com>>, are examples of search engines that utilize Meta-Tag searches. See *id.*

83. See Complaint, *supra* note 14; see also *supra* note 69 and accompanying text.

84. 947 F. Supp. 1227 (N.D. Ill. 1996).

85. *Id.* at 1230.

86. *Id.* at 1234-35.

87. *Id.* at 1236, 1241.

88. *Id.* at 1240.

89. *Playboy Enter. Inc. v. Calvin Designer Label*, 985 F. Supp. 1218, 1220-21 (N.D. Cal. 1997).

granted only because the court first found domain name infringement. However, when a court is presented with a claim based entirely on Meta-Tag abuse, it should decline the invitation to render a judgment based on current trademark law.

It is logical to say that the inclusion of unrelated Web sites on a search index may impede the user's ability to find the Web site for which they are searching. Although users are likely to be confused about why unrelated Web sites are listed, there is no reason to think that an "infringing" Web site's presence on a search list will confuse users about the origin of each individual Web site listed. The allegedly infringing Web sites in *Oppedahl & Larson* contain no visible references to the Oppedahl & Larson law firm. Users simply do not have the capacity for confusion when they are not privy to those visible references.⁹⁰ It is unclear how additional listed Web sites affect the value of the OPPEDAHL & LARSON mark, especially when the allegedly infringing Web sites contain no visible references to the Oppedahl & Larson law firm.⁹¹

Courts should determine that trademark law does not cover situations in which the allegedly infringing use is invisible to users, and the effect of the alleged infringement does not preclude users from accessing the mark owner's Web site. This is not to say that the defendants' behavior should be condoned. This Comment is merely seeking to question whether trademark litigation is the appropriate means to seek redress.

In evaluating the correct means of redress, it is important to note that search engines are run by private companies that have the right to

90. Inspection of defendants' Web sites will bear out this conclusion. The URLs in question are:

- * <<http://prowebsite.com/server.html>>;
- * <<http://www.codeteam.com/msiorder.htm>>;
- * <<http://www.advancedconcepts.com/products.html>>;
- * <<http://www.advancedconcepts.com/whois.html>>;
- * <<http://www.advancedconcepts.com/domain.html>>;
- * <<http://www.advancedconcepts.com/domregis.html>>;
- * <<http://www.advancedconcepts.com/vserfea.html>>;
- * <<http://www.advancedconcepts.com/website.html>>;
- * <<http://www.advancedconcepts.com/ordrblnk.html>>;
- * <<http://www.advancedconcepts.com/>>;
- * <<http://www.advancedconcepts.com/examples.html>>

Complaint, *supra* note 14.

91. Compare this situation with domain name disputes in which a company's trademark is incorporated into an infringer's URL (e.g., <<http://www.mcdonalds.com>>). See generally Friedman & Seibert, *supra* note 28.

provide their indexing services in any manner they please.⁹² Although these companies do not charge for inclusion in their databases (unlike the Yellow Pages, for instance), they certainly have the right to exclude Web sites that engage in Meta-Tag abuse from their databases. In fact, market theory seems to suggest that it would be wise to do so, since Meta-Tag abuse certainly affects the ability of the search engine to make efficient and effective keyword matches. Assuming that it is in the best interests of search engines to combat Meta-Tag abuse, it seems likely that AltaVista would have forced the defendants to change their Meta-Tags if Oppedahl & Larson had merely requested that they do so. This is effectively the same result that was reached by the *Oppedahl & Larson* court after months of pre-trial expense.⁹³

B. "Choice of Law" Problems Exacerbated in Cyberspace

Without delving too deeply into the morass of jurisdictional problems begotten by the Internet, a discussion of related "choice of law" concerns is appropriate. The use of federal trademark law, not to mention state law causes of action, to decide Internet disputes will certainly amount to inconsistent legal precedent globally. While these inconsistencies have manifested themselves in many other contexts,⁹⁴ none seems as troublesome as the context of the Internet. David G. Post, an associate law professor at Temple University, has addressed this exact dilemma:

"If I publish something, should I be hauled into court in Singapore because my Web site can be received there?" Post asks. "If the answer is yes, then I also must be subject to the laws of every country in the world simultaneously. And then the country with the most restrictive set of laws will monopolize rule making for the entire net. That can't be right."⁹⁵

92. Many search engines do not even use Meta-Tag technology to conduct their services. See Alvarez, *supra* note 13, at 8.

93. This situation seems to show that the market is the best source of regulation at this time. However, because this section of the Comment focuses on current problems and not potential solutions, an in-depth analysis of this and other potential alternatives may be found in Section IV.

94. One instance is the determination of the correct liability structure to be instituted for copyright infringement by independent service providers (ISPs). Compare *Playboy Enter. Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding that a traditional strict liability copyright infringement scheme is appropriate), with *Sega v. Maphia*, 948 F. Supp. 923 (N.D. Cal. 1996) (instituting a contributory infringement liability scheme).

95. See Carl S. Kaplan, *Finding Government's Role in a Global Network*, N.Y. TIMES ON THE WEB, CyberTimes (July 10, 1997) <<http://search.nytimes.com/books/search/..etdoc+cyber-lib+cyber-lib+17494+21++law>>.

Once a Web page is posted to the World Wide Web, it is instantly visible globally. Under the current scheme of things, the laws of every country, state or municipality that can receive a Web page can theoretically determine the validity of the Meta-Tags in that Web site. Jack Goldsmith, assistant professor of law at the University of Chicago, has stated that such issues "are not really any different from those presented by current trans-border transactions," because "cyberspace relations . . . are no different from telephone relations and smoke-signal relations."⁹⁶ However, this view seems flawed, as telephone and smoke-signal communications are not receivable simultaneously in every country in the world. Before companies trust the commercial environment of the Internet, consistent standards that will transcend governmental borders need to be established.

The Internet has globalized communications and is certain to globalize commerce. A successful global environment depends upon laws that are tailored to the unique nature of Internet transactions and are consistent across governmental borders. The current litigation-oriented alternatives to resolve Meta-Tag disputes are insufficient to achieve these necessary ends.

V. RECONCILING THE ARGUMENTS AGAINST INTERNET REGULATION WITH THE CONCERNS ABOUT COMMERCIAL STABILITY IN CYBERSPACE

Even though the Internet was created by the American Department of Defense,⁹⁷ it seems that the philosophy espoused in many a chat room is grounded in regulatory trepidation.⁹⁸ The Clinton Administration must be attuned to this philosophy, since its *A Framework for Global Electronic Commerce (Framework)* sings the praises of a laissez faire approach to electronic commerce regulation.⁹⁹

96. *Id.*

97. See Amy Knoll, Comment, *Any Which Way But Loose: Nations Regulate the Internet*, 4 TUL. J. INT'L & COMP. L. 275, 276 (1996).

98. See, e.g., John Perry Barlow, *Declaration of the Independence of Cyberspace* (visited Sept. 16, 1998), <<http://www.eff.org>>. "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of the Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that which liberty itself always speaks. I declare the global special space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear." *Id.*

99. See FRAMEWORK, *supra* note 24.

President Clinton's *Framework* is based on the notion that "for electronic commerce to flourish, the private sector must continue to lead."¹⁰⁰ The Administration supports a system of industry self-regulation, where the government encourages and supports the efforts of private sector organizations to develop mechanisms to facilitate the successful operation of the Internet.¹⁰¹ The *Framework* warns against undue restrictions on electronic commerce because "government attempts to regulate are likely to be outmoded by the time they are finally enacted, especially to the extent such regulations are technology-specific."¹⁰²

There are other compelling reasons for a laissez-faire approach to governmental regulation. Economies of scale and the elimination of "middlemen" are two reasons why Internet commerce is desirable.¹⁰³ Government regulation is not only cumbersome, it is also costly and would interfere with the current economic advantages that the World Wide Web offers companies. Furthermore, because electronic commerce should be facilitated on a global basis,¹⁰⁴ federal or state legislation or judicial review seems counterintuitive.

The best rationale for keeping the government off the Net is simply that the market should decide.

Ultimately, the strongest argument for self-regulation is that it works. Under the current laissez-faire approach, cyberspace has experienced exponential growth measured by the total number of users, total volume or dollar value of commerce, and the advancement of the technology. Further, the technology, software, and infrastructure has responded virtually instantaneously to meet every perceived need or to protect against perceived dangers. Thus, experience in cyberspace militates for a hands-off approach by government.¹⁰⁵

Gibbons's article goes on to suggest that governments should encourage a self-regulation model.¹⁰⁶ However, regulation by service providers, domain name registration services, search engines and

100. *Id.* at 4.

101. *See id.*

102. *Id.*

103. One need only look at the success of Amazon.com, located at <<http://www.amazon.com>>, to see that wholesaling on the World Wide Web is a lucrative business opportunity.

104. *See FRAMEWORK, supra* note 24.

105. Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J. L. & PUB. POL'Y 475, 484 (1997).

106. *See id.* at 510. *See also FRAMEWORK, supra* note 24.

individual webmasters poses problems as well. Giving these companies policing power makes them, in effect, pseudo-governmental regulatory agencies. Furthermore, these are private companies in existence to make a profit and have no desire to become cyberspace watch-dogs, Web-police, or Internet tribunals. However, self-regulation models like Cybersitter, Net Nanny, and SurfWatch,¹⁰⁷ have done much more to combat the evils of on-line pornography than the amendments to the Communications Decency Act (CDA) struck down as unconstitutional by the United States Supreme Court in *Reno v. ACLU*.¹⁰⁸

Regardless of the problems that both self-regulation and governmental regulation present, the Internet community must choose between them or settle on a combination of the two. Judging from the litany of Internet-based legislation currently before Congress¹⁰⁹ and ever-increasing judicial intervention,¹¹⁰ a regulation-free Internet is never going to happen. "The no regulation model is a null choice because, in cyberspace, the idyllic state of nature never actually existed."¹¹¹ The popularization of the information superhighway has alerted judges, legislatures, and governments that the Internet is a place where real wrongs take place.¹¹² The only question is whether those governments regulate the remedies themselves or allow the Internet community the freedom to self-regulate.

No one wants the governments of the world stifling the innovations of the Internet. However, with the rise of electronic commerce, there is rising concern about whether innovation can continue without a legal structure supported by those self-same governments. The Clinton Administration undoubtedly endorses the "less is more" theory of regulation, but it is not oblivious to the fact that the future of electronic commerce also depends upon the stability that only government involvement can provide. *Framework* states, "Where government intervention is necessary to facilitate electronic commerce,

107. These are programs that block a PC user's access to offensive materials on the Internet, including World Wide Web and FTP sites, "alternative" newsgroups, chat rooms, gophers, and e-mails. See Gibbons, *supra* note 105, at 513.

108. 521 U.S. at 844.

109. See, e.g., H.R. 2652, 105th Cong. (1997) (prevention of misappropriation of collections of information), H.R. 2326, 105th Cong. (1997) (Children's Online Privacy Protection Act of 1998), H.R. 2441, 104th Cong. (1995) (Copyright Protection Act of 1995).

110. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997); *Religious Tech. Ctr. v. Netcom On-Line Comm'n Serv.*, 907 F. Supp. 1361 (N.D. Cal. 1995); *Sega Enter., Ltd., v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994); *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

111. Gibbons, *supra* note 105, at 501.

112. See *id.*

its goal should be to ensure competition, protect intellectual property and privacy, prevent fraud, foster transparency, support commercial transactions, and facilitate dispute resolution."¹¹³

The European Commission (EC) is taking this proposition even further. They are moving ahead with concrete plans to develop a regulatory scheme for electronic commerce in the European Union.¹¹⁴ The EC's first objective is to build trust and confidence in the Internet by establishing a regulatory and institutional legal framework.¹¹⁵ The second objective is to ensure full access for electronic commerce to the Single Market.¹¹⁶ Echoing the earlier critique of the current "choice of law" alternatives, the EC believes that full access cannot be achieved when different governmental units are developing divergent approaches that are ineffective given the transfrontier nature of electronic commerce.¹¹⁷ Clinton's *Framework* suggests that "governments should establish a predictable and simple legal environment based on a decentralized, contractual model of law rather than one based on top-down regulation."¹¹⁸ The EC has done more than suggest such a contractual model, they have adopted one.¹¹⁹

Both the United States government and the EC realize that there is a need for commercial stability on the Internet. If speedy resolutions to commercial Internet disputes are not available, many advantages to using the Internet commercially are lost. These lost advantages include speed, user confidence, and efficiency. The Clinton Administration's *Framework* and the EC's response show that both understand that market theory does not work in a chaotic, anarchic atmosphere. It is now time for them to act upon that understanding and to put a trustworthy legal framework in place. That legal framework begins with judicial deference to problems that can be dealt with through technological means or the electronic marketplace, especially in the short term.

This brings us back to Meta-Tags. The theories embodied in Clinton's *Framework* do very little to help resolve these disputes. It is one thing to outline the need for a "contractual model of law" that will

113. FRAMEWORK, *supra* note 24, at 5.

114. See *European Union Considers Regulatory Framework for Electronic Commerce*, 16 No. 12 BANKING POL'Y REP. 10 (1997).

115. See *id.*

116. See *id.* at 11. This "single market" refers to the Unified European Economic Market. *Id.*

117. See *id.*

118. FRAMEWORK, *supra* note 24, at 5.

119. See *European Union Considers Regulatory Framework for Electronic Commerce*, *supra* note 113, at 12.

“support commercial transactions” and “facilitate dispute resolution.”¹²⁰ It is quite another to actually put such principles into practice.¹²¹ Before implementing either legislative or judicial “fixes” to Internet disputes that could potentially stunt Internet expansion, lawmakers should first evaluate the ability of the marketplace to remedy the problem. A message to both the Clinton Administration and the judiciary: Although there are certainly problems that need to be legally addressed, a solid foundation for enacting or judicially creating a regulation model is continued deference to the workings of the electronic marketplace. Meta-Tag abuse seems to qualify as a prime example of an instance where the Internet community should be allowed to police itself.

VI. POTENTIAL ALTERNATIVES: A FEASIBILITY, PRACTICALITY, AND EFFECTIVENESS ANALYSIS

Because this author does not wish only to criticize, a few potential solutions to the Meta-Tag abuse problem are listed below. The attendant feasibility, practicality, and effectiveness analysis is couched both in terms specific to the Meta-Tag problem and that address Internet regulation in general. Three potential solutions are listed below:

A. *Amendments to the Lanham Act*

This Comment rests on the proposition that federal trademark law is not the correct vehicle with which to combat Meta-Tag abuse. Trademark laws were not enacted with Meta-Tag abuse in mind, and the invisible nature of Meta-Tags distinguishes them from every trademark that has ever been deemed to be infringed. One potential alternative is for Congress to enact legislation specifically targeted at the Meta-Tag problem in the form of an amendment to the Lanham Act. Before doing so, Congress should evaluate the effectiveness of a proposed amendment, the likelihood of an amendment stunting technological growth, and the amenability of a global marketplace to Internet regulation.

120. FRAMEWORK, *supra* note 24, at 5.

121. Compare FRAMEWORK, *supra* note 24, with “A European Initiative in Electronic Commerce” (as described in *European Union Consider Regulatory Framework for Electronic Commerce*, *supra* note 113, at 10). The EC is currently crafting legislation to regulate all aspects of electronic commerce rather than merely discussing such regulations on a theoretical level. See *European Union Considers Regulatory Framework for Electronic Commerce*, *supra* note 113, at 10.

1. Technological Growth

To understand the argument that amendments to the Lanham Act may stunt technological growth, it is informative to look to proposed copyright legislation. In 1995, the House of Representatives proposed HR 2441, the "National Information Infrastructure Copyright Protection Act of 1995," to amend Section 106 of the Copyright Act to include a new "transmission" right.¹²² This amendment was intended to extend a copyright holder's rights to include the exclusive right to transmit copies and phonorecords of his/her copyrighted works.¹²³ Members of the Digital Future Coalition (DFC) objected to the amendment on the ground that "it fails to sustain the principle of balance, placing a nearly exclusive emphasis on the protection for copyrighted content, and doing so at the expense of promoting innovation, privacy, education and public information access."¹²⁴

While they recognized the need to fight piracy, the DFC believed that legislative interference with the current on-line environment could "frustrate competition in the market for digital goods and services, [and] stifle innovation and job creation in the private sector . . ."¹²⁵ The DFC advises that "a deliberate process of copyright law revision is more likely to produce results which will stand the tests of time and the marketplace than a process driven by a false sense of urgency."¹²⁶ Whenever proposed legislation is going to cause drastic change in the current methodologies of the electronic environment, the advice of the DFC seems sound.

While the Meta-Tag dispute deals with trademark and not copyright law, the advice of the DFC still applies. If Congress were to enact legislation to allow trademark law to govern the content of programming code, it would effectively stifle Meta-Tag technology. If companies are unsure about the legitimacy of the Meta-Tags they use, the effectiveness of the technology is lost. If programmers are reluctant to write new software for fear of liability under trademark law, their dilemma is perfectly analogous to the dilemma the DFC visualizes in the copyright regime. The DFC is concerned that programmers will not create new technology if that technology implicates "transmission" of copyrighted material. Congress should

122. H.R. 2441, 104th Cong. (1995).

123. *See id.*

124. Statement of Members of the Digital Future Coalition on H.R. 2441 at <<http://www.dfc.org/dfc/legislat/copyrigh.htm>> (on file with the *Seattle University Law Review*).

125. *Id.*

126. *Id.*

similarly be wary of stunting innovation by using trademark law to regulate programming code until it is certain that the market is not effectively dealing with the problem.

2. Amenability of the Global Marketplace

An amendment to the Lanham Act will only serve to regulate trademark infringement occurring within American borders. American territorialism is a widely discussed subject in domain name cases.¹²⁷ "Long-arm statutes" allow for jurisdiction when both parties are American corporations, as in cases like *Oppedahl & Larson*. However, the costs for a foreign trademark owner to bring suit in the United States might prove prohibitive,¹²⁸ especially if the dispute were simply about the existence of the foreign plaintiff's trademark in the defendant's Meta-Tag code. This problem would be exacerbated if different countries were to treat Meta-Tag regulation differently. Plaintiffs would look to the most prohibitive countries in which to bring suit, and defendants would find the least prohibitive country in which to upload their sites to the World Wide Web. This behavior is termed "regulatory arbitrage."¹²⁹

The novel issues arising out of Meta-Tag and Internet technology are important topics of discussion and analysis. While this novelty mandates brainstorming and evaluation, the time may not be right for Congress to enact reactionary legislation. Because the Internet is a global enterprise and because legislative interference with programming code could stifle technological growth, a federal amendment to the Lanham Act is ill-advised at this time. The global nature of the Internet mandates a global solution.

B. *International Treaties and Combined Efforts to Regulate*

The global nature of the Internet would necessitate the development of a multinational agreement on how the Internet should be regulated. While international treaties are obviously difficult to negotiate and finalize, history shows that these treaties are made when the global economy and free market are implicated.

127. See, e.g., David W. Maher, *Trademark Law on the Internet—Will it Scale? The Challenge to Develop International Trademark Law*, 16 J. MARSHALL J. COMPUTER & INFO. L. 3 (1997).

128. See *id.* at 11.

129. See A. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE 129 (Brian Kahin & Charles Nesson eds. 1997).

One example of an economy-driven, free-market motivated treaty is the North American Free Trade Agreement (NAFTA). The basic goals of NAFTA are to:

- (1) eliminate trade barriers;
- (2) promote conditions of fair competition;
- (3) increase investment opportunities;
- (4) provide adequate protection for intellectual property rights;
- (5) establish effective procedures for its implementation and application; and
- (6) provide for the resolution of disputes among the signatures of the agreement.¹³⁰

The benefits of addressing immigration, narcotics, and environmental protection, coupled with the obvious benefits arising from a larger market base, motivated the signature countries to overcome territorial differences and pass NAFTA.¹³¹

Another treaty-formed organization based on free-market principles is the European Community (EC). A hot topic in the EC recently has been the role of intellectual property rights.¹³² The focus has been to resolve problems stemming from the territorial nature of Member State-created intellectual property rights.¹³³ The importance of uniform laws regarding intellectual property motivated the EC Member States to create a Community law that overrides the territorialist intellectual property laws of the Member States.¹³⁴ Again, when the free market is implicated, different nations are able to agree on a transnational regulation structure.

Finally, the international agreement that best analogizes a transnational Internet regulation agreement is the World Intellectual Property Organization (WIPO). WIPO grew out of the 1883 Paris Convention treaty on patents and trademarks and the 1886 Berne Convention on copyrights.¹³⁵ Today, it administers 20 major intellectual property treaties and promotes the adoption of new treaties.¹³⁶ Again, countries recognized the need for uniform regula-

130. See generally THE NORTH AMERICAN FREE TRADE AGREEMENT 1, 7-8 (Bernard D. Reams, Jr. & Jon S. Schultz eds., 1994).

131. See Larry Bakken, *The North American Free Trade Agreement: The Foundation for a New Trade Alliance*, 18 HAMLINE L. REV. 329 (1995).

132. See Andreas Reindl, *Intellectual Property and Intra-Community Trade*, 20 FORDHAM INT'L L.J. 819 (1997).

133. See *id.* at 819.

134. See *id.*

135. See Gerald J. Mossinghoff & Ralph Oman, *The World Intellectual Property Organization: A United Nations Success Story*, 79 J. Pat. & Trademark Off. Soc'y 691, 692 (1997).

136. See *id.*

tion that would transcend territorial borders when inventions, original creations, and valuable trademarks were implicated.

There are certainly problems that will hinder the ability of nations to agree on an Internet regulation treaty. These problems include scope issues, cultural differences, varying standards of computer technology and telecommunications networks, inherent difficulties in reaching a consensus, and the possible inability to enforce a binding agreement.¹³⁷ However, as countries grasp the economic implications that walk hand-in-hand with electronic commerce, a global Internet policy encompassing a large spectrum is sure to be agreed upon, just like the policies behind NAFTA, the EC, and WIPO. This author is not advocating that countries mobilize to do battle with Meta-Tag abuse, but simply that the United States legislature and judiciary should allow the market to regulate until a global agreement can be reached. Until progress can be made towards a global agreement, self-regulation seems to be the most viable and logical option to deal with the majority of Internet disputes, including Meta-Tag abuse.

C. *Self-Regulation by Search Engines*

The theoretical problems with an amendment to the Lanham Act and the logistical problems with a global treaty bring us back to a market based, self-regulatory solution. Search engine regulation of Meta-Tag disputes is a more efficient, more uniform, and less costly alternative than court orders, under either the current scheme or a proposed new Lanham Act scheme. This is true because the likely outcome of valid Meta-Tag abuse complaints will simply be a court order mandating that the defendants delete two words from their programming code, with or without the addition of court costs and attorneys' fees. While courts must continue to play a role in deciding some Internet disputes, judicial deference to a self-regulatory scheme is in the best interests of Meta-Tag litigants specifically, and the Web culture in general.

Another benefit of the private self-regulatory model is the fact that private companies are not as constrained by political borders as are governments. Self-regulation will avoid many jurisdictional and "choice of law" concerns,¹³⁸ because contractual and market driven schemes transcend territoriality. Allowing Meta-Tag disputes to be self-regulated ameliorates both jurisdictional and "choice of law" concerns, while showing the denizens of the Web that the government

137. See Knoll, *supra* note 96, at 300-01.

138. See generally Kaplan, *supra* note 2.

does not wish to interfere in every contentious issue that arises on the Internet.

The idea that search engines should police the behavior of those benefiting from their services is not a novel one. In the domain name context, this type of alternative is already being used.¹³⁹ Network Solutions, Inc. (NSI) is a private registry, under contract from the National Science Foundation, that assigns the vast majority of domain names.¹⁴⁰ In the face of complaints from trademark owners, NSI reacted by instituting a self-regulatory process.¹⁴¹ The most important element of this self-regulation was a "Domain Name Dispute Policy," where registered trademark owners can challenge an infringer's domain ownership. The tenets of the original scheme are essentially that: (1) applicants can obtain only one domain; (2) they must pay a fee to receive a domain; and (3) registered trademark owners, both domestic and foreign, can challenge "identical" domains by submitting a registration certificate to NSI.¹⁴² Although NSI's "Dispute Policy" is an extremely efficient way in which to deal with domain name disputes, the system came under attack for being biased in favor of those who have obtained federal or international trademark registrations, as opposed to those who may have a case for common law protection.¹⁴³

A litigant's choice to seek redress in the courts rather than through a private company can be seen as a major problem with self-regulation. In other words, without government endorsement, self-regulation may not prove effective.¹⁴⁴ And while the Internet Society formed the Internet Ad Hoc Committee (IAHC) to finalize domain name assignment policy as an alternative to self-regulation,¹⁴⁵ there is no guarantee that those methods will be effective without government support. However, the IAHC's inception itself shows that members of the Internet culture are attempting to take domain name disputes out of the hands of the judiciary, in the belief that a self-regulation model is the best regulatory scheme at this time.

139. See generally Sally M. Abel & Marilyn Tiki Dare, *Trademark Issues in Cyberspace: The Brave New Frontier*, 486 Practising L. Inst./Patents, Copyrights, Trademarks and Literary Property Course Handbook Series 381 (1997).

140. See *id.* at 384.

141. See *id.* at 388-89.

142. See *id.*

143. See *id.* at 390.

144. Note the rash of domain name cases that bypassed NSI's dispute system and appeared in American courts of law. See *id.* See also Friedman & Siebert, *supra* note 28.

145. See Able & Dare, *supra* note 138, at 401.

Leaving domain names and other Internet disputes aside, courts should defer to the market's ability to regulate Meta-Tag abuse. Search engines are in a much better position to pull offending Web sites from their indexes than are courts. Furthermore, self-regulation is in the best interests of search engines, as keyword uniformity ensures efficient, specific search processes. In fact, search engines are already competing in the Meta-Tag sphere, because Excite's search engine software facilitates searches without using Meta-Tags. As President Clinton's administration realized before releasing the *Framework*, Internet regulation should be kept to a minimum. In order to ensure this, some areas of Internet regulation must be left to the marketplace. Meta-Tag technology has created one of those areas.

VII. CONCLUSION

Meta-Tag technology has created a type of dispute that has heretofore never been addressed by our courts. Invisible keywords are inserted into programming code in order to facilitate on-line information searches. Programmers have not resisted the temptation to include famous words in their Meta-Tag code to increase the traffic to their Web sites. The use of trademarked words in Meta-Tag code has sparked controversy. However, traditional trademark remedies were not put in place to deal with invisible programming code. Therefore, trademark law should not be used to regulate Meta-Tag disputes. President Clinton addressed the correct type of regulation scheme in his *A Framework for Global Economic Commerce*, when he advocated a laissez-faire approach to Internet regulation. While there are obviously some Internet disputes that need to be addressed by the judiciary, it is important to be cautious in choosing which disputes merit judicial attention. American courts can go a long way in supporting the growth of the Internet by allowing many disputes to be regulated through technology or the marketplace. Judicial deference to the marketplace in the Meta-Tag context will send the message that American courts support experimentation and development of electronic commerce and the Internet.