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Applicant Comes Up Short in Rejected "Trump Too Small" Trademark Application

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Love him or hate him, Donald Trump has something a lot of people want – a household name. That is why some try to capitalize on the Trump name by incorporating it into a slogan or saying in an attempt to obtain a federal trademark registration. The Trademark Trial and Appeal Board ("Board"), however, has rejected such attempts, including a recent application for "Trump Too Small" for various forms of shirts that criticized President Donald Trump, obviously without the President's approval. *In re Steve Elster*, Serial No. 87749230 (T.T.A.B. July 2, 2020). The Board, for the second time, ruled that proposed trademarks incorporating the name "Trump" were not federally registrable.

The Examining Attorney refused registration of "Trump Too Small" on the ground the mark falsely suggested a connection with President Trump under 15 U.S.C. § 1052(a) and the use of his name was without consent under 15 U.S.C. § 1052(c). Using a celebrity's name in a Trademark sounds enticing, attractive, and even profitable; however, Section 2(c) of the Lanham Act prohibits registration of a mark that "consists or comprises a name, portrait, or signature identifying a particular living individual except by his written consent."

The Applicant tried arguing that the public would not assume a connection between Trump and the goods because the shirts were overtly anti-Trump. The Board held that Section 2(c) applies "regardless of whether there is a suggested connection between the individual and the goods." The Board cited to its ruling in *In re Hoefflin*, 97 USPQ2d 1174 (T.T.A.B. 2010), where the mark OBAMA PAJAMA was barred under Section 2(c) for identifying then President Barack Obama. The Court reasoned Section 2(c) "operates to bar the registration of marks containing not only full names, but also surnames … so long as the name in question does, in fact, 'identify' a particular living individual." The Board dismissed the Applicant's argument that the "Trump Too Small" mark was intended to be overtly anti-Trump, and restated that the only analysis of a connection under Section 2(c) is "determining whether the public would perceive the name in the proposed mark as identifying a particular living individual," regardless of whether the mark was intended to negatively editorialize the president.

The Applicant also argued his mark constituted "private, political speech" because it criticized President Trump and, therefore, was protected by the First Amendment. He argued that because presidents yield rights of privacy and publicity and invite widespread use of their names by seeking public office, the prohibition cannot be justified as narrowly tailored to a compelling state interest. The

Board rejected this free speech defense and found the prohibitions did not impose “viewpoint discrimination,” as did the recently invalidated disparaging and scandalous bars to registration. Therefore, the Board found Sections 2(a) and 2(c) were not direct restrictions on speech. Unlike the disparagement prohibitions that were found to violate the First Amendment because of discrimination on the basis of viewpoint, Section 2(c) does not require a subjective viewpoint, but is applied “in an objective, straightforward way to any proposed mark that consists of or comprises the name of a particular living individual, regardless of the viewpoint conveyed by the proposed mark.”

Based on the objective and straight forward nature of Section 2(c), the Board closed the door on a First Amendment defense to the “name of a particular living individual” prohibition. The Board distinguished viewpoint discrimination from unauthorized use of a person’s name and made clear that applicants would have a difficult time registering marks, without the consent of the individual, consisting of individual names that can reasonably be connected to a specific person, regardless of the motive behind the mark. According to the Applicant, an attorney, an appeal is forthcoming.

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