



Trying to trademark a name without the owner's permission? Think again. The U.S. Patent and Trademark Office (USPTO) protects individuals' identities, as reinforced by a recent Supreme Court case. Businesses must understand the legalities in using someone's name in a trademark as well as potential consequences of not obtaining consent.

On June 13, 2024, the Supreme Court of the United States issued an opinion in *Vidal v. Elster*, 602 U.S. 286 (2024). The Court reversed a judgment by the Court of Appeals for the Federal Circuit (CAFC) holding that the trademark application for "Trump too small" was entitled to registration and that the USPTO's refusal under Section 2(c) of the Lanham Act, 15 U.S.C. § 1052(c) was unconstitutional.

Steve Elster filed a trademark application for "Trump too small" for, among other things, t-shirts. The mark was supposedly chosen by Mr. Elster to "invoke[e] a memorable exchange between [former-]President Donald Trump and Senator Marco Rubio from a 2016 presidential primary debate." Mr. Elster also intended to criticize Mr. Trump by implying that his politics were small as to how he approached governance over the United States and specific issues as president.

Mr. Elster's application was refused registration by the USPTO under Section 2(c) of the Lanham Act which prohibits registration of a mark that consists of or comprises a name, portrait, or signature identifying a particular living individual whose written consent to register the mark is not of record. Mr. Elster argued his mark was political commentary and asserted that consumers would not expect such a mark to be endorsed, sponsored by, or otherwise affiliated with Mr. Trump. The USPTO maintained the refusal, and Mr. Elster appealed to the Trademark Trial and Appeal Board (TTAB) which affirmed the USPTO.

Upon appeal, the CAFC reversed the TTAB holding that Section 2(c) violated the First Amendment. The CAFC began its discussion by finding that Section 2(c) is a viewpoint-neutral, content-based restriction on free speech and is subject to at least intermediate scrutiny. Viewpoint-neutral means that the government is not discriminating based on the viewpoint that something expresses. Content-based refers to the government's discrimination against speech based on the substance of what the speech communicates. And intermediate scrutiny requires that the government satisfy that the discrimination advances a substantial government interest if it is allowed.

The Supreme Court, with Justice Thomas writing for the majority, held that Section 2(c) was not unconstitutional and was in fact content-based and viewpoint-neutral. Justice Thomas concluded that Section 2(c) is content-based because "it turns on whether the proposed trademark contains a person's name." He emphasized the long history of names in trademark law, noting that "a person has ownership over his own name, and

that he may not be excluded from using that name by another’s trademark.” Due to this long history of the co-existence between trademark law and the First Amendment, the Court held that it “need not evaluate a solely content-based restriction ... under heightened scrutiny.”

Accordingly, the Court reversed the decision of the CAFC. The Court noted that its decision was narrow and that it “does not set forth a comprehensive framework for judging whether all content-based but viewpoint-neutral trademark restrictions are unconstitutional.” Thus, the USPTO’s

position was confirmed: registering a person’s name without consent is prohibited, even for political figures. While the Court left open the door for future disputes surrounding this area of trademark law and individual’s names, the decision is a good reminder that there are certain restrictions on registering trademarks.



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