Trademark Rights and Free Speech: Can They Coexist? Supreme Court Ruling on "Trump Too Small" Trademark Provides an Answer

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Can the First Amendment provide cover when seeking to use a name in a trademark application? If your company seeks to trademark an individual's name when they don't have permission to use the individual's name, is that possible?

In a recent legal challenge (*Vidal v. Elster*), the Supreme Court addressed a trademark application that centered around the phrase "***Trump too small***." Stemming from a notable exchange during the 2016 Presidential primary debate between Donald Trump and Senator Marco Rubio, Steve Elster sought registration of the mark "Trump too small" for use on apparel such as shirts and hats. The U.S. Patent and Trademark Office ("USPTO") initially rejected Elster's application under the Lanham Act's "names clause," which prohibits marks containing a living individual's name without the individual's explicit consent (15 U.S.C. §1052(c)). Despite arguments invoking First Amendment protections, the Trademark Trial and Appeal Board upheld the decision. However, the Federal Circuit later overturned this ruling, holding that the names clause of the Lanham Act infringed upon the First Amendment. **The USPTO appealed the Federal Circuit's ruling to the Supreme Court, which found that the names clause in the Lanham Act does not violate free speech protections, thus upholding the initial determination of the USPTO.**

Key Issues:

1. Viewpoint-Neutral Content-Based Restriction:

- The names clause was analyzed as a viewpoint-neutral, content-based restriction. While the names clause restricts the use of certain content (names of living individuals), it does not do so based on the viewpoint expressed . Viewpoint-based regulations, which discriminate based on the speaker's perspective, face heightened scrutiny and must serve

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compelling state interests with narrow tailoring. Thus, the Court determined that the names clause does not discriminate based on viewpoint and meets constitutional standards.

2. First Amendment Implications:

- The Court further assessed whether this type of content-based restriction violates the First Amendment. The First Amendment argument considered whether the Lanham Act's "names clause" might restrict free speech rights by limiting the ability to use expressions or critiques involving public figures' names in commercial contexts. The Court had to decide whether to rely on historical and traditional justifications for such restrictions or on established First Amendment precedents that typically subject content-based restrictions to strict scrutiny .

Here, the Court's majority opinion emphasized the historical and traditional context of the names clause, citing longstanding principles in trademark law that protect the names of living individuals from being used without consent. This historical approach was intended to justify the constitutionality of the names clause without resorting to strict scrutiny typically applied to content-based restrictions . It was this approach that was determinative: consent to use and register the name of a living individual remains the rule; there is no First Amendment exception.

3. Future Implications:

- The concurring opinions highlighted that, while the historical approach was sufficient in this case, it might not be applicable in future cases lacking a clear historical analogue. Justices noted that at some future point, the Court might need to establish a more defined standard for evaluating similar trademark restrictions under the First Amendment .

What does this mean for me?

This decision underscores the complex interplay between trademark law and First Amendment rights, particularly in the context of content-based, viewpoint-neutral regulations. If you seek to register a trademark or protect your brand, reach out to your Butzel Trademark or Media Law team member or one of the authors listed below.

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