

This Opinion is Not a
Precedent of the TTAB

Mailed: July 29, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Richard Zajkowski
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Serial No. 87554778
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Richard Zajkowski, pro se.

Kapil K. Bhanot, Trademark Examining Attorney, Law Office 108,
Kathryn E. Coward, Managing Attorney.

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Before Acting Deputy Chief Administrative Trademark Judge Lynch, and Kuhlke
and Thurmon, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Richard Zajkowski (“Applicant”) seeks registration on the Principal Register for the mark TRUMPINOCCHIO in standard characters for “Bumper stickers; Cards, namely, greeting cards, note cards, business cards; Posters,” in International Class 16, “Cups; Dishes,” in International Class 21, and “Caps being headwear; Hats; Jackets; Shirts,” in International Class 25.¹

¹ Application Serial No. 87554778 filed on August 3, 2017 based on an allegation of a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney has refused registration of Applicant's mark under (i) Trademark Act Section 2(a), 15 U.S.C. § 1052(a), on the basis that the proposed mark comprises matter that may falsely suggest a connection with former President Donald J. Trump, and (ii) under Section 2(c), 15 U.S.C. § 1052(c), on the ground that it comprises his name without his written consent. Applicant has appealed, and the appeal has been fully briefed.

On February 1, 2023, this appeal was suspended in view of the decision by the U.S. Court of Appeals for the Federal Circuit in *In re Elster*, 26 F.4th 1328 (Fed. Cir. 2022), holding that the Office's refusal under Section 2(c) to register the proposed mark TRUMP TOO SMALL, as applied, violated the First Amendment. The Office filed a petition for a writ of certiorari, which was granted by the U.S. Supreme Court to review the *Elster* decision, and the Court issued its decision on June 13, 2024, reversing the Federal Circuit, and holding that Section 2(c) does not violate the First Amendment. The Federal Circuit, following the Supreme Court's directions, affirmed the Board's *Elster* decision on July 25, 2024. The final disposition of the *Elster* decision removed the basis for suspension of this appeal, and therefore, this appeal is resumed.

We affirm the Section 2(c) refusal, as explained below, and we do not reach the refusal under Section 2(a)'s false association clause. *See In re Society of Health and Physical Educators*, 127 USPQ2d 1584, 1590 (TTAB 2018).²

² Initially the original Examining Attorney refused registration only under Trademark Act Section 2(c). After Applicant appealed and filed an appeal brief the new Examining Attorney requested remand to issue a new refusal under Trademark Act Section 2(a). The application

I. Constitutional Challenge to Section 2(c)

Applicant argues that his proposed mark is a protected parody and the statutory refusal is unconstitutional under the First Amendment to the Constitution. The constitutional challenge to Section 2(c) as an impermissible restriction on the right to free speech is squarely addressed and rejected by the U.S. Supreme Court in *Vidal v. Elster*, 602 U.S. 286 (2024), the Court decision mentioned above. In that decision, the Court held that “the names clause in § 1052(c), does not violate the First Amendment.” *Id.* at 289. In view thereof, Applicant’s First Amendment challenge is no longer viable and we turn to the refusal under Section 2(c).

II. Section 2(c) Refusal

Section 2(c) of the Trademark Act precludes, in relevant part, registration of a mark that “[c]onsists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent.” 15 U.S.C. § 1052(c). “A key purpose of requiring the consent of a living individual to the registration of his or her name, signature, or portrait is to protect rights of privacy and publicity that living persons have in the designations that identify them.” *In re ADCO Indus. Techs., L.P.*,

was remanded for further examination. Applicant filed an “Appeal Brief” with the Board which the Board construed as a response to the Office Action issued after remand. Once the second Final Office Action issued the appeal was resumed. Applicant was allowed time to file a Supplemental Brief but did not do so. Under Trademark Rule 2.142(f), 37 C.F.R. § 2.142(f), if the new ground of refusal is made final after a remand, the application is returned to the Board and an applicant is allowed time in which to file a brief. In the event a supplemental brief is not filed, the appeal may be dismissed. Here, in view of Applicant’s apparent confusion regarding the procedure distinguishing between responses to Office actions and briefs on appeal during a remand, and the Board’s resumption of proceedings acknowledging Applicant’s failure to file a supplemental brief, we do not consider the refusal under Section 2(a) conceded.

2020 USPQ2d 53786, at *7 (TTAB 2020) (citations omitted). Another is to “protect[] consumers against source deception.” *Id.* at *11; *see also, Vidal v. Elster*, 602 U.S. at 307 (Section 2(c) protects “the other’s reputation and goodwill”).

Applicant has conceded that TRUMP “obviously” refers to the former President Donald Trump. 13 TTABVUE 5.³ The record also supports this finding.⁴ Based on the strong association of the word TRUMP with Donald Trump the Examining Attorney concludes that in the absence of written consent the application must be refused under Section 2(c).

Applicant argues that “no reasonable person would assume a business association between Donald J. Trump and TRUMPINOCCHIO.” *Id.* For names, the statute requires that the matter sought to be registered include the name of a particular living individual, rather than merely include words that only by coincidence happen to be someone’s name but which the relevant public generally would not recognize as that living individual’s name. *Martin v. Carter Hawley Hale Stores, Inc.*, 206 USPQ 931, 933 (TTAB 1979). To address the scenario in which the name would not be recognized as identifying the individual, Section 2(c) has been interpreted to mean

³ Citations to TTABVUE throughout the decision are to the Board’s public online database that contains the appeal file, available on the USPTO website, www.USPTO.gov. The first number represents the docket number in the TTABVUE electronic case file and the second represents the page number(s).

Citations to the examination record refer to the USPTO’s online Trademark Status and Document Retrieval system (TSDR).

⁴ *See, e.g.*, September 8, 2017 Office Action, TSDR at 7-22 (wikipedia entries); December 19, 2020 Office Action, TSDR at 2-52 (news articles, political commentary); August 1, 2020 Office Action, TSDR at 2-85 (advertisements for goods utilizing the name or image). The record also includes several search results where Donald Trump is referenced with Pinocchio. *See, e.g.*, September 8, 2017 Office Action, TSDR at 2-3.

that when a name appears in a proposed mark, the written consent of the person with that name must be supplied where: (1) the public would reasonably assume a connection between the individual and the goods or services because the individual is so well known; or (2) the individual is publicly connected with the business in which the mark is used. *ADCO*, 2020 USPQ2d 53786, at *8; *see also Martin v. Carter Hawley Hale Stores*, 206 USPQ at 932-33 (“requirement for consent depends upon a determination of whether the mark would be recognized and understood by the public as identifying the person”).

However, the analysis of a connection under the test set forth above regarding Section 2(c) is just part of determining whether the public would perceive the name in the proposed mark as identifying a particular living individual. Unlike Section 2(a)’s explicit statutory requirement that the matter in question “falsely suggest a connection,” Section 2(c) prohibits registration of any proposed mark that “consists of or comprises a name ... identifying a particular living individual except by his written consent.” 15 U.S.C. §§ 1052(a) & (c). The prohibition applies regardless of whether there is a suggested connection. As explained in *Martin v. Carter Hawley Hale Stores*, 206 USPQ at 933:

[I]t is more than likely that any trademark which is comprised of a given name and surname will, in fact, be the name of a real person. But that coincidence, in and of itself, does not give rise to damage to that individual in the absence of other factors from which it may be determined that the particular individual bearing the name in question will be associated with the mark as used on the goods, either because that person is so well known that the public would reasonably assume the connection or because the

individual is publicly connected with the business in which the mark is used.

More recently, the Board in *Hoefflin* held that an application to register OBAMA PAJAMA for pajamas, sleepwear and underwear was barred by Section 2(c) even if “the record does not support the conclusion that President Obama is in any way connected with [such goods].” *In re Hoefflin*, 97 USPQ2d 1174, 1177 (TTAB 2010). The Board addressed the fame of a President of the United States, stating that “well-known individuals such as celebrities and world-famous political figures are entitled to the protection of Section 2(c) without having to evidence a connection with the involved goods or services.” *Id.* The evidentiary record in this case clearly shows that former President Trump is extremely well known, not only because of his political office but also because of his prior celebrity. With a proposed mark such as this one that names someone very well-known such as former President Trump, and as Applicant has admitted, there is no question that the public would view the name in question as the name of a particular living individual. As in *ADCO*, we find that the proposed mark including TRUMP “identif[ies] Donald Trump, whose identity is renowned. By any measure, ... Donald Trump is a well-known political figure and a celebrity.” *ADCO*, 2020 USPQ2d 53786, at *9. Thus, the necessary connection for purposes of Section 2(c) exists. Accordingly, in applying Section 2(c) in this case, we need not probe for a Section 2(a)-type connection but rather just a showing that the relevant public would recognize the name in the mark as that of a particular living individual.

Decision: We affirm the refusal to register the proposed mark under Section 2(c) on the ground that it comprises the name of former President Donald Trump without his written consent. We do not reach the refusal to register under Section 2(a)'s false association clause.