

A TRADEMARK FOR TRUMP'S PRIVATE PART? THE GIFT THAT GOES ON GIVING

Posted on June 14, 2023 by Michael A. Kahn



Tags: [Copyrights](#), [Donald Trump](#), [False Endorsement](#), [John Fogarty](#), [Neil Young](#), [Supreme Court](#), [Trademarks](#)



Ready? How about a copyright claim over a farting doll named **Pull My Finger Fred**? Or a Supreme Court case over the trademark **FUCT**?



Yes, to quote the reassurance that Cousin Eddie (Randy Quaid) offers to a disappointed Clark Griswold (Chevy Chase) in **National Lampoon's Christmas Vacation** when Clark discovers that his Christmas bonus is not a big fat check but a one-

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year subscription to the Jelly of the Month Club, intellectual property law “is the gift that keeps on giving the whole year.”

But never has one man been a bigger gift to us IP lawyers than Donald J. Trump. As I have written in a [prior post](#), he has outraged musicians, including Neil Young, whose copyrighted song “Rockin’ in the Free World” was blaring on all speakers as Trump rode down the Trump Tower gold escalator in June of 2015 to launch his campaign for president. Trump’s blatant flouting of copyright conventions remained a constant throughout his four-year term as he continued to use songs in fundraising appearances and political ads over the [objections of the copyright owners](#) in those songs.

And, [as I wrote last year](#), this Trump gift that goes on giving extends beyond the realms of copyright and false endorsement when, earlier that year, the Federal Circuit Court of Appeals confronted the application by Steve Elster to register the trademark TRUMP TOO SMALL for T-shirts.



By way of background, during a presidential debate in 2016, Trump assured the voters that despite what [Marco Rubio](#) had suggested about the correlation between the size of Trump's small hands

and the size of another part of his anatomy, Trump defiantly held up his hands at the podium and said, “Look at these hands, are they small hands? And referred to my hands – ‘if they're small, something else must be small.’ I guarantee you there's no problem. I guarantee!”

The Trademark Examiner rejected the TRUMP TOO SMALL application back in 2018 because of Section 2(c) of the Trademark Act, which requires the applicant for a trademark that includes the name of a living individual to obtain the written consent of that person, which Elster had not.

In his response to that rejection, Mr. Elster explained that the trademark was “political commentary about presidential candidate Donald Trump's refutation at the March 3, 2016, Republican debate of presidential candidate Marco Rubio's insinuation that Donald Trump has a small penis.” He further explained that the trademark was “also political commentary about the smallness of Donald Trump's overall approach to governing as president of the United States.”

Elster soldiered on for two years in the Trademark Office, then appealed to the Trademark Trial and Appeal Board, lost again, and appealed once more, this time to the Federal Circuit Court of Appeals. In February 2022, the Court ruled that the application of the consent requirement of Section 2(c) to Elster's mark “is unconstitutional under any conceivable standard of review, and accordingly reverse

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the Board's decision that Elster's mark is unregistrable." In **re: Elster, No. 2020-2205 (Fed. Circ. 2022)**, the Court explained, "The government has no valid public interest that could overcome the First Amendment protections afforded to the political criticism embodied in Elster's mark."

Ah, while some claim that Trump's you-know-what may be too small, his appetite for appeals is not—although this time the Trump gift was delivered by the Biden administration's Solicitor General Elizabeth B. Prolegar, who filed a Petition for a Writ of Certiorari, asking the U.S. Supreme Court to review the Court of Appeals trademark decision, contending that "far from enhancing freedom of speech, the decision below makes it easier for individuals like the respondent to invoke enforcement mechanisms to restrict the speech of others. This Court's intervention is warranted to correct the court of appeals' misapplication of First Amendment principles."

And guess what? On Monday, June 5, 2023, the Supreme Court announced that it would indeed take the case and decide whether Mr. Elster could trademark the phrase "Trump too small." So . . . stay tuned for the next round in what has seemed to morph from a "too small" trademark into a rather big dispute. And yes, Cousin Eddie, regardless of size, it's the gift that keeps on giving the whole year.

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