IS DONALD TRUMP'S YOU-KNOW-WHAT TOO TINY TO TRADEMARK? TRUMPED AGAIN IN A "SMALL" 1ST AMENDMENT TRIUMPH

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Ever since he rode down that Trump Tower gold escalator in June of 2015 to launch his campaign for president, the name Donald J. Trump has inspired either adoration or abomination. But for we intellectual property lawyers, whether we admire or loathe the man, we view him as the gift that goes on giving.

Indeed, as the Neil Young song "Rockin' in the Free World" blared on all speakers during that public elevator ride, we music lawyers waited for Neil's legal team to accuse Trump of copyright infringement and false endorsement—and, as I wrote back then, they did so within 24 hours.

Fogarty v. Trump

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. For example, John Fogarty issued a cease-and-desist infringement letter to Trump after he started using Fogarty's "Fortunate Son" song at campaign rallies.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

As Fogarty explained in a Tweet:

> *"I wrote this song because, as a veteran, I was disgusted that some people were allowed to be excluded from serving our country because they had access to political and financial privilege. I also wrote about wealthy people not paying their fair share of taxes. Mr. Trump is a prime example of both of these issues. The fact that Mr. Trump also fans the flames of hatred, racism and fear while rewriting recent history, is even more reason to be troubled by his use of my song."*

Most recently, a federal district judge rejected Trump's "fair use" defense to a lawsuit by Eddy Grant over use of Grant's "Electric Avenue" song in a nasty online Trump campaign ad denigrating Joe Biden.

TRUMP TOO SMALL

And this Trump gift that goes on giving extends beyond the realms of copyright and false endorsement. Earlier this year the Federal Circuit Court of Appeals confronted the application by Steve Elster to register the trademark TRUMP TOO SMALL for T-shirts. The Trademark Examiner had rejected the 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 clever 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."*

Attached to Mr. Elster's response were 89 pages of exhibits, beginning with a CNN article headlined "Donald Trump defends size of his penis."

You can't make this stuff up!

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Well, the Examiner rejected those arguments, Elster fought on for two years in the Trademark Office, then appealed to the Trademark Trial and Appeal Board, lost again, and soldiered on, appealing the Board's denial to the Federal Circuit Court of Appeals.

Earlier this year, in a thoughtful opinion, 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 the Board's decision that Elster's mark is unregistrable."* In re: Elster, No. 2020-2205 *(Fed. Cir. 2022)*

As 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."*

The Trump Family Trademarks

The irony here is that Trump, his family, and his companies own scores of TRUMP trademark registrations. Indeed, his daughter owns 18 separate registrations for IVANKA TRUMP for everything from costume jewelry to athletic shorts to bed linens to handbags.

But as I write this, there are several other TRUMP applications working their way through the Trademark Office process whose prospects have been greatly improved by the *In re: Elster* ruling and that, to put it mildly, do not appear to be owned by their namesake or his family members, including the following applications:

- MY DOG IS SMARTER THAN YOUR TRUMP VOTER
- DUMP TRUMP AND LOCK HIM UP
- INDICT THE TRUMP ORGANIZATION
- MAKE AMERICA GREAT AGAIN. DUMP TRUMP! 2020

Yes, the Trump gift keeps on giving.

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