Application for Mark US SPACE FORCE Crashes at Trademark Board

Timothy J. Lockhart

An application to register US SPACE FORCE as a trademark crashed at the Trademark Trial and Appeal Board (TTAB) of the U.S. Patent and Trademark Office (PTO) when the TTAB ruled that the mark caused a false suggestion of a connection with the United States Space Force. *In re Thomas D. Foster, APC*, Serial No. 87981611 (September 19, 2022) [not precedential] (Opinion by Judge Thomas W. Wellington).

The corporation Thomas D. Foster, APC (Foster) filed an application to register US SPACE FORCE for a wide variety of commemorative goods such as license plate framers, collectible coins, and toy spacecraft in nine international classes. The PTO Examining Attorney assigned to the application refused registration of the mark on the ground that under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), the mark falsely suggested a connection with the United States Space Force. Foster appealed the refusal to the TTAB.

The TTAB began its analysis by noting that Section 2(a) prohibits registration of a designation that falsely suggests a connection with "persons, living or dead, institutions, beliefs, or national symbols." 15 U.S.C. § 1052(a). The TTAB also noted that the U.S. government and its agencies and instrumentalities "are considered juristic persons or institutions within the meaning of the statute" (citing 15 U.S.C. § 1052(a); Section 45 of the Trademark Act, 15 U.S.C. § 1127). To support its second point the TTAB cited *In re Peter S. Herrick P.A.*, 91 USPQ2d 1505, 1506 (TTAB 2009) ("institutions, as used in Section 2(a), include government agencies"), and three other finding the U.S. Navy, West Point, and NASA to be juristic persons and institutions.

The TTAB said that establishing that a proposed mark falsely suggests a connection with a person or an institution requires showing the following:

> (1) the mark is the same as, or a close approximation of, the name or identity previously used by another person or institution; (2) the mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution; (3) the person or institution named by the mark is not connected with the activities performed by the applicant under the mark; and (4) the fame or reputation of the person or institution is such that, when the mark is used with the applicant's goods or services, a connection with the person or institution would be presumed (citing *University of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co.,* 703 F.2d 1372 (Fed. Cir. 1983)).

The TTAB noted that the Examining Attorney had provided evidence that the U.S. Space Force is an agency of the U.S. government and that "the U.S. Space Force is the sixth branch of the U.S. military, nested within the Department of the Air Force." (The other five branches are the Air Force, Army, Coast

Guard, Marine Corps, and Navy.) The TTAB also noted that Foster did not argue that its proposed mark is not the same as the U.S. Space Force.

Foster argued, however, that because the filing date of its application, March 19, 2018, predated the statutory creation of the U.S. Space Force in late 2019, the Space Force had not "previously used" its mark first. But the TTAB noted that because Foster's application was based on an intent to use the mark and there had been official references to a "U.S. Space Corps" in 2017 and "a sixth branch of the United States Armed Forces" in June 2018, the U.S. Space Force was the prior user of its mark.

Foster made several arguments that US SPACE FORCE does not "point[] uniquely and unmistakably" to the U.S. Space Force. One such argument was that the 2020 Netflix series *Space Force* and a lesser-known 1987 animated TV show named *Starcom: the U.S. Space Force* meant Foster's mark could not point only to the U.S. Space Force. The TTAB rejected all of those arguments, noting that US SPACE FORCE could point only to the U.S. Space Force (just as, the TTAB said, a reference to the U.S. Navy could not be a reference to any other navy).

Next the TTAB found that Foster has no connection with the U.S. Space Force and that the fame of the sixth military branch is such that when Foster's mark is used with the Foster's goods, a connection with the U.S. Space Force would be presumed. Thus, the TTAB said, Foster's mark falsely suggests a connection to the U.S. Space Force in violation of Section 2(a).

Finally, Foster argued that the false-suggestion ground for refusal in Section 2(a) is unconstitutional and, as such, is ripe for review and treatment by the Supreme Court. In making that argument, Foster pointed to *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (prohibition against immoral or scandalous marks unconstitutional) and *Matal v. Tam*, 137 S. Ct. 1744 (2017) (prohibition against disparaging marks unconstitutional). But the TTAB said that, in contrast to those clauses of Section 2(a), the false-suggestion clause directly furthers the goal of preventing consumer deception caused by source identifiers (citing *In re Adco Industries - Technologies, L.P.* 2020 USPQ2d 53786, *10 (TTAB February 11, 2020). Thus, the TTAB rejected Foster's argument "that the false suggestion of a connection refusal is unconstitutional."

Accordingly, the TTAB affirmed the refusal to register Foster's mark US SPACE FORCE "based on a false suggestion of a connection with the U.S. Space Force, under Section 2(a)."

Timothy J. Lockhart
Chair, Intellectual Property Group
Willcox Savage
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510
tlockhart@wilsav.com
(757) 628-5582