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Protection of Government Symbols in the United States

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Official symbols used by the U.S. federal government and its agencies, as well as by states and other nations, are protected by various statutes and regulations. These laws either bar federal registration of such symbols or otherwise restrict or prohibit their use.

Section 2(b) of the U.S. Trademark Act (Lanham Act), 15 U.S.C. § 1052(b), bars the registration of marks that consist of or comprise the “the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.” The “simulation” of any such marks is also barred from registration. This is a blanket prohibition, and no additional element—such as disparagement or a false suggestion of a connection with the government—is necessary.

The design pictured on the front of the Great Seal of the United States—featuring an American bald eagle—is the national coat of arms of the United States, which is used on official documents such as passports and military insignia. (The Great Seal also appears on the back of U.S. one dollar bills.) The seal was authorized by a Congressional resolution in 1782. One of its more interesting features is the “all-seeing eye” on the reverse, which was a well-known symbol during the Renaissance.

The current U.S. flag features 13 alternating red and white stripes symbolizing the original 13 colonies. The rationale for protecting flags and coats of arms is that they are symbols specifically designed to represent government authority. The phrase “other insignia” in Section 2(b) was interpreted early on by the U.S. Trademark Trial and Appeal Board (TTAB) as being limited to the same general class as “the flag or coats of arms” of the United States, such as the Great Seal, the Presidential Seal and seals of government departments, while symbols of departments that are used merely to identify a service or facility of the government are not insignia of national authority and should not be prohibited from use and registration. See *In re U.S. Dep’t of the Interior*, 142 U.S.P.Q. 506, 507 (T.T.A.B. 1964) (“National Park Service” name surrounded by an arrowhead design held not to be an “insignia” of the United States).

A “simulation” of the flag, coat of arms or other insignia is “something that gives the appearance or effect or has the characteristics of an original item, and a “simulation” in this context requires a visual comparison of the mark vis-à-vis actual replicas of the flag, coat of arms or other insignia at issue. *In re Advance Industrial Security, Inc.*, 194 U.S.P.Q. 344, 347 (T.T.A.B. 1977); *In re Waltham Watch Co.*, 179 U.S.P.Q. 59 (T.T.A.B. 1973).

The TTAB has held that a determination of whether a mark consists of or comprises a “flag or coat of

arms or other insignia” requires “careful analysis and side-by-side comparison.” *In re Advance Industrial Security, Inc.*, 194 U.S.P.Q. at 347. This is true for both U.S. and foreign government symbols.

For example, where an applicant sought to register a mark consisting of flags reminiscent of, but not identical to, those of Scandinavian countries as part of its mark NOR-KING & Design, the TTAB held there was no representation of “the flag or flags of any particular nation.” *Knorr-Nahrungsmittel A.G. v. Havland International, Inc.*, 206 U.S.P.Q. 827, 833 (T.T.A.B. 1980). Similarly, a mark consisting of words and the design of a shield with vertical stripes was held to be registrable because the design was easily distinguished from the shield of the Great Seal of the United States and, therefore, not a “simulation” of the seal. *In re National Van Lines, Inc.*, 123 U.S.P.Q. 510 (T.T.A.B. 1959).

The TTAB determined in *In re Waltham Watch Co.* that a proposed design mark that included flags in simple black and white representations and admittedly contained “geometric elements present in a number of national flags” did not violate the Section 2(b) prohibition on use of national flags in marks because color, “which is the most suggestive and the only distinguishing feature of any number of foreign flags,” was not employed in the mark. While the flag imagery conjured up and contained features found in the flag of Switzerland and the British Union Jack, the Board concluded that the flag imagery was readily distinguishable from these or any other actual national flags.

Various U.S. government symbols also have been granted special trademark protection by public laws and regulations. Many of these are codified in Title 18 Chapter 33 (Sections 700, et seq.) of the United States Code (U.S.C.), which deems any violation a criminal act punishable by fine or imprisonment. These provisions contain broader usage prohibitions than Section 2(b), which restricts only the registration of specific symbols; they include, for example, designs prescribed by the head of any U.S. department or agency for use by any of its officers or employees (Section 701), decorations or medals authorized by Congress for the U.S. armed forces (Section 704), and use or likeness of the Great Seal, Presidential and Vice Presidential Seals and seals of either house of Congress (Section 713). Special protection from commercial use is granted under 10 U.S.C. § 7881 for the initials “USMC” and the seal and emblem of the United States Marine Corps. All these provisions make any commercial use unlawful. While some of these provisions contain specific exemptions, others do not, and the extent to which noncommercial use is allowed is not always clear.

Other statutes are more limited in their prohibitions, such as Section 704 pertaining to “medals,” which restricts only the wearing, manufacturing or sale of any decoration or medal absent a specific regulation exception. Federal military agency regulations promulgated under both Section 701 and Section 704 permit the photographing of insignia provided it does not “bring discredit upon the military service” and the images are not used deceptively, but commercial uses are prohibited without permission. The same regulations, however, permit the manufacture and sale of all authorized military insignia, badges, bars, ribbons and lapel buttons, but prohibit the incorporation of images of medals, badges and the like into articles manufactured for public sale. 32 C.F.R. § 507.

The U.S. government has at times been vigilant in protecting its national symbols. For example, in October 2005, associate counsel for the president sent a cease and desist letter to the satirical newspaper *The Onion*, which had published parodies of President George W. Bush’s weekly radio address, based on the paper’s depiction of the Presidential Seal on its website. The letter cited the statutory prohibition on use of the seal for commercial purposes. *The Onion* responded by emphasizing the purely satirical nature of the publication and the fact that some 3 million people read it and obviously considered it a joke. (See www.nytimes.com/2005/10/24/business/24onion.html)

The U.S. government has enacted legislation that prohibits or limits the unauthorized reproduction or use of certain quasi-government imagery, such as the “Smokey Bear” and “Woodsy Owl” characters used by the U.S. Department of Agriculture’s Forest Service (18 U.S.C. §§711, 711a).

Such restrictions, however, also have their limitations. A federal court ruled, for example, that use of the “Smokey Bear” image in political advertisements did not violate the statute because of overriding First Amendment protections afforded free speech. *LightHawk, The Environmental Air Force v. Robertson*, 25 U.S.P.Q.2d 2014 (W.D. Wash. 1993). While noting that “[t]he government’s property interest in the character Smokey Bear is analogous to, but admittedly broader than, that of an owner of a trademark,” the court emphasized that “[u]nder trademark law courts have uniformly ruled that non-commercial parodies and satires do not infringe legitimate trademarks because there is little chance of confusion as to sponsorship.” The court concluded that the statute was overbroad and could not apply to these kinds of noncommercial uses.

Another federal court concluded that an image of the U.S. Capitol building (the seat of Congress) pictured in a mark did not constitute a prohibited use of any “insignia of the United States” under Section 2(b) because “there is no evidence before the Court that the Capitol building was ‘formally adopted to serve as an emblem of governmental authority’ as flags and coats of arms are...” *Heroes Inc. v. Boomer Esiason Hero’s Foundation Inc.*, 43 U.S.P.Q.2d 1193 (D.D.C. 1997). Similarly, in *Liberty Mutual Insurance Co. v. Liberty Insurance Co. of Texas*, 185 F. Supp. 895 (E.D. Ark. 1960), the Statue of Liberty was held not to be a government symbol because it clearly was not “insignia of the United States.”

Other marks have been registered or used as trademarks by various government agencies without special statutory protection, where any protection is assessed under traditional tests for infringement and likelihood of confusion. For example, the U.S. Postal Service was successful in asserting an anticybersquatting claim against the registrant of the domain postal-service.com based on the agency’s ownership of the unregistered mark POSTAL SERVICE as a descriptive mark having acquired secondary meaning. *Zipee Corp. v. U.S. Postal Service*, 140 F. Supp. 2d 1084 (D. Or. 2000).

The U.S. government has standing to object to uses of marks that may falsely suggest a connection with the government. To that end, in addition to the above-mentioned statutes, the government has enacted other, sometimes obscure statutes and regulations granting such protections. Conveniently, WIPO posts an extensive listing of U.S. government and agency names, acronyms and symbols that are protected by federal statutes and regulations at www.wipo.int/clea/docs_new/en/us/us009en.html. Decisional law has restricted some of these limitations to the narrow, literal wording of the respective statutes.

For example, in *Blinded Veterans Association v. Blinded American Veterans Foundation*, 872 F.2d 1035 (D.C. Cir. 1989), the Blinded Veterans Association (BVA) sought to enjoin the Blinded American Veterans Foundation (BAVF) from using the words “blinded” and “veterans” in its name and from using the initials BAV as an acronym. BVA contended that BAVF’s name was confusingly similar to BVA’s and would deceive the public into thinking BAVF was BVA. The appeals court held that BVA’s name was not a protectable trademark because the term “blinded veterans” was generic. Although the plaintiff argued that 36 U.S.C. § 867, which grants the plaintiff a special charter, also granted trademark protection to the name “Blinded Veterans Association,” the court held that such protection “does not extend to the words ‘blinded veterans’ any more than it does to the individual words ‘blinded,’ ‘veterans,’ or ‘association.’”

Issues concerning foreign government symbols have also arisen in the United States. For example, in

Vuitton et Fils, S.A. v. J. Young Enterprises, Inc., 644 F.2d 768 (9th Cir. 1981), a federal appeals court held that although a portion of a design resembled the fleur-de-lis, which was challenged as being an insignia of France, “the fleur-de-lis is a traditional symbol of royalty rather than an ‘insignia’ of France within the meaning of Section 2(b). The term ‘national insignia,’ as used in the statute, is restricted to the official symbols of a government. The reign of French royalty ended over a century ago.”

Similarly, in *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A.*, 32 U.S.P.Q.2d 1192 (T.T.A.B. 1994), the Board noted that it was not clear under Section 2(b) if the coat of arms of an Italian municipality would be protected, because the statute could be interpreted so as to limit protection only to coats of arms of “foreign countries.”

With the United States having a potpourri of special statutes and agency regulations supplemented by court and TTAB case law, it would behoove anyone considering use of any official or quasi-official emblem, seal, insignia or the like to research thoroughly the possible limitations on such use. Although the TTAB and some courts have limited such restrictions to actual commercial use or where there is a likelihood of confusion or misrepresentation, violations of these regulations could, in the worst case, lead to fines and even imprisonment.

Although every effort has been made to verify the accuracy of items carried in the INTA Bulletin, readers are urged to check independently on matters of specific concern or interest.

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