Withdrawing Lanham Act Section 2(c) Consent: What Should Courts Do?

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CONSENT: WHAT SHOULD COURTS DO?

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INTRODUCTION

Before Luka Dončić was a National Basketball Association (NBA) superstar, he found success on basketball courts in Europe, making his professional basketball debut when he was just sixteen years old.1 With this success came awards, recognition, and business opportunities.2 As a young phenom, Dončić relied upon his mother, Mirjam Poterbin, to help guide him in his off-court business ventures. This included filing an application with the United States Patent and Trademark Office (USPTO) in which he gave his mother his consent to use the mark, “Luka Dončić 7.”

∗ Marquette University Law School Class of 2024. Thank you to my mom, Jolie, my dad, John, my brother, Andrew, and the rest of my family for all of your support. This is only possible because of you. I would also like to give a special thank you to Professor Boyden and Professor Murray for your guidance throughout my education on intellectual property law. Lastly, thank you to the Intellectual Property and Innovation Law Review editorial board for this opportunity.
Today, Dončić is twenty-three years old and one of the best talents in the NBA. Due to his newfound fame in the NBA, Dončić filed a trademark application for the mark, “LUKA DONČIĆ.” Subsequently, the USPTO refused his application due to his mother’s current trademark. On July 23, 2021, Dončić provided written notice to his mother of the revocation of his consent, and he filed for cancellation of the “Luka Dončić” mark under Section 14(3) of the Lanham Act. After months of skepticism throughout the legal field on how this case might transpire, Dončić canceled his bid to get his mother’s trademark canceled. However, courts are once again left with a question that remains unprecedented and undecided.

There is no legal guidance on how a court should rule if a person initially gives their consent to use their name in a mark but later withdraws their consent. This question sees two theories of law contrasting with each other: the freedom of contract and the right of publicity. This comment will propose a legal framework for how courts should determine the outcome of cases similar to this one, which involves a balancing test between these two areas of law. The author of this comment will begin by discussing trademark law and how a trademark is registered with the USPTO when a person’s name is involved, including a discussion on how trademarks are canceled under Section 2(c) of the Lanham Act. Second, the author will dive into the freedom of contract and how giving consent to use a name in a mark can be seen as a branch of the freedom of contract. Third, the author will discuss the right to publicity and the policy reasons behind the laws that make up that doctrine. Finally, the author will propose a balancing test that courts should use to rule on these cases, which involves extending the eBay factors to this unique and unprecedented area of trademark law.

TRADEMARK LAW

Prior to The Lanham Act of 1946, there was no legislation regarding consent to a trademark similar to what exists in Lanham Act 2(c). The law of registering trademarks first went into effect in 1870, but it was quickly repealed due to its conflict with certain constitutional rights. On March 3, 1881, Congress enacted the Trademark Act of 1881, which authorized and protected

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the registration of trademarks. Even though this Act gave numerous rights and protections, names and consent were not mentioned. Over two decades later, the Trademark Act of 1905 was enacted, and for the first time, there was legislation related to consent to use a name in a trademark. In the same year, the Trademark Act of 1905 was enacted, and for the first time, there was legislation related to consent to use a name in a trademark. Section 5(b) to The Trademark Act of 1905 lists numerous occasions in which a trademark cannot be registered, including that “[n]o portrait of a living individual may be registered as a trade—mark except by the consent of such individual, evidenced by an instrument in writing . . . .” Congress evidently determined between 1881 and 1905 that there was a need for a consent requirement when it came to using a person’s name or image. In 1946, when Congress adopted the Lanham Act, it decided to keep the consent requirement as a part of the legislation, and to this day, it remains a part of the Lanham Act.

The Lanham Act

Congress enacted the Lanham Act in 1946 as a way for it to provide a national system of trademark recognition and to protect owners of a federally registered trademark against the use of confusingly similar marks. While mark owners can register their marks to have protection, it is not required as a mark only needs to be registered if a mark owner wants to make a claim of infringement against another party. In order to have a mark registered with the USPTO, a trademark owner must prove that the mark is distinctive. Proving that a mark is distinctive can be done by using the Abercrombie Spectrum as described in detail in Zatarains v. Oak Grove Smokehouse. While the Abercrombie Spectrum does not explicitly go into detail about trademarking an individual’s name, understanding the Abercrombie Spectrum is essential to understanding not only why certain names can be trademarked, but also when those names are eligible to be trademarked.

7. Id.
9. Id.
In *Zatarains*, the Fifth Circuit discussed how trademarks are broken into four different categories. First, there are generic terms. A generic term is a term that is the name of a particular genus or class of which an individual article or service is a member. For example, “aspirin” and “cell phone” have both been deemed generic terms. These types of marks are not available for federal registration, and if at any point a mark has a term that becomes generic, the mark is subject to cancellation.

A descriptive term is second on the Abercrombie Spectrum, and this type of term identifies a characteristic or quality of an article or service. Descriptive terms are only protectable as trademarks if they acquire secondary meaning. To show secondary meaning, a plaintiff must “show that the primary significance of the term in the minds of the consuming public is not the product but the producer.” If the plaintiff cannot establish secondary meaning, the descriptive mark is not protectable as a trademark.

Third, there are suggestive terms, which describe some particular characteristic of the goods or services to which it applies and require the consumer to use their creativity to conclude as to the nature of the goods or services. Suggestive marks do not need secondary meaning to be proved to be protected. Lastly, there are arbitrary or fanciful marks that have no relationship to the goods or services to which they are applied to, such as Apple for technology or Dove for soap. The Abercrombie Spectrum has laid out a concrete picture for trademarks to be analyzed when determining their level of distinctiveness and whether they are federally registerable.

While the Abercrombie Spectrum is essential for determining whether a term should be protected as a trademark, when names acquire a secondary meaning, they may become protectable. Section 2(c) of the Lanham Act specifically addresses names itself and provides a rule for when names can be protected as a trademark:

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12. *Id.* at 786
13. *Id.* at 790.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
21. *Id.*
22. *Id.*
No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.\footnote{23}

Names are generally not trademarkable as they are seen as generic. However, there are instances where names can be trademarked, specifically, in the instances where the name is of a famous person or a public figure.\footnote{24} To register one’s name as a trademark, that person must use it in business (i.e., satisfying the “use in commerce” requirement).\footnote{25} Numerous celebrities have been successful in trademarking their names, including Bruce Springsteen and Taylor Swift.\footnote{26} Alternatively, Michael Jordan was unable to trademark his name due to the commonality of his name.\footnote{27} To receive a trademark, Jordan had to add his famous jersey number to the mark to make it unique, so he registered: “Michael Jordan 23.”\footnote{28}

Section 2(c) of the Lanham Act provides a way for names to be used as trademarks. While there is not much case law in this area, the Lanham Act clearly allows someone’s name to be used as a trademark by another person if the registering party gains the other party’s consent. This part of the Lanham Act is straightforward. Based on Section 2(c) of the Lanham Act, names are trademarkable by other parties as long as the consent requirement is met. For example, if a celebrity, such as LeBron James, consented to another party to use his name as a trademark, the default rule says that the other party would have a right to use his name as a trademark. The lack of case law on Section 2(c) further shows how this section of the Lanham Act is in place for the sole purpose of protecting a person’s name. However, when consent is given, this Section does not provide any defense for the consenting party. Because names are within the scope of trademarks, the next step is to look at another important aspect that courts will consider when reviewing trademark applications—the likelihood of confusion.

\footnotetext{23}{15 U.S.C. § 1052(c).}
\footnotetext{24}{Jean Murray, \textit{Qualifications for Trademarking Your Name}, THE BALANCE, (Sept. 20, 2022) https://www.thebalancemoney.com/can-i-trademark-my-personal-name-399021#:~:text=People%20trademark%20their%20names%20all,must%20have%20a%20business%20use.}
\footnotetext{25}{Id.}
\footnotetext{26}{Id.}
\footnotetext{27}{Id.}
\footnotetext{28}{Id.}
Likelihood of Confusion

Another area of trademark law that is important to focus on regarding this issue is the likelihood of confusion. Courts will look at whether there is a likelihood of confusion between two marks when deciding whether to grant a trademark. Dončić was unable to register his trademark due to the likelihood of confusion between his mark and the one that his mother previously registered, ultimately leading to the revocation of his consent. While the United States Supreme Court has not adopted an official likelihood of confusion test that binds all courts, several circuit courts have implemented tests to guide whether a trademark is likely to cause confusion.29 This section will focus on two circuit courts’ tests and discuss their similarities to each other and show how useful it can be to have a test put in place for an unprecedented area of trademark law.

Dončić could not get his trademark granted due to a likelihood of confusion between his proposed trademark and the mark that his mother registered. Several circuit courts have different tests to determine whether a mark will create a likelihood of confusion, thus, barring the trademark from meeting the requirements to be registered. In 1979, the Ninth Circuit implemented the “Sleekcraft Factors.”30 The Sleekcraft Factors give a list of eight factors that the court should weigh when determining whether confusion between marks is likely.31 In Sleekcraft, there was a dispute between two boating companies that manufacture recreational boats.32 One company used the term “Slickcraft,” and the other used the term “Sleekcraft.”33 The petitioner urged the court to find a likelihood of confusion between the two marks, and the Ninth Circuit agreed.34 In doing so, the court analyzed what are now known as the Sleekcraft Factors.35 Those factors include: (1) the strength of the mark; (2) the proximity of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) the type of goods and the degree of care likely to be exercised by the purchaser; (7) the defendant’s intent in selecting the mark; and (8) the likelihood of expansion of the product lines.36

The Second Circuit established similar factors in Polaroid v. Polarad Elecs. Corp., 287 F.2d 492, 495 (1961). The factors that the Second Circuit uses include: (1) the strength of the plaintiff’s mark; (2) the degree of similarity

30. AMF Inc., 599 F.2d at 348.
31. Id.
32. Id. at 346.
33. Id.
34. Id. at 354.
35. Id. at 348.
36. Id. at 348-39.
between the two marks; (3) the proximity of the products; (4) the likelihood that the owner will bridge the gap; (5) evidence of actual confusion; (6) defendant’s good faith in adopting the mark; (7) the quality of defendant’s product; and (8) the sophistication of the consumers. While there is not a test used by the Supreme Court, the tests used by circuit courts are fairly similar, including those used by the Ninth and Second Circuits. When a circuit court’s factors lean towards a likelihood of confusion, the would-be mark owner is barred from having their mark granted, which was at the heart of the USPTO’s decision to reject Dončić’s trademark.

While the Second and Ninth Circuits have their own tests, the two tests are very similar to each other. Both tests discuss the strength of the marks, the proximity of the goods, the similarity of the marks, and evidence of actual confusion. Alternatively, both tests also have their distinctions. The Sleekcraft Factors weigh the degree of care that is likely to be exercised by the purchaser as well as the likelihood of expansion of the product lines. The Polaroid factors, however, consider the quality of the defendant’s product and the defendant’s good faith in adopting the mark. In totality, it seems that both tests will likely produce the same result if cases with the same facts arise in each circuit.

While these tests are effective for determining the likelihood of confusion among two marks, they do not assist in any way with the issue of withdrawing consent for name trademarks. However, when viewing famous names, it seems that the USPTO has attempted to avoid the likelihood of confusion by only granting marks to names that have uniqueness or some sort of secondary meaning. As noted above, Michael Jordan had to add his basketball number to his mark to trademark his name, even though he is one of the most famous basketball players to ever play the game. Regardless, a test is needed, and the proposed eBay test expanding to these trademarks will help guide courts in this area of the law.

FREEDOM TO CONTRACT

Section 2(c) of the Lanham Act states that a person cannot register another’s name as a mark without their consent. When giving consent, the party whose name is being used verbally agrees to allow their name to be used as a trademark by the other party. In plain view, this agreement can easily be seen as a verbal contract between the two parties. An important policy is that when two parties make a contract, promise, or quasi-contract, the parties voluntarily agree to enter into that contract. The policy of allowing people to freely enter contracts

37. *Polaroid*, 287 F.2d at 495.
is strong as courts do not want to hinder people from legally binding themselves to an agreement. Because of this, courts tend to give deference to contracts. Thus, when a party desires to get out of a contract, they usually have a higher burden to meet than the other party, as they need to show why the contract should be voided or altered away from the original agreement.

For over 100 years, Congress has recognized consent with name trademarks. In fact, they even made the policy stronger with the Lanham Act in 1946. As such, Congress recognized how important it was to protect a person’s name and their rights to use their name to their benefit. More so, Congress also saw the importance of not allowing others to profit off another’s name. Those who think that the freedom to contract is the strongest doctrine when discussing Section 2(c) of the Lanham Act and revoking consent would argue that consent should be prohibited from being revoked. Alternatively, there are defenses for people to get out of contracts under certain circumstances, and there should be a way for people to get out of a bound contract in situations like Dončić’s.

Applying the basic principle of the freedom to enter into a contract to Section 2(c) of the Lanham Act, specifically, a case like Dončić’s, where he intended to revoke his consent, may make it more difficult for the original consenter to win. While the court does not have a set test in place yet for how to handle these cases, the policy of the freedom to contract weighs in favor of the original trademark holder. However, although a contract was freely entered into, other areas of law as well, including the right of publicity, should be considered.

RIGHT OF PUBLICITY

Alternatively, a policy reason as to why courts should allow consent to be revoked is the right of publicity. Specifically, the right of publicity allows a celebrity or public figure to control the commercial use of their identity.40 Today, the right of publicity is often known as name, image, and likeness, but the concept has been around for decades and holds its place in the intellectual property world. As previously discussed, Congress saw how important it was to allow an individual to use their name how they desired, and the right of publicity supports that policy.

The Supreme Court has only reviewed the right of publicity one time—nearly fifty years ago in 1977.41 In Zacchini v. Scripps-Howard Broadcasting, 97 S. Ct. 2849 (1977), Zacchini was an entertainer who performed a “human

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41. Id.
cannonball” act, where he was shot from a cannon into a net about 200 feet away.\textsuperscript{42} In 1972, Zacchini performed at a county fair in Ohio in a fenced area surrounded by grandstands.\textsuperscript{43} Those in the fair were not charged an extra admission to see Zacchini perform.\textsuperscript{44} At one of his performances, a reporter for Scripps-Howard Broadcasting Co. attended with a camera.\textsuperscript{45} Zacchini asked him not to film, but the next day, the reporter returned and filmed the performance at the request of one of his producers.\textsuperscript{46}

Zacchini sued Scripps-Howard Broadcasting, alleging that the reporter showed and commercialized the film of his act without his consent and that his conduct was an unlawful appropriation of Zacchini’s professional property.\textsuperscript{47} The Supreme Court said that Scripps-Howard’s privileged free speech did not extend to its broadcast of Zacchini’s entire performance.\textsuperscript{48} In making this ruling, the Supreme Court stated that the right of publicity “provides an economic incentive for him to make the investment required to produce a performance of interest to the public.”\textsuperscript{49}

The right of publicity not only allows people to control the manner in which their name is used, but it also has an even more direct connection to celebrities and athletes who rose to fame throughout their lives. Without the right of publicity, celebrities whose name makes them multi-millions of dollars would not be able to control their name, image, and likeness, causing them to miss out on endorsements and other ways to expand their brand and their image throughout their careers.

Since entering the NBA, Dončić has capitalized on the opportunity in front of him to generate income and popularity through his name. Most notably, Dončić signed a multi-year endorsement deal with the Jordan brand in 2019.\textsuperscript{50} Shortly after, it was announced that Dončić would become the sixth player ever with a Jordan Brand signature shoe and the first ever European player to reap that accomplishment.\textsuperscript{51} Dončić makes roughly six to ten million dollars on

\begin{itemize}
  \item \textsuperscript{42} Zacchini v. Scripps-Howard Broadcasting, 97 S. Ct. 2849, 2851 (1977).
  \item \textsuperscript{43} Id.
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Id.
  \item \textsuperscript{46} Id.
  \item \textsuperscript{47} Id. at 2852.
  \item \textsuperscript{48} Id. at 2857.
  \item \textsuperscript{49} Id. at 2858.
  \item \textsuperscript{50} Luka Dončić Net Worth, SPORTSKEEDA (Feb. 17, 2023), https://www.sportskeeda.com/basketball/luka-Doncic-net-worth.
  \item \textsuperscript{51} Nick Metallinos, Luka Dončić joins exclusive list of players with a Jordan Brand signature shoe: When does the Luka 1 release?, The Sporting News (Oct. 10, 2022), https://www.sportingnews.com/us/nba/news/luka-Doncic-jordan-brand-signature-
endorsements through Air Jordan, Panini, and NBA2K annually. If Dončić could not control his name, image, and likeness, otherwise known as his right of publicity, he would miss out on potentially ten million dollars a year. Dončić is just one example of how valuable a celebrity’s name is when they become famous; still, it shows how important the right of publicity is, how it needs to be protected, and how it needs a place in the Section 2(c) consent revocation argument.

By looking at Zacchini and the Supreme Court’s reasoning behind the right of publicity, one may interpret the right of publicity to be in place of protecting public figures and as a way to encourage them to continue to invest their time and energy into what has them in the public eye. However, the right of publicity is at issue in claims like Dončić’s, and courts will have to face the task of balancing the right of publicity against the freedom to contract. It is essential for courts to revamp the right of publicity in contexts such as this one. Adopting a new test like the eBay factors can be a perfect way to do so and help protect those whose names come into play under Section 2(c).

THE EBAY FACTORS – A BALANCING TEST

Although Dončić has dropped his claim against his mother, the question that remains is how courts will handle this type of issue in the future. Namely, the issue is how courts should analyze a claim where after a person gives their consent to another to use their name as a trademark under 15 U.S.C. § 1052(c), they wish to revoke that consent. It has been established that under Section 2(c) of the Lanham Act, someone can register another’s name as a trademark with their consent. This can be viewed as a contract or other type of agreement in which the courts tend to give deference to upholding the contract. Alternatively, courts also protect the right of publicity, thus leaving two policies on opposite sides of the table on how to handle legal matters of this sort.

In determining whether a person should be able to cancel their consent or not, courts should adopt a balancing test. Courts can look to a neighboring area of intellectual property to find a test that will work in cases like this one. In 2006, the Supreme Court adopted the eBay factors to determine whether an injunction should be granted in a patent case, and this applies to all types of intellectual property injunctions. The eBay factors are laid out as follows:

shoe/oua/ji6qkikehesggk6f0/...text=The%20Luka%201%20features%20Jordan,shoe%20with%20Michael%20Jordan’s%20brand.
52. SPORTSKEEDEA, supra note 51.
53. 15 U.S.C. § 1052(c)
A plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.\textsuperscript{55}

In trademark cases, a defendant has the burden to dispose of the irreparable harm requirement.\textsuperscript{56} The Trademark Modernization Act says that “[a] plaintiff seeking any such injunction shall be entitled to a rebuttable presumption of irreparable harm upon a finding of a violation identified in this subsection.”\textsuperscript{57} For the second factor, if there are no adequate damages, that factor will be satisfied. Next, the court will balance the hardships on both parties. Courts have held that hardships on the defendant to stop infringing is not a hardship, but they will take it into consideration. Lastly, the courts will look at the public interest.

Through considering these factors and exhausting them over to claims of the type like Dončić’s, courts will have a way to decide whether a plaintiff should be able to revoke their consent given. While an injunction is not being granted, allowing a plaintiff to revoke their consent will make it where the trademark that is in question is now being used without the party’s consent, ultimately violating 15 U.S.C §1052(c). This test provides an equitable way for courts to handle this type of analysis, and doing so will be valuable to all courts around the country if and when this type of claim is to ever arise again.

People in the opposition may mention how implementing and extending another multi-factor test will result in inconsistent rulings and equity when it comes down to whether a person should be able to withdraw their consent. However, this is not the case. The reason that a factor test is necessary, rather than a bright-line yes or no decision, is so that the courts are still acknowledging and giving reason to the right of publicity and the freedom of contract. Having a bright-line rule would bring more inconsistency as the facts and circumstances that may arise on a case-by-case basis will differ from one another with some facts leaning towards granting the injunction and other facts leaning against it.

For example, if Michael Jordan were to grant his consent to another to use his name as a trademark back when he was in high school, the repercussions

\textsuperscript{55} Id. at 391.
\textsuperscript{56} H.R. 6196, Report No. 116-645.
\textsuperscript{57} Id.
today would be immaculate if the court were to not allow him to revoke his consent. Jordan and Nike would have never been able to launch the Jordan brand, which is arguably one of the most iconic shoe brands in the world today.58

By looking at the factors, Jordan would have clearly suffered an irreparable injury. He would never have been able to build a brand that he wished to build off of his name. Monetary damages would have been virtually impossible for the court to compute.

ANALYSIS – APPLYING THE EBAY FACTORS TO DONČIĆ’S CLAIM

While Dončić ultimately dropped his claim against his mother, if the eBay factors were extended and applied here, Dončić would have won his case. Looking at the first factor, Dončić can argue that he is facing irreparable injury. As one of the NBA’s most famous players, Dončić can make a large amount of money on articles of merchandise that have his name and logo. Dončić makes up to ten million dollars of income annually off of endorsements alone, and this is just through Air Jordan, Panini, and NBA2K.59 Dončić is making an immense amount of profit off of his name, and he is barred from owning the rights to his own name as a trademark. As a young man and one of the faces of the NBA, Dončić should have the ability to market himself and profit off of his name in whichever way he pleases. However, due to his mother’s trademark, he is unable to do so. Since he is not able to register his trademark, he is missing out on valuable sales. If his mother’s trademark were to stand and remain a bar for him registering his trademark, he would continue to miss out on these sales and profits. Additionally, the burden would be on his mother to prove that he does not have irreparable harm, which she would have a difficult time accomplishing.

Second, Dončić would need to show that there is no adequate remedy at law, which there is not. Even if a court granted Dončić a large sum of money, if it allowed his mother to use the trademark, Dončić still would not be able to register his trademark. Under the right of publicity, Dončić would be missing out on an opportunity to control the commercial use of his name, and another would be profiting off his name instead. The only justifiable way for Dončić to be fully enriched in this situation is by allowing him to own his trademark with his name attached to it.

Third, the court will balance the hardships of each party if an injunction were granted versus if an injunction were not granted. Dončić would have a

59. Metallinos, supra note 52.
large hardship if an injunction were not granted, specifically, regarding his ability to control the commercial use of his name under the right of publicity. He would still be unable to register his name, and that in and of itself should be enough for this factor to weigh massively in favor of him. Alternatively, his mother would have the hardship of losing profits, but it is not her name that she is using. If the courts were to rule in favor with Dončić’s mother, Dončić would likely have to go through hurdles if he were to want his name on a shoe or any clothing item. With Dončić’s ability to maximize his profits and likeness from his name being hindered by his mother’s trademark, this factor should be satisfied for Dončić.

Lastly, the court will look at public policy. Specifically, the right of publicity and the freedom to contract will be at issue here. If the court chooses not to rule in favor of Dončić, the right of publicity may be in danger. Alternatively, if the court sides with Dončić, the court is invalidating an agreement between Dončić and his mother and conflicting with the freedom to contract. When looking at both of these policies, the court should look into the facts of this case, specifically, and decide that the right of publicity is stronger here. When Dončić gave his mother consent to use his name as a trademark, he was a young, international phenom on a big stage. With a chance to make large profits under his name as a young man, Dončić went to his mother for his help, not realizing that it would cause a conflict this large down the road. The fourth factor should weigh in favor of Dončić.

In totality, all four factors of the eBay test would lean in favor of Dončić. If this were not the case, courts would balance the factors against one another and decide from there. Here, Dončić would win his claim after satisfying all of the factors of the eBay test, and his mother’s trademark would be canceled, clearing the way for Dončić to register his trademark federally.

CONCLUSION

Since Dončić dropped his claim against his mother, courts will not be handling this issue as to whether a person who grants their consent under Section 2(c) of the Lanham Act should be able to revoke their consent. However, a test is still needed in the case that this issue ever arises again. Since the enactment of the Lanham Act, courts have struggled with deciding how to weigh the likelihood of confusion, with no set test in the Supreme Court and different circuit courts using different variations of their tests. While the likelihood of confusion is not at the forefront of withdrawing consent under Section 2(c), it shows how easily the courts can fall into a trap of not having a consistent test, or any test at all, to rule on cases dealing with withdrawing consent. It is essential that a test is in place for when this type of case arises again, and extending the eBay factors to this area of Trademark law is a perfect
solution so that courts can make consistent, fair, and equitable rulings in the future.

There are two competing policies at the forefront of whether a person should be allowed to withdraw their consent under Section 2(c). While the freedom to contract favors contracts and would lean towards not allowing consent to be revoked, the right of publicity allows people to use their name, image, and likeness how they choose. Balancing these two competing doctrines gives courts a difficult decision to make. The eBay test would give courts a solution that will weigh both policies effectively, making sure that the right outcome is made every time a case like this arises.

First, courts will look at whether an irreparable injury has been suffered. Next, courts will determine if the remedies available at law, such as monetary damages, are inadequate to compensate for that injury. Third, courts will balance the hardships between the plaintiff and defendant and determine whether a remedy in equity is warranted. Lastly, courts will decide whether the public interest will be disserved by a permanent injunction. Weighing these factors in totality will ensure that the right decision is being made when these cases arise in courts in the future. By extending the eBay test to this type of claim, courts will have a way to analyze these claims in the future, and it will prove to be fair and equitable when the time does come.