

“F” Word Doesn’t Faze Supreme Court — Supreme Court Says USPTO Cannot Refuse to Grant Trademarks Merely Because They Contain Expletives

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Susan Okin Goldsmith

Trademark Alert

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George Carlin famously observed that there are seven words you can’t say on TV. Erik Brunetti didn’t get the message and thus sought to register a trademark for a line of clothing called “FUCT.” The U.S. Patent and Trademark Office refused to register the mark on the grounds that this obvious misspelling of the “F” word is scandalous or immoral. Thanks to the Supreme Court, Mr. Brunetti no longer has to worry about the opinion of the Trademark Office on his use of expletives, nor do others who are looking to register trademarks similar in nature.

Trademarks are a type of intellectual property and can take many forms, including that of a symbol (e.g., Nike’s swoosh), a real or coined word (e.g., Amazon, Audible), or a phrase (e.g., “Just Do It”). Trademarks indicate the source of a product or service, allowing consumers to evaluate the quality of a product before making a purchase. Trademarks also help combat sales of counterfeit products. Trademark registrations provide a bundle of rights and remedies to assist mark owners in protecting their brands and businesses.

The dispute over the name of Mr. Brunetti’s Los Angeles-based clothing brand, “FUCT,” started when he filed a trademark application. This mark is pronounced the same way as the past participle of the “F” word. The Trademark Office rejected the trademark application based on a section of the trademark statute that prohibits registration of trademarks containing “immoral” or “scandalous” terms. Just two years ago, however, the Supreme Court struck down a different part of this same statute, holding that the provision was unconstitutional as to “disparaging” marks because it discriminated against marks on the basis of the viewpoint expressed and thus violated the freedom of speech clause of the First Amendment.

In today’s decision, the Supreme Court has yet again come to the defense of free speech, this time striking down the “immoral” or “scandalous” portion of the trademark law. As a result, the Trademark Office must approve applications for trademarks containing expletives if all other requirements are met. The Court’s decision reiterates the clear message that the Trademark Office is not to use its role as gatekeeper of trademarks to impart the

government's viewpoint. Additionally, the Court's decision will remedy the inconsistent application of this statutory section – for example, the prior grants of registration to the marks “FCUK” and “PHUC” but the denial of registration to “FUCT” for similar goods. Mr. Brunetti may still have issues with the likelihood of confusion with these other registrations, but he has passed the hurdle of refusal on absolute grounds.

The Court's opinion is important not only for its effect on trademark law, but also for its reaffirmation of the principles of free speech. As Justice Alito wrote in a concurring opinion, “[v]iewpoint discrimination is poison to a free society.”

It remains to be seen whether other restrictions on trademark registrations found in this same section will face a similar fate. For now, the USPTO is likely bracing itself for many more trademark applications seeking to register “the seven words” and their countless variations. The case is *Iancu v. Brunetti*, Case No. 19-302 (U.S., June 24, 2019). If you would like additional information on this topic, please contact the authors or your lawyer at McCarter & English, LLP.

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