U.S. Supreme Court Opens The Door To Registering "Immoral" And "Scandalous" Trademarks

Description

In a 6-3 decision in *Iancu v. Brunetti*, the U.S. Supreme Court has declared a provision of the federal trademark law unconstitutional and in violation of the First Amendment protection of free speech. The provision in question permits the U.S. Patent and Trademark Office (USPTO) to refuse to register trademarks that consist of or comprise "immoral" or "scandalous" matter.

The case involves a trademark application by Erik Brunetti, an artist and entrepreneur, who founded a clothing line that uses the trademark "FUCT". The USPTO and the Trademark Trial and Appeal Board refused to register the mark because the mark was "highly offensive" and "vulgar," and because the mark had "decidedly negative sexual connotations."
In striking down the federal trademark ban, the Supreme Court relied on its 2017 decision in *Matal v. Tam*, which struck down a similar restriction on the registration of "disparaging" trademarks. In that decision, the Supreme Court determined that if a provision prohibiting trademark registration is "viewpoint based," it violates the First Amendment and is unconstitutional.

In *Brunetti*, the Supreme Court analyzed the provision preventing registration of immoral or scandalous marks, and concluded this prohibition also is "viewpoint based." The Supreme Court found that the federal trademark law is written to allow registration of marks when their messages accord with society's sense of decency or propriety, but not when their messages defy such sense. Justice Kagan's decision went on to provide specific examples, such as the USPTO's refusal to register YOU CAN'T SPELL HEALTHCARE WITHOUT THC for pain-relief medication, and MARIJUANA COLA and KO KANE for beverages, because it is "scandalous to inappropriately glamorize[e] drug abuse," but approval to register "D.A.R.E. TO RESIST DRUGS AND VIOLENCE" and "SAY NO TO DRUGS — REALITY IS THE BEST TRIP IN LIFE." Although the rejected marks express opinions that are, at the least, offensive to many Americans, the Supreme Court concluded that a law disfavoring these "ideas that offend" discriminates on viewpoint in violation of the First Amendment.

The *Brunetti* decision opens the door for other "scandalous" and "immoral" trademarks to be registered. In recent months, the USPTO has reported an upsurge in such applications, perhaps anticipating the result in *Brunetti.* For example, as of June 24, 2019, there are over 200 pending applications in the USPTO for trademarks containing the "F-word."

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