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FIRST AMENDMENT REIGNS IN SCOTUS TRADEMARK CASE

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Federal trademark law has long since barred applicants from seeking to register “immoral” and “scandalous” trademarks. However, on Monday, the Supreme Court issued a ruling in Iancu v. Brunetti, which struck down this bar on First Amendment grounds. The United States Patent and Trademark Office (USPTO) can no longer prevent the registration of such immoral or scandalous trademarks.

The case centered around Erik Brunetti, a clothing designer who sought a trademark for the word “FUCT,” which stands for “Friends U Can’t Trust.” Brunetti co-founded the clothing line FUCT in 1990, but in response to several attempted knockoffs, he applied for a trademark in 2011. The USPTO denied Brunetti’s application, on the basis that it was pronounced the same way as a vulgar word. That decision was upheld by the Trademark Trial and Appeal Board (TTAB). Brunetti appealed the TTAB decision to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit held that while the TTAB was not incorrect in applying the plain language of the Lanham Act, the ban on “immoral” and “scandalous” marks is an unconstitutional restriction on free speech. The USPTO, through undersecretary Andrei Iancu, appealed to the Supreme Court.

In Monday’s decision, the Supreme Court unanimously ruled that the statutory ban against the registration of “immoral” or “scandalous” trademarks was a violation of the Free Speech Clause of the First Amendment. In the decision, Justice Kagan noted that the Court had previously declared unconstitutional a Lanham Act ban on registering marks that were deemed to “disparage” any person, living or dead. In that case, the Court ruled any bar to registration that is “viewpoint based” is not constitutional. Justice Kagan concluded that whether a trademark is “immoral” or “scandalous” is likewise viewpoint based and thus such a ban on registration is also unconstitutional.

In her majority opinion, Justice Kagan noted that the bar was a sweeping restriction on free speech. “There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all,” wrote Justice Kagan. “It therefore violates the First Amendment.”

The USPTO can no longer prevent registration of trademarks on the basis of a judgment call as to whether the mark is immoral or scandalous. Accordingly, the Supreme Court’s decision has opened the door to applicants seeking to protect new and creative trademarks, however offensive they may be to trademark examiners or others. Many may see this is a boon for modern creatively – others are likely to continue to disagree.

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