

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*In re Application of Erik Brunetti,*

ERIK BRUNETTI, Appellant,

v.

DIRECTOR, UNITED STATES
PATENT & TRADEMARK OFFICE, in
his official capacity ("Director"),
Appellee.

NOTICE OF APPEAL

Serial No. 85/310960

Pursuant to 37 C.F.R. Section 2.145, 15 U.S.C. Section 1071(a) and U.S. Court of Appeals for the Federal Circuit Rule 15, Erik Brunetti ("Applicant") hereby appeals to the U.S. Court of Appeals for the Federal Circuit from the August 1, 2014 decision of the Trademark Trial and Appeal Board ("TTAB") denying registration to Applicant.

A copy of the TTAB decision is attached hereto.

A copy of this Notice of Appeal, in triplicate is being sent to the Clerk of the Court of Appeal for the Federal Circuit, together with the fee required by the Federal Circuit Rule 52.

Dated this 17th day of September 2014.



JOHN R. SOMMER

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ERIK BRUNETTI**09-22-2014**

CERTIFICATE OF SERVICE

I hereby certify under 37 C.F.R. Section 2.197, that this Notice of Appeal is being deposited with the U.S. Postal Service, with sufficient postage prepaid, via First Class Mail, addressed to:

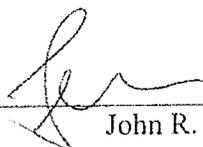
Director of the United States Patent and Trademark Office
Office of the General Counsel
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, Virginia 22313-1450

I hereby also certify that this Notice of Appeal is being served to the TTAB by electronic filing through the ESTTA.

I hereby also certify that three copies of this Notice of Appeal, together with all filing fees, is being deposited with the U.S. Postal Service, with sufficient postage prepaid, via First Class Mail, addressed to:

Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

Dated: September 17, 2014



John R. Sommer

This Opinion is not a
Precedent of the TTAB

Mailed: August 1, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Brunetti*¹

Serial No. 85310960

John R. Sommer of John R. Sommer, Attorney-at-Law,
for Erik Brunetti

Zachary R. Bello, Trademark Examining Attorney, Law Office 111,
Robert L. Lorenzo, Managing Attorney.

Before Bucher, Wellington and Wolfson,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Erik Brunetti (“Applicant”) seeks registration on the Principal Register of the term **fact** (*in standard character format*) for “athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps; children’s and infant’s apparel, namely, jumpers,

¹ This application was originally filed by joint applicants, David Gollup and Christopher MacLachlan, of Cary, NC, on May 3, 2011. On May 12, 2012, joint applicants (Messrs. Gollop and MacLachlan) assigned their entire interest in the ITU application for the term **fact** to Erik Brunetti of Los Angeles, California, which assignment document was received by the Assignment Branch of the United States Patent and Trademark Office on May 14, 2012. The Assignors allegedly assigned, transferred and conveyed “... all right, title and interest in and to the trademark **fact** along with all goodwill associated therewith and that portion of the business of assignor’s business to which the trademark pertains ...” See Section 10 of the Trademark Act, 15 U.S.C. § 1060; 37 C.F.R. § 3.16; and TMEP § 501.01(a).

overall sleepwear, pajamas, rompers and one-piece garments” in International Class 25.²

The Trademark Examining Attorney has refused registration of Applicant’s mark under Trademark Act Section 2(a), 15 U.S.C. § 1052(a), because the applied-for mark comprises immoral or scandalous matter.

According to the Trademark Examining Attorney, the term “Fuct” is the phonetic equivalent of the word “Fucked,” the past tense form of the verb “fuck.” For this reason, the Office maintains this term is “vulgar, profane and scandalous slang.” Applicant, on the other hand, contends that: with the Trademark Examining Attorney’s focus on the alleged “vulgar” nature of this term, the Office has employed an incorrect standard in refusing registration under Section 2(a) of the Trademark Act; that the evidence of record is not sufficient to prove that the term “Fuct” is “so scandalous” as to justify the refusal to register; that the applied-for mark, **fuct** is a coined word that has no meaning other than as Applicant’s brand name; and finally, that the Board should narrow the scope of the statutory bar under “scandalous and immoral” in light of evolving First Amendment jurisprudence and the opinions of respected legal commentators that this provision of the Trademark Act, as currently enforced by the Office, is simply unconstitutional.

² Application Serial No. 85310960 was filed on May 3, 2011, based upon Applicant’s allegation of a *bona fide* intention to use the term in commerce under Section 1(b) of the Trademark Act. On May 18, 2012, Mr. Brunetti filed an Amendment to Allege Use (AAU) claiming first use anywhere and use in commerce, through his predecessors-in-interest, since at least as early as December 31, 1991.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Trademark Examining Attorney denied the request for reconsideration, the appeal was resumed. As explained below, we agree with the Trademark Examining Attorney, and affirm the refusal to register.

I. Preliminary matter

The Trademark Examining Attorney has objected to “Exhibit A” and arguments related to that exhibit, which Applicant submitted for the first time with its appeal brief. Under our Trademark Rules, the record in an application should be complete prior to the filing of an appeal. 37 C.F.R. § 2.142(d). Inasmuch as this new evidence and arguments were submitted in an untimely manner, we have not considered these tardy submissions. *See In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1147-48 (TTAB 2011); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1990-91 (TTAB 2011); *In re Van Valkenburgh*, 97 USPQ2d 1757, 1768 n.32, 1769 (TTAB 2011); and TBMP §§ 1203.02(e), 1207.01 (2014).

II. Brunetti’s “Streetwear”

Erik Brunetti is an artist and entrepreneur whose graphics are infused with cultural strands from skateboarding, graffiti culture, punk rock music, and remnants of Situationist Ideal ideologies. He has been a trail-blazer since the early nineties in popularizing “streetwear” having revolutionary themes, proudly subversive graphics and in-your-face imagery. His assaults on American culture critique capitalism, government, religion and pop culture. Brunetti’s blog is directed

to a cult following that he, his company, Fuct Manuf. Co., and Fuct's "Same Shit Different Day" line of clothing have developed since he allegedly first adopted this designation in 1991.

III. Legal standard for determining whether a term is scandalous

The determination of whether a term is scandalous is a conclusion of law based on the underlying facts. *See, e.g., In re Fox*, 702 F.3d 633, 105 USPQ2d 1247, 1249 (Fed. Cir. 2012). The U.S. Patent and Trademark Office has the burden of proving that a trademark falls within the prohibition of Section 2(a). *Id.* To prove that the term **fuct** is scandalous, it is sufficient if the Trademark Examining Attorney shows that the term is vulgar. *Id.* at 1248; *Luxuria*, 100 USPQ2d at 1148. Our primary reviewing Court has consistently held that "the threshold for objectionable matter is lower for what can be described as 'scandalous' than for 'obscene.'" *In re McGinley*, 660 F.2d 481, 211 USPQ 668, 673 n.9 (CCPA 1981).

In determining whether a particular designation is scandalous, we must consider the term in the context of the marketplace as applied to applicant's identified goods. *In re Fox*, 105 USPQ2d at 1248. Furthermore, the analysis must be made (1) from the standpoint of a substantial composite of the general public, and (2) in terms of contemporary attitudes. *Id.* Thus, even though "the news and entertainment media today [may be] vividly portraying degrees of violence and sexual activity that, while popular today, would have left the average audience of a generation ago aghast" [*In re Maveety Media Group Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923, 1926 (Fed. Cir. 1994)], there are still terms that are sufficiently vulgar that they fall

under the prohibition of Section 2(a). See *In re Tinseltown, Inc.*, 212 USPQ 863, 866 (TTAB 1981) (“the fact that profane words may be uttered more freely does not render them any the less profane”; refusing to register **BULLSHIT** for personal accessories and clothing). See also *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059 (TTAB 2013) (**AWSHIT WORKS** refused as vulgar); *In re Red Bull GmbH*, 78 USPQ2d 1375 (TTAB 2006) (**BULLSHIT** refused as vulgar). While each of these decisions was decided on its own merits and record relevant to the time of decision, they illustrate the enduring vulgarity of some terms, despite changing times or norms.

IV. The evidence

A. Dictionary Evidence

From the dictionary entries placed into the record by the Trademark Examining Attorney, we have no doubt but that the word “fuck” continues correctly to be characterized as “offensive,”³ “extremely offensive,” “highly offensive,” “intentionally offensive,” an “obscenity,” “vulgar slang,” the “f-bomb,” and at the root of a number of other twisted and angry expressions.⁴

³ **Fuck:** *Fuck* is one of the most common words in English – it’s also *one of the most offensive*. Its main meaning is “have sex,” but it has hundreds of other uses.

This slang term for sexual intercourse is not a word to be used lightly – it’s an obscenity that, if used on some television networks, could cost the person who “dropped the f-bomb” thousands of dollars. Despite all the people who don’t want to hear it, *fuck* is one of the most common obscenities, and can be used as a noun, verb, adjective, and adverb. It’s often used as a modifier to add emphasis to another word, as in “that’s so *fucking* stupid!” vocabulary.com, as attached to Final Office action of January 27, 2013.

⁴ For example, from the Wikipedia entry, under the heading “*Offensiveness*”:
“... It is unclear whether the word has always been considered *vulgar*, and if not, when it first came to be used to describe (often in an extremely angry, hostile or belligerent manner) unpleasant circumstances or people in an intentionally offensive way, such as in

fuck – definition

VERB [INTRANSITIVE/TRANSITIVE] OFFENSIVE  [Macmillan](#) /fʌk/  [Word Partner](#)
e.g., past tense **fucked**
past participle **fucked**

MACMILLAN
DICTIONARY

[View thesaurus entry for fuck](#)

[What are red words?](#)

 [Using the thesaurus](#)

an extremely offensive expression that means to have sex with someone

 [Thesaurus](#) entry for this meaning of fuck

PHRASE

- **fuck it/you/them etc.** offensive
an extremely offensive expression used for showing anger at someone or something

 [Thesaurus](#) entry for this meaning of fuck

PHRASAL VERBS

- [fuck around](#)
- [fuck off](#)
- [fuck over](#)
- [fuck up](#)
- [fuck with](#)

Related dictionary definitions

- fuck** INTERJECTION
- fuck** NOUN
- fuck up** PHRASAL VERB
- fuck-up** NOUN
- fuck off** PHRASAL VERB
- fuck over** PHRASAL VERB
- fuck with** PHRASAL VERB
- fuck around** PHRASAL VERB
- the fuck**
- not give a (flying) fuck**

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- o O o -

fucked – definition

ADJECTIVE OFFENSIVE  [Fishousian](#) /fʌkt/

MACMILLAN
DICTIONARY

[View thesaurus entry for fuck](#)

[What are red words?](#)

 [Using the thesaurus](#)

1. an extremely offensive word that means having no chance of success

 [Thesaurus](#) entry for this meaning of fucked

2. an extremely offensive word that means completely broken or destroyed

 [Thesaurus](#) entry for this meaning of fucked

Related dictionary definitions

...

6

- o O o -

the term *motherfucker*, one of its more common usages in some parts of the English-speaking world ...”

[wikipedia.org](#), as attached to Final Office action of January 27, 2013.

The terms “fuck” and “motherfucker” are two on the list of “George Carlin’s Seven Dirty Words.” 10 TTABVue at 7 of 7.

⁵ [macmillandictionary.com](#). (American English definition), Macmillan Publishers Limited, as attached to Office action denying Applicant’s Request for Reconsideration, dated Aug. 20, 2013, 9 TTABVue at 3 of 8.

⁶ The Trademark Examining Attorney asked that we take judicial notice of this entry, including its pronunciation, as shown at [macmillandictionary.com](#). Macmillan Publishers Limited. The Board may take judicial notice of dictionary definitions that appear in printed publications, including online dictionaries with regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d at 1378; *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TFAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). We note that in applying the Macmillan phonetic guides for “American English” to the vowel sound of the “a” creating the strong form of the stressed syllable in the word “fucked” [fʌkt/], one would have an adjectival form pronounced phonetically as “fukt.” Because the letters “c” and “k” can be pronounced identically, the pronunciations would then be identical.

Fuck (fʊk) *Vulgar Slang*
v. **fucked, fuck·ing, fucks**
v.*tr.*

1. To have sexual intercourse with.
2. To take advantage of, betray, or cheat; victimize.
3. Used in the imperative as a signal of angry dismissal.

v.*intr.*

1. To engage in sexual intercourse.
2. To act wastefully or foolishly.
3. To interfere; meddle. Often used with *with*.

The term “fuct” is recognized as a slang and literal equivalent of the word “fucked,” and having the same vulgar meaning. The Trademark Examining Attorney provided a copy of an entry for the term “fuct” from the Urban Dictionary that equates the two:⁸

Fuct

- The past tense of the verb fuck. Also used to express a general state of incapability.
We are so fuct!
She fuct me like a dog in heat!
That's fuct up!
(Rural definition) *Hey maw, I just fuct yer best frind [sic].*
- fuct- friends u can trust
fuct for life bro
without a doubt brother

B. Applicant's declaration

According to Mr. Brunetti's declaration drafted during this proceeding:

¶4. The name of the FUCT brand is an arbitrary made up word. However, to the extent I am asked for a meaning I refer to FRIENDS U CAN'T TRUST. See Exhibit “4.”⁹

⁷ The American Heritage Dictionary of the English Language, Fourth Edition, available at thefreedictionary.com.

⁸ As attached to initial refusal under Section 2(a) in Office action of July 3, 2012.

⁹ A wiki contribution to THE URBAN DICTIONARY lists “friends u can trust” as an expression supporting one alleged origin of the term “FUCT.” However, consistent with Applicant's overall philosophy, he seems to have adopted FRIENDS U CAN'T TRUST – the opposite meaning – as a justification for his having selected his **fuct** term.

¶5. The FUCT brand does not refer to “fuck” or the act of sexual intercourse.

¶6. In the 22 years since its creation, the FUCT brand has been sold throughout the United States and worldwide. The brand has been sold in a variety of retailers, from small skate and street fashion shops up to the worldwide retailer Urban Outfitters

¶7. FUCT’s products do not show anything that refers to sexual intercourse. Nor does its blog. Exhibit “3.” In fact, there is very little in FUCT’s products that could even be considered in bad taste.

In this context, Applicant’s response of January 2, 2013, argues as follows:

... Although the brand is cutting edge, there is nothing on the labeling to imply any connection with sexual intercourse. When the clothing products themselves are examined, they do not have any graphics that would suggest that FUCT means “fuck”: there are no graphics of nude or even semi-nude persons.

C. Evidence of Applicant’s FUCT line of clothing and accessories

Both the Trademark Examining Attorney and Applicant have made of record hundreds of visuals – many of them taken from applicant’s website and online blog titled “The Love Awareness Program” – showing Applicant’s use of the term fuct on T-shirts, other goods and related blog postings.¹⁰ These pictures show that Applicant’s website and products contain strong, and often explicit, sexual imagery that objectifies women and offers degrading examples of extreme misogyny,

¹⁰ blog.fuct.com. As noted, the blog is titled “The Love Awareness Program.” However, apart from suggesting objects of sexual desire, any of the more common connotations of “Love” (such as “affection,” “devotion,” “tenderness” or “warmth”) are not readily apparent from a perusal of Applicant’s blog entries over a period of years.

generally immediately next to Applicant's use of his proposed mark. It is clear from the record that the term "Fuct," as used by applicant, will be perceived by his targeted market segment as the phonetic equivalent of the word "fucked," and leaves an unmistakable aura of negative sexual connotations.

Further, moving to the secondary definitions of "fucked" and "fuct" that connote lives "having no chance of success," the dictionaries make it clear, in this context, that the term "fucked" (or "fuct") is still "an extremely offensive word." See macmillandictionary.com. We conclude from a review of the entire record that Applicant's clothing and website also mirror the offensive nature of the word in this context as well. In response to the pessimistic, rhetorical question of "just how 'fuct' are we?," the imagery Applicant employs throughout this record is one of extreme nihilism – displaying an unending succession of anti-social imagery of executions, despair, violent and bloody scenes including dismemberment, hellacious or apocalyptic events, and dozens of examples of other imagery lacking in taste, usually in close proximity to Applicant's use of his proposed mark.

V. Analysis

In light of the evidence recited above, with the prevalence of various meanings of the term "fucked" (e.g., having decidedly-negative sexual connotations, as well as extreme misogyny, depravity, violence, intolerance, anger, and imagery of being "doomed" or a "loser," etc.) that dominate applicant's themes and designs, we find that applicant's declaration statements that "fuct" was chosen as an invented or coined term stretches credulity. Although counsel explicitly argues that Applicant's

repeated reliance upon the acronym explanation allegedly drawn from the phrase FRIENDS U CAN'T TRUST is “*not just a façade* [for Applicant] to hide [behind]” (*emphasis supplied*), we conclude, to the contrary, that the term “fuct” was chosen precisely because it was knowingly calibrated to be simultaneously alluring, offensive, and corporate (i.e., “mainstream”) – retaining just enough ambiguity to provide plausible deniability when necessary around the question of whether it is merely another way to say “fucked,” while knowing that members of its specially target audience would never be fooled.

As to Applicant’s claim that “vulgar” is not the correct standard under Section 2(a), we find that while various precedential cases of our primary reviewing court define the meaning of “scandalous” in additional and more comprehensive terms, the word “vulgar” captures the essence of the prohibition against registration in the case at bar, and therefore, we have chosen to use the term “vulgar” to facilitate our analysis and discussion, and to encapsulate what the Trademark Examining Attorney called “vulgar, profane and scandalous slang.”

We have seen from the dictionary definitions of record that “fucked” and its phonetic twin, “fuct,” are both vulgar terms. Whether one considers “fucked” as a sexual term, or finds that Applicant has used “fucked/fuct” in the context of extreme misogyny, nihilism or violence, we have no question but that these are still extremely offensive terms in the year 2014. That there has been a U.S. band performing and recording under the name “Fucked Up” is irrelevant to our determination. Similarly, that the United States Patent and Trademark Office may

have issued trademark registrations where the composite mark contained the word “Screwed” is also of no moment in our determination of whether the terms “fucked/fuct” are scandalous.

As to the fact that **fuct** has served as applicant’s source identifier for decades, we reiterate that our responsibility under the Lanham Act is to determine the question of registrability based upon our applying contemporary standards to the specific evidence of record. We find that the Trademark Examining Attorney has shown by a preponderance of the evidence that a substantial composite¹¹ of the general public would find this designation vulgar.¹² Applicant’s cult following may well represent a reliable niche market for its goods and ideology. While the existence of this market segment may reveal differing opinions within the consumer community, once a substantial composite has been found to consider the term scandalous, the mere existence of differing opinions cannot change the conclusion. *Cf. Amanda Blackhorse, et al. v. Pro-Football, Inc.*, 111 USPQ2d 1080, 1111 (TTAB 2014) (in the recent “Redskins case,” the issue was disparagement, not scandalousness, but the principle as to the effect of our finding a “substantial composite” is the same). Moreover, that any given Trademark Examining Attorney may have initially failed to make a scandalous refusal under Section 2(a) of the Trademark Act is also immaterial to our decision herein.

¹¹ A substantial composite is “not necessarily a majority.” *See In re Mavety Media Group Ltd.*, 31 USPQ2d at 1925 (quoting *In re McGinley*, 211 USPQ at 673).

¹² *See In re Manwin/RK Collateral Trust*, 111 USPQ2d 1311, 1315 (TTAB 2014) (the Board should consider the views of the general public and not just consumers of the particular goods/services – in *Manwin*, online porn).

Finally, we readily recognize the statutory limitations of this tribunal. It is abundantly clear that the Trademark Trial and Appeal Board is not the appropriate