

Response to Office Action

Mark: **FUCT UP**
Serial Number: 88/308,463
Deadline: September 29, 2019
Owner: Erik Brunetti

The Examining Attorney has noted two concerns with respect to Applicant's proposed mark, mainly surrounding the possible likelihood of confusion with a prior existing user, and then a 2(a) Advisory based on scandalous matter. Applicant wishes to provide arguments such that the Examining Attorney will reconsider the cited registration.

SECTION 2(d) LIKELIHOOD OF CONFUSION REFUSAL:

Comparison of the Marks

The Examining Attorney has cited one registration (U.S. Reg. No. 4495813), a highly stylized mark encompassing the letters **F'D UP**, as a bar to Applicant's **FUCT UP** mark. The design elements of the cited mark include a figure riding a board, squiggly lines throughout, and finishing up the loopy circle elements with arrows pointing to the left and right. The test for similarity of marks encompasses (amongst other aspects) sight, sound and meaning.

Visually and Audibly Distinct

Visually, the cited mark, which contains words, letters, figures and squiggly lines, would not be viewed as confusingly similar to Applicant's **FUCT UP** word mark, as set forth below:

FUCT UP



From a sight perspective, the marks are easily distinguishable. There are too many (and varied) elements in the cited mark for consumers to emphasize solely the letters. Furthermore, if **FUCT** has been deemed to not conflict with **FVCK** or **FCUK**, then **F'D UP (Stylized)** cannot conflict with **FUCT UP**.

In addition, audibly, the marks are different. When said aloud, the **F'D** term would start with a soft "eff'ed" sound.

Difference in Meaning

Moving from sight and sound distinctions, we must analyze meaning. While at first blush there could be a possible similarity in meaning, the marks cannot be similar. Prior to the decision of the U.S. Supreme Court in *Iancu v Brunetti*, profanity could not be registered. Thus, by definition, **F'D UP** does not refer to **FUCKED UP**. Otherwise, the cited mark would have been rejected under Section 2(a). Accordingly, Applicant respectfully requests that such citation be withdrawn.

As the record demonstrates, the Registrant, Mr. Robison, has argued that his “F'D UP” wording refers to “*fired up*”. These arguments, made in his underlying Response to Office Action, are what ultimately allowed the Examiner to accept his mark for publication. **FIRED UP** is not **FUCT UP** nor is it **FUCKED UP** (as the Examiner suggests). Applicant contends that the cited mark would never have been accepted for publication back in 2013 if the actual meaning had been “fucked up”, so the only conclusion is that “**F'D UP**” represents FIRED UP. Registrant of the cited mark is bound by his original admission, as filed with the USPTO, and Applicant’s mark is therefore factually different in meaning. See *Festo Corp v. Shoketsuu Kinzoku Kogyo Kabushiki Co.*, 535 722 (2002).

Prior Use and Filing Date

In addition, Applicant has technically co-existed with the cited mark since the inception of Mr. Robison’s initial filing back in 2012. Applicant’s **FUCT** mark was filed prior to the cited mark – on May 3, 2011. The USPTO approved Applicant’s **FUCT** mark for publication (originally in 2012 and now again in 2019), prior to the cited mark’s existence. Thus, obviously, the **F'D UP** term does not mean **FUCKED**, or if it does, it is not too close. Due to USPTO scandalous mark advisories, Applicant’s mark has not yet issued to registration. Applicant has been using its **FUCT** mark since 1991, long before the cited mark’s **F'D UP** logo was created.

SECTION 2(a) ADVISORY – SCANDALOUS MATTER:

Applicant understands that according to USPTO Examination Guide 2-19, the Supreme Court has now held that the scandalousness provision is unconstitutional under the Free Speech Clause of the First Amendment. Accordingly, a mark may not be refused registration because it consists of or comprises “immoral” or “scandalous” matter.

CONCLUSION

Having provided clarity regarding how and why the cited mark is different in sight, sound and meaning from Applicant’s mark, Applicant seeks to overcome the likelihood of confusion issues.

The 2(a) Advisory should be removed. Applicant respectfully requests that its application be approved for publication.

Respectfully submitted,

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Attorney for Applicant