Alexander Lutzky in INTA Bulletin: No Likelihood of Confusion Found Between I'M SMOKING HOT and SMOKIN' HOT SHOW TIME Marks

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PRACTICES Intellectual Property Litigation, Trademark and Advertising, Intellectual Property

The U.S. Patent and Trademark Office (USPTO) Trademark Trial and Appeal Board (TTAB), in an August 23, 2018, precedential decision, reversed a finding of likelihood of confusion between an application for the mark I'M SMOKING HOT and a cited registration for SMOKIN' HOT SHOW TIME. Even though the goods covered under both marks were "identical," the different overall commercial impression and weakness of a common term in the two marks made confusion unlikely. In *re FabFitFun, Inc.*, 127 USPQ2d 1670, 1677 (TTAB 2018).

FabFitFun, Inc., a California-based retailer of beauty products, applied for a U.S. trademark registration for the word mark I'M SMOKING HOT for a list of goods in International Class 3, including "cosmetics and makeup." The USPTO refused registration under Section 2(d) of the Lanham Act, asserting a likelihood of confusion existed with a registration for the word mark SMOKIN' HOT SHOW TIME for "cosmetics, mascara." FabFitFun appealed to the TTAB.

Using the well-worn multifactor analysis from the seminal *In re E. I. du Pont de Nemours & Co. case*, the TTAB determined that several factors weighed in favor of a finding of likelihood of confusion. For example, one of the goods described under the application and cited registration, "cosmetics," was identical. In addition, the "channels of trade," "classes of consumers," and "conditions of sale" factors favored confusion, as well.

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