



ALERT
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How Scandalous! Federal Circuit Holds Vulgar Trademarks Are Registrable

Trademarks will no longer be refused registration on the basis that they constitute immoral or scandalous matter. On December 15, 2017, the U.S. Court of Appeals for the Federal Circuit unanimously ruled in *In re Brunetti* that the bar against such marks is unconstitutional because it violates the First Amendment.

The appeal concerned a trademark application for the proposed mark FUCT, covering various clothing goods. The U.S. Patent and Trademark Office refused to register the trademark based on Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), which prohibits the registration of a trademark that "[c]onsists of or comprises immoral ... or scandalous matter."

On appeal, the case was originally stayed pending the U.S. Supreme Court's June 2017 decision in *Matal v. Tam*, which reviewed the disparagement provision of Section 2(a) and found that provision unconstitutional. Relying on the Supreme Court's reasoning in *Tam*, the Federal Circuit held that refusing registration would unfairly deprive the applicant of his right to free speech.

The Federal Circuit first found that a "substantial composite" of the American public would find the mark vulgar, and it was therefore scandalous under Section 2(a). However, the court concluded that the scandalousness provision constitutes an impermissible content-based restriction on speech, which does not survive strict or even intermediate scrutiny. The court reasoned that "the government's interest in protecting the public from off-putting marks is an inadequate government interest for First Amendment purposes." According to the Federal Circuit: "The First Amendment ... protects private expression, even private expression which is offensive to a substantial composite of the general public."

As the bar on immoral and scandalous marks was held to be unconstitutional, the court reversed the holding that the mark was unregistrable under Section 2(a).

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