

Jason Bloom in Managing IP on SCOTUS Petition Regarding Scandalous and Immoral Trademark Registrations

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PRACTICES Intellectual Property Litigation, Copyright, Intellectual Property, Litigation

Haynes Boone Partner and Copyright Practice Group leader [Jason Bloom](#) weighed in on the United States Patent and Trademark Office's recent petition to the Supreme Court seeking to overturn a Federal Circuit ruling finding the Lanham Act's bar on registrations of "scandalous and immoral" trademarks unconstitutional.

Below are excerpts from the *Managing Intellectual Property* article, entitled "US Government Likely to be Disappointed in Brunetti Review Quest:"

The U.S. Patent and Trademark Office (USPTO) has filed a petition for cert asking the Supreme Court to reverse the Federal Circuit's 2017 *In re Brunetti* decision, which found that the "immoral and scandalous" provision of the Lanham Act is unconstitutional because it violates the First Amendment.

The petition comes a little more than a year after the Supreme Court found the "disparaging" provision of Section 2(a) of the Lanham Act to be unconstitutional in *Matal v Tam*. Many expect its reasoning in *Tam* to apply to *Brunetti*, if it decides to take up the case at all.

Jason Bloom, partner at Haynes Boone, says: "I don't see a big distinction between the two clauses from a First Amendment perspective."

There is a comparison to copyright law because there are almost no limits on what kind of content can be copyrighted. Lewd and offensive works of all kinds, up to and including pornography, are entitled to copyright protection. If copyright registrations must be granted regardless of the offensiveness of the content, why should the law be different with respect to trademark registrations?

Bloom plays Devil's advocate by comparing it to copyright law:

"They could say the Copyright Act is designed to promote and protect creative expression, while the Trademark Act was in part designed to protect consumers' and brand owners' rights, the goodwill in their goods, and to identify their goods." But in the end, he concludes: "There's not a strong argument for the distinction."

Before the Supreme Court's *Tam* ruling, there was a fear that abolishing the restriction on disparaging marks would lead to a deluge of offensive trademarks. This hasn't been the case. Bloom explains why the same will be true for immoral and scandalous marks if *Brunetti* stands: "Trademark law is about commerce, brands, and selling products."

"People are ultimately going to let market forces dictate what trademarks to use. I don't think you're going to see an explosion of people with pornographic or otherwise scandalous or immoral marks,

because that's not a good way to have your product appeal to the public."

No matter what happens, the outcome will not upset the system; if the Supreme Court does reverse and find the provision constitutional, "it shouldn't change anything because the ban had been in place for over a hundred years," says Bloom.

To read the full article, click [here](#). (Subscription required.)