

Give Me Aphukenbrake* – USPTO Issues Examination Guide on Treatment of Scandalous Marks Following Supreme Court Case

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by Sarah Robertson



We recently posted about the U.S. Supreme Court's June 24th holding in *Iancu v. Brunetti*, which upheld a ruling that the Lanham Act's bar on the registration of scandalous or immoral marks is unconstitutional because it violates the right to free speech.

On July 3rd, the USPTO issued written guidance via Examination Guide 2-19 outlining how it will handle applications for marks previously subject to the scandalousness bar following the Brunetti decision.

For pending applications for which the USPTO had issued an advisory refusal under the scandalousness provision, and which the USPTO had suspended until the Brunetti litigation was resolved, the USPTO will lift the suspensions and continue the examination of these applications for any other requirements or refusal. For applications that previously went abandoned after being refused registration under the provision, and which are beyond the deadline for filing a petition to revive, a new application can be

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filed. Going forward, the USPTO will no longer refuse registration or cancel a registration based on “immoral” or “scandalous” matter, and the portions of the Trademark Manual of Examining Procedure that relate specifically to such matter (§1203) will no longer apply.

As to timing, the terms of the Guidance will go into effect at least 25 days after the decision, or on July 19, 2019, at the earliest, after the Brunetti case returns to the agency.

A number of applications for marks that would otherwise have been subject to the immoral or scandalous standard have already been filed. It remains to be seen whether legislative action will be taken to create a more narrowly-crafted provision that will only bar marks that are obscene, vulgar or profane instead.

*APHUKENBRAKE is a mark of Some Spider, Inc. that was previously barred as scandalous.