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### Squeeze Blood From Turnip: Abusing Trademark Law's Morality Provision in the TTAB

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## Squeeze Blood From Turnip®: Abusing Trademark Law’s Morality Provision in the TTAB



Cathay Y. N. Smith

### ABSTRACT

Trademark law prohibits the registration of trademarks that are immoral or scandalous. This “Morality Provision” in trademark law has been criticized as being an unconstitutional abridgement of free speech and resulting in inconsistency and other problems at the USPTO examination stage. This essay exposes another problem with the Morality Provision, which is its abuse by third parties in the TTAB. This essay explores why the Morality Provision—and not any other provisions in trademark law—is susceptible to this type of abuse and outlines examples of these abusive cases in the TTAB. These cases show that, in *inter partes* proceedings in the TTAB, the Morality Provision is often asserted by individuals without any real interest in the proposed trademark, but who instead morally disapprove of the trademark owner or its commercial activities. This type of behavior, where third parties use trademark law and the TTAB to direct their moral outrage at individuals or businesses of which they disapprove, overextends trademark law’s jurisprudence, disrupts commerce, and inappropriately drains government resources. Yet as long as the Morality Provision is part of trademark law in the U.S., these cases continue to appear in the TTAB and result in years of contentious and unnecessary litigation. The tendency and ease for the Morality Provision to be abused in this way combined with its potential to violate free speech and its other problems at the USPTO examination stage supports the argument that the Morality Provision is flawed and should be overhauled or removed from trademark law.

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## INTRODUCTION

Today, a consumer can eat a Kickass Cupcake, drink a glass of Fat Bastard wine, and sit in front of a Big Ass Fan while fishing with a rod from Master Bait & Tackle.<sup>1</sup> In our competitive market, businesses are getting creative with their branding in order to attract consumers and distinguish their goods and services from competitors. Many of these businesses would be surprised to find, however, that in spite of their brand recognition and market success, they may not be able to register their trademarks with the U.S. Patent and Trademark Office (USPTO). Regardless of how famous a trademark has become, as of now, Section 2(a) of the Trademark Act explicitly prohibits the registration of a trademark that “[c]onsists of or comprises immoral . . . or scandalous matter” (hereinafter, the “Morality Provision”), and third parties have a right to oppose a trademark application or cancel a registration if they believe the trademark is immoral or scandalous.<sup>2</sup>

The Federal Circuit is currently considering whether the Morality Provision is an unconstitutional abridgement of free speech in the pending case, *In re Brunetti*.<sup>3</sup> On the eve of the Federal Circuit’s decision, this essay discusses an overlooked and under-discussed problem with the Morality Provision—its susceptibility for abuse by third parties in the Trademark Trial and Appeal Board (TTAB). Specifically, this Essay exposes the ways in which third parties abuse the Morality Provision in the TTAB, examines why the Morality Provision—and not other provisions in trademark law—is more susceptible to this type of abuse, and outlines examples of these cases in the TTAB. These cases show that in *inter partes* proceedings in the TTAB, the Morality Provision is often asserted by individuals without any real interest in the proposed trademark, but who instead morally disapprove of the trademark owner or its commercial activities. This type of behavior, in which third parties use trademark law and the TTAB to punish businesses of which they morally disapprove, overextends trademark law’s jurisprudence, disrupts commerce, and inappropriately burdens government resources. Yet, as long as the Morality Provision is part of trademark law in the United States, these cases continue to

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1. John Grossman, *Risque Names Reap Rewards for Some Companies*, N.Y. TIMES (Apr. 23, 2014), [http://www.nytimes.com/2014/04/24/business/smallbusiness/risque-names-reap-rewards-for-some-companies.html?\\_r=0](http://www.nytimes.com/2014/04/24/business/smallbusiness/risque-names-reap-rewards-for-some-companies.html?_r=0).
  2. 15 U.S.C. § 1052(a) (2012).
  3. *See* No. 15-1109 (Fed. Cir. argued Aug. 29, 2017).

appear in front of the TTAB and sometimes result in years of contentious and expensive litigation. The tendency and ease for the Morality Provision to be abused in this way combined with its potential to violate free speech<sup>4</sup> and its problems at the USPTO examination stage<sup>5</sup> supports the argument that the Morality Provision is flawed and should be overhauled or removed from trademark law.

### I. THE MORALITY PROVISION IN THE TTAB

The Morality Provision is codified in Section 2(a) of the Lanham Act, 15 U.S.C. 1052(a). Once a party files a trademark application in the USPTO, the application goes through the USPTO examination phase, during which a trademark examiner employed by the USPTO determines whether the proposed trademark meets the requirements set forth in Section 2 of the Trademark Act. These requirements include that the proposed trademark is not confusingly similar to another registered trademark, that the trademark is not merely descriptive, and that the trademark does not consist of or comprise immoral or scandalous matter.<sup>6</sup> Once the USPTO approves a trademark application it will publish the trademark for opposition. At that time, anyone who believes it will be damaged by the registration of the trademark may file a notice of opposition to initiate an *inter partes* proceeding in the TTAB to oppose the application based on the grounds set forth in Section 2.<sup>7</sup> If the trademark is already registered, anyone who believes it will be damaged by the

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4. This is the issue on appeal in *In re Brunetti*. See *id.* The U.S. Supreme Court recently decided the same issue in regards to trademark law's disparagement provision, in which the Court found the disparagement provision violated the First Amendment by discriminating against certain speech. See *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).
  5. The Morality Provision's numerous problems at the U.S. Patent and Trademark Office (USPTO) examination stage have been explored in other papers, including Jasmine Abdelkhalik, *To Live in In-"Fame"-y: Reconceiving Scandalous Marks as Analogous to Famous Marks*, 25 CARDOZO ARTS & ENT. L.J. 173 (2007); Megan M. Carpenter & Kathryn T. Murphy, *Calling Bulls\*\*t on the Lanham Act: The 2(a) Bar for Immoral, Scandalous, and Disparaging Marks*, 49 U. LOUISVILLE L. REV. 465 (2011); Anne Gilson LaLonde & Jerome Gilson, *Trademarks Laid Bare: Marks That May Be Scandalous or Immoral*, 101 TRADEMARK REP. 1476 (2011); and, Regan Smith, Note, *Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks*, 42 HARV. C.R.-C.L. L.REV. 451 (2007).
  6. Section 2(d) prohibits confusingly similar trademarks, section 2(e) prohibits merely descriptive trademarks, and section 2(a) prohibits immoral or scandalous content. 15 U.S.C. § 1052. Section 2 includes other requirements, such as prohibiting trademarks that consist of the flag or coat of arms of the United States, a name or portrait of a living individual without consent, or deceptive matter, etc. *Id.*
  7. U.S. PATENT & TRADEMARK OFFICE, TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 102.02 (June rev. 2017).

continued registration of the trademark may file a petition in the TTAB to cancel the trademark registration.<sup>8</sup> A third party may initiate an action in the TTAB to cancel an immoral or scandalous trademark under Section 2(a)'s Morality Provision at any time regardless of how long that trademark has been registered in the USPTO.

Case law on the Morality Provision has historically treated the words "immoral" and "scandalous" as being synonymous.<sup>9</sup> According to the Federal Circuit, for a mark to be considered immoral or scandalous, it must be "shocking to the sense of truth, decency, or propriety; disgraceful; offensive; disreputable; . . . giving offense to the conscience or moral feelings; . . . [or] calling out [for] condemnation."<sup>10</sup> This demonstration must be made "in the context of contemporary attitudes" and "from the standpoint of not necessarily a majority, but a substantial composite of the general public."<sup>11</sup> The TTAB has recognized that these standards are "somewhat vague," and that deciding whether a mark is immoral or scandalous is a "highly subjective" activity.<sup>12</sup> What is not vague, however, is the requirement that a claim to oppose a trademark application or cancel a trademark registration under the Morality Provision pertain only to trademarks that are scandalous or immoral. Trademark law does not regulate the goods or services a trademark owner offers even if those goods or services may be viewed as scandalous or immoral, as is the case with pornographic magazines. In this specific example, the TTAB explained:

[T]he question of whether or not the contents of the magazine may be pornographic in nature is not an issue to be decided by [the] Board. If such were the criterion, many well-known magazines with inoffensive or arbitrary titles might well have been precluded registration in the Patent Office.<sup>13</sup>

Trademark law does not regulate the morality of businesses or services that a trademark owner offers, but rather the proposed trademark itself. Nonetheless, as illustrated in the cases below, the Morality Provision is often asserted by third parties opposing applications or petitioning to cancel

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8. *Id.*

9. *In re Manwin/RK Collateral Trust*, 111 U.S.P.Q.2d 1311, 1312 n.3 (T.T.A.B. 2014) ("[T]he terms 'immoral' and 'scandalous' are typically discussed as though basically synonymous. . . .").

10. *In re Mavety Media Grp. Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994) (alterations in original) (quoting *In re Riverbank Canning Co.*, 95 F.2d 327, 328 (C.C.P.A. 1938)), *abrogated by In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015).

11. *Mavety*, 33 F.3d at 1371 (first quoting *In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216, 1219 (T.T.A.B. 993); then quoting *In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981)).

12. *In re Hershey*, 6 U.S.P.Q.2d 1470, 1471 (T.T.A.B. 1988).

13. *In re Madsen*, 180 U.S.P.Q. 334, 335 (T.T.A.B. 1973).

registrations in the USPTO because those third parties morally disapprove of the trademark owner or its goods or services, as opposed to the trademark itself. In spite of the obvious attempts to overextend trademark law's jurisprudence and the TTAB's authority, many of these cases have resulted in years of litigation and appeals, and in some instances even the ultimate abandonment of valid trademark rights.

## II. EXAMPLES OF ABUSIVE CASES IN THE TTAB

Over the past twenty years, a number of individuals have filed oppositions or petitions in the TTAB that highlight the potential for abuse of the Morality Provision. One of the first cases involving this type of abuse in the TTAB was *Ritchie v. Simpson*.<sup>14</sup> Orenthal James Simpson, commonly known as O.J. Simpson or the "Juice,"<sup>15</sup> was a successful NFL player who began appearing as a small-time actor in movies and as a sports commentator after retiring from football in 1979.<sup>16</sup> On June 12, 1994, the police found Simpson's ex-wife, Nicole Brown Simpson, and her lover stabbed to death outside of Brown's California home.<sup>17</sup> Five days later, the police arrested Simpson and charged him with their murders, leading to one of the most infamous criminal trials in American history.<sup>18</sup> About a month after his wife's murder, O.J. Simpson applied to register the trademarks "O.J. Simpson," "O.J.," and "The Juice" in the USPTO covering a variety of goods including figurines, trading cards, sportswear, medallions, coins, and prepaid telephone cards.<sup>19</sup> Simpson's trademark applications were published for opposition in 1995 in the midst of his criminal trial.<sup>20</sup> William B. Ritchie filed to oppose Simpson's trademark applications in the USPTO. In his notice of opposition, Ritchie claimed to oppose all three trademark applications because "he disapproves of Mr. Simpson's morality and therefore of the 'reprehensible' connotations of his

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14. 170 F.3d 1092 (Fed. Cir. 1999).

15. Simpson was frequently referred to as the "Juice" because his initials—O.J.—were the same as for orange juice and he was known for his energetic runs on the football field. *O.J. Simpson: American Football Player*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/biography/O-J-Simpson> [<https://perma.cc/Q9GA-3AY2>].

16. *Id.*

17. *Id.*

18. *Id.*

19. See U.S. Trademark Application Serial No. 74551770 (filed July 21, 1994) (O.J. SIMPSON); U.S. Trademark Application Serial No. 74551768 (filed July 21, 1994) (O.J.); U.S. Trademark Application Serial No. 74670836 (filed May 8, 1995) (O.J. SIMPSON); U.S. Trademark Application Serial No. 74670837 (filed May 8, 1995) (THE JUICE).

20. See sources cited *supra* note 19.

name.”<sup>21</sup> Ritchie asserted that the marks were scandalous “because they would ‘attempt to justify physical violence against women,’”<sup>22</sup> and Ritchie would be personally damaged by the registration of the trademarks because they disparaged his family values.<sup>23</sup> The TTAB dismissed Ritchie’s notice for lack of standing, warning:

If we were to find that [Ritchie] has standing based on the allegations in his pleading . . . . That would seem to open the way for any individual to challenge the registration of an individual’s or corporation’s trademark or service mark, where that individual . . . is offended by the individual or corporate trademark applicant’s product or its hiring policies, political affiliation, environmental record, advertising campaigns, etc.<sup>24</sup>

But the Federal Circuit reversed.<sup>25</sup> The Federal Circuit held that, to establish standing to oppose a trademark application under the Morality Provision, an individual need not have a personal interest in the application “beyond that of the general public.”<sup>26</sup> Because Ritchie alleged that he “belie[ved] in a loving and nurturing relationship between husband and wife,” “the marks [at issue] are synonymous with wife-beater and wife-murderer,” and he purportedly obtained petitions signed by individuals “who agree with him that the marks at issue are scandalous, denigrate their values, encourage spousal abuse and minimize the problem of domestic violence,” the Federal Circuit found that Ritchie sufficiently alleged standing to oppose Simpson’s trademark applications.<sup>27</sup> In allowing Ritchie’s opposition to go forward, the Federal Circuit opened the door for any member of the public who had “feelings of moral outrage at the behavior of an applicant” to oppose a trademark application under the Morality Provision.<sup>28</sup> Simpson ultimately abandoned his applications.

Unfortunately, the TTAB’s warning in *Ritchie v. Simpson* came true. After *Ritchie*, additional cases involving moral disapproval of the trademark owner began to appear in the TTAB. For instance, in *Conkle v. Various, Inc.*,<sup>29</sup>

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21. *Ritchie v. Simpson*, 170 F.3d 1092, 1102 (Fed. Cir. 1999) (Newman, J., dissenting).

22. *Id.* at 1097 (majority opinion).

23. See *Ritchie v. Simpson*, 41 U.S.P.Q.2d 1859, 1860 (T.T.A.B. 1996), *rev’d*, 170 F.3d 1092.

24. *Id.* at 1861.

25. *Ritchie*, 170 F.3d at 1092.

26. *Id.* at 1095 (quoting *Ritchie*, 41 U.S.P.Q.2d at 1861).

27. *Id.* at 1097–98.

28. 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 20:50:50 (5th ed. 2017).

29. *Conkle v. Various, Inc.*, No. 92051587 (T.T.A.B. dismissed July 7, 2011). Please note that I was counsel to Various, Inc. in this proceeding. All of the information in this essay comes from publicly available information and documents.



Various, Inc. was a social networking, online dating, and entertainment company which operated the online dating website FriendFinder.com and more than thirty other targeted dating and social networking sites including Amigos.com, AsiaFriendFinder.com, SeniorFriendFinder.com, and AdultFriendFinder.com.<sup>30</sup> Various, Inc. owned the registration for the trademark “AdultFriendFinder” for “dating services” and “providing online chat room[s] for transmission of messages among computer users for the purpose of users meeting other users to encourage dating.”<sup>31</sup> Four and a half years after the USPTO registered the trademark, James Conkle petitioned to cancel the AdultFriendFinder registration on the ground that the services Various, Inc. offered in connection with its mark were offensive to him and “his family and religious values and beliefs,”<sup>32</sup> and that he suffered “substantial emotional and mental injury as a direct result of [his] reasonable belief that [his] children and grandchildren” are being exposed to Various, Inc.’s services.<sup>33</sup> Specifically, Conkle alleged in his petition to cancel that Various, Inc.’s website promised sex to subscribing customers, induced Internet browsers to purchase memberships in Various, Inc.’s online “sex club,” and allowed consumers “immediate access to these sex-providing women who assertedly are ready at a moment’s notice to perform a variety of sex acts in the subscriber’s own neighborhood.”<sup>34</sup> Various, Inc. moved to dismiss Conkle’s petition for lack of standing and failure to state a claim that the trademark itself was immoral or scandalous. The TTAB denied Various, Inc.’s motion to dismiss based on the precedent set in *Ritchie v. Simpson*.<sup>35</sup> After twenty-one months of contentious proceedings and motion practices in front of the TTAB, Conkle finally dismissed his petition with prejudice.<sup>36</sup>

A similar case involving an individual using the Morality Provision to direct his moral outrage at the trademark owner is *McDermott v. San Francisco*

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30. *About Us*, VARIOUS, <http://www.various.com/about.php> [<https://perma.cc/523A-PRLM>].

31. Petition for Cancellation at 13, *Conkle* No. 92051587 (emphasis omitted), <http://ttabvue.uspto.gov/ttabvue/v?pno=92051587&pty=CAN&eno=1> [<https://perma.cc/YRF4-SG38>].

32. *Id.* at 3.

33. *Id.* at 11.

34. *Id.* at 7.

35. Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss, *Conkle*, No. 92051587, <http://ttabvue.uspto.gov/ttabvue/v?pno=92051587&pty=CAN&eno=14> [<https://perma.cc/567B-QAL2>] (“[I]n accordance with the principles established in *Ritchie* . . . we are constrained to find that petitioner has sufficiently alleged that he has a direct and personal interest in the outcome of this proceeding . . . .”); *see also Ritchie v. Simpson*, 170 F.3d 1092, 1102 (Fed. Cir. 1999).

36. *See Conkle*, No. 92051587, <http://ttabvue.uspto.gov/ttabvue/v?pno=92051587&pty=CAN&eno=35> [<https://perma.cc/YKP8-Z5F6>] (displaying the timeline of the proceedings).

*Women's Motorcycle Contingent*.<sup>37</sup> In *McDermott*, San Francisco Women's Motorcycle Contingent (SFWMC) applied for the trademark "Dykes On Bikes" for the following services:

Education and Entertainment Services in the nature of organizing, conducting, and promoting parade contingents, community festivals, events, street fairs, forums, seminars, parties and rallies to support, organize and motivate women motorcyclists everywhere to do the same, thereby fostering pride in a wide variety of sexual orientations and identities, namely lesbian, bisexual and transgender.<sup>38</sup>

SFWMC started in 1976 when a group of twenty to twenty-five women motorcyclists assembled at the head of the San Francisco Pride Parade.<sup>39</sup> Over the years, it has grown into a successful organization that supports philanthropic activities in the LGBT and women's communities.<sup>40</sup> Michael McDermott opposed the trademark application for Dykes On Bikes under the Morality Provision, alleging that "the mark in full is associated with a pattern of illegal activity by the group applying for registration of the mark."<sup>41</sup> Instead of objecting that the trademark Dykes On Bikes was itself immoral or scandalous, McDermott's notice of opposition plainly objected to the morality of the trademark applicant, its activities, and its politics. For instance, in his notice McDermott claimed that he was harmed by SFWMC because "during the annual illegal government supported San Francisco Dyke Hate Riot, [he] and ALL other MALE Citizens are subject to Criminal Attack and Civil Rights Violations committed by 'Dykes' taking part in this Anti Male Hate Riot."<sup>42</sup> He also claimed that he was "literally FORCED FROM A CROSSWALK by a group of 'Dykes on Bikes' who would Not let [him] cross the street because [he] was MALE, where as they let Women Pass" and that the annual "Dyke Festival/March' causes harm to all citizens by creating an atmosphere and conditions for lawlessness, particularly against Men."<sup>43</sup> The TTAB eventually

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37. 81 U.S.P.Q.2d 1212(T.T.A.B. 2006), *aff'd*, 240 F. App'x 865 (Fed. Cir. 2007).

38. U.S. Trademark Application Serial No. 78281746 (filed July 31, 2003), *quoted in McDermott*, 81 U.S.P.Q.2d 1212.

39. *Our History*, DYKES ON BIKES, <https://www.dykesonbikes.org/history> [https://perma.cc/2W54-85DT].

40. *Dykes on Bikes*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Dykes\\_on\\_Bikes](https://en.wikipedia.org/wiki/Dykes_on_Bikes) [https://perma.cc/QB6R-ZTTK]; DYKES ON BIKES, <https://www.dykesonbikes.org> [https://perma.cc/8S9C-KG9P].

41. *McDermott v. S.F. Women's Motorcycle Contingent*, 240 F. App'x 865, 867 (Fed. Cir. 2007).

42. Notice of Opposition at 2, *McDermott*, 81 U.S.P.Q.2d 1212 (No. 91169211) (errors in original), <http://ttabvue.uspto.gov/ttabvue/v?pno=91169211&cpty=OPP&eno=1> [https://perma.cc/W3SV-62SX].

43. *Id.* at 3, 5 (errors in original).

dismissed McDermott's opposition for lack of standing, a decision subsequently affirmed by the Federal Circuit.<sup>44</sup> Nevertheless, this contentious proceeding lasted over nineteen months from filing to final resolution.<sup>45</sup>

Another relevant case that is still pending in the TTAB is *Smith v. Cook Collection Attorneys, P.L.C.*<sup>46</sup> Cook Collection Attorneys, P.L.C. ("Cook Collection") is a law firm in the business of collecting judgments for California plaintiff attorneys.<sup>47</sup> Cook Collection's trademark "SqueezeBloodFromTurnip.com" was registered in the USPTO on July 3, 2007.<sup>48</sup> More than five years later, Scott Smith filed a petition in the TTAB to cancel the trademark registration for SqueezeBloodFromTurnip.com.<sup>49</sup> In his petition, Smith alleged that Cook Collection used "unreasonable, unethical and aggressive collection tactics"<sup>50</sup> to try and collect the more than \$1 million he owed by sending "numerous emails and letters to Smith," filing "numerous publicly accessible documents in federal courts and other government agencies against Smith . . . [that] refer to Smith as a 'debtor,'" and making "numerous attempts to seize Smith's assets."<sup>51</sup> Smith alleged that he was harmed by Cook Collection's SqueezeBloodFromTurnip.com trademark because it "could cause persons suffering from high levels of stress due to an inability to pay their debts, to 'snap' and do harm to themselves or others," "dehumanizes persons and organizations that have fallen behind in their financial obligations," and "unfairly characterizes all persons and organizations that have fallen behind in their financial obligations . . . as being 'turnips,' 'the thick, fleshy, edible root of either of two plants of the mustard family.'"<sup>52</sup> Notwithstanding the obvious retaliatory nature of Smith's petition, the TTAB denied Cook Collection's motion to dismiss. Five years after initiating this proceeding in November 2012, this proceeding is still pending in

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44. *McDermott*, 240 F. App'x at 868.

45. *See id.* (resolving the claim initially filed February 15, 2006).

46. *Smith v. Cook Collection Attorneys, P.L.C.*, No. 92056538 (filed Nov. 28, 2012).

47. COOK COLLECTION ATT'YS, <http://cookcollectionattorneys.com> [<https://perma.cc/6XBE-HR88>].

48. SQUEEZEBLOODFROMTURNIP.COM, Registration No. 3,257,604.

49. Petition for Cancellation, *Smith*, No. 92056538 (T.T.A.B. filed Nov. 28, 2012), <http://ttabvue.uspto.gov/ttabvue/v?pno=92056538&pty=CAN&eno=1> [<https://perma.cc/A8XQ-B9EN>].

50. Petition for Cancellation, *Smith v. Cook Collection Attorneys, P.L.C.*, No. 92054966 (T.T.A.B. filed Dec. 20, 2011), <http://ttabvue.uspto.gov/ttabvue/v?pno=92054966&pty=CAN&eno=1> [<https://perma.cc/79VF-RZD3>]. This was the initial petition by Smith in an earlier proceeding. *See id.*

51. Petition for Cancellation, *supra* note 49, at 4.

52. *Id.* at 5–6.

the TTAB today with ninety-four documents on the docket.<sup>53</sup> This shows how easy it is for an individual to hold-up the legitimate trademark rights of another by using the Morality Provision to drag a trademark owner through years of contentious and expensive litigation in the TTAB.

### III. THIS PROBLEM IS UNIQUE TO THE MORALITY PROVISION

The cases above are examples of clear overreach and abuse of trademark law in the TTAB. These proceedings were directed at the morality of the trademark owners or their goods and services, rather than at the trademark itself. Unfortunately, these types of abusive proceedings are able to subsist because of the Morality Provision's lax standing requirement, the inherent subjectivity of the terms "immoral" and "scandalous," and the precedent established in *Ritchie v. Simpson*<sup>54</sup> that prevents the TTAB from dismissing proceedings that clearly target a trademark owner or its goods and services and not the trademark itself.

There is virtually no standing requirement in the TTAB to oppose or petition to cancel a trademark under the Morality Provision, and anyone in the United States has standing to oppose or cancel a trademark in the USPTO based on morality. This is unlike other provisions in Section 2 of the Trademark Act, which typically require a party to allege that she has a real commercial interest that would be harmed by the trademark registration<sup>55</sup> or that she possesses a trait or characteristic implicated in the proposed trademark.<sup>56</sup> This lax standing requirement is not the Morality Provision's only flaw. The Morality Provision is also an inherently subjective law in which the standard to determine whether a mark is immoral or scandalous is so vague that even trademarks with innocuous dictionary definitions could, theoretically, be broadly interpreted to be immoral or scandalous to certain members of the population. Indeed, trademarks that may seem immoral or scandalous to some may be entirely innocent to others. Trademarks that may have been considered immoral or scandalous in the past may be perfectly acceptable today. These unique characteristics of the Morality Provision allow abusive proceedings to continue in the TTAB for years, resulting

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53. *See* *Smith v. Cook Collection Attorneys, P.L.C.*, No. 92056538 (filed Nov. 28, 2012).

54. 170 F.3d 1092 (Fed. Cir. 1999).

55. For instance, Section 2(d) of the Trademark Act requires a party to assert that the proposed trademark is likely to cause confusion with his registered trademark. 15 U.S.C. § 1052(d) (2012).

56. For instance, Section 2(a)'s disparagement provision required a party to assert that he possesses a trait or characteristic that is clearly and directly implicated in the proposed trademark. *Id.* § 1052(a).

in inconsistent and arbitrary outcomes. For instance, based on the cases previously discussed, a self-proclaimed conservative Christian family man could drag Planned Parenthood through years of protracted proceedings in the TTAB by filing petitions to cancel Planned Parenthood's trademarks under the Morality Provision because they offend "his family and religious values and beliefs" and inflict upon him "substantial emotional and mental injury as a direct result of his reasonable belief that his children and grandchildren"<sup>57</sup> are exposed to Planned Parenthood's services and trademarks. Similarly, an environmental activist could petition to cancel British Petroleum's trademark registration for "BP" because she disapproves of BP's morality, its handling of the Deepwater Horizon oil spill, and of the "reprehensible connotations"<sup>58</sup> of the BP mark. Even though trademark owners may ultimately prevail on the merits in these proceedings, trademark owners are still forced to expend valuable time, resources, and expense defending their trademarks from these overreaching attacks. These proceedings thus hold up legitimate commercial activities by dragging trademark owners through years of contentious proceedings in the TTAB.

#### IV. THE MORALITY PROVISION IS FLAWED

As commentators have explored at the USPTO examination phase, the Morality Provision results in inconsistency, allowing some trademarks to be registered while denying other trademarks with the same immoral or scandalous term.<sup>59</sup> As the Federal Circuit is exploring in *In re Brunetti*,<sup>60</sup> the Morality Provision is likely to be found an unconstitutional abridgement of free speech. Indeed, as the U.S. Supreme Court found in *Matal v. Tam*,<sup>61</sup> trademarks are private speech subject to the protections of the First Amendment, and they cannot be refused registration because they may be offensive to certain segments of the population.<sup>62</sup> Finally, as this Essay has exposed, because of its overly liberal standing requirement, its admittedly vague and highly subjective standard, and unsound precedent, the Morality Provision is often used as a tool for abuse in the TTAB. These characteristics of the Morality Provision provide an all-too-easy platform for intermeddling third parties to intrude into

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57. Petition for Cancellation, *supra* note 31, at 3, 11.

58. *Ritchie*, 170 F.3d at 1102 (Newman, J., dissenting) (internal quotation omitted).

59. *See supra* note 5.

60. No. 15-1109 (Fed. Cir. argued Aug. 29, 2017).

61. 137 S. Ct. 1744 (2017).

62. *See id.*

legitimate commercial trademark rights of others based on moral disapproval of a trademark owner, its business, activities or politics, instead of the trademark itself. For these reasons, the Morality Provision is clearly flawed.

Trademark law is not the appropriate vehicle to attempt to legislate, regulate, or influence morals of society, nor does it have the “legal right, moral authority, social responsibility, or judgmental power, to intrude into commercial trademark rights based on moral disapproval of the trademark owner.”<sup>63</sup> Providing a platform for third parties to file these abusive proceedings then allowing them to drag on for years in the TTAB creates a loss of confidence in the trademark administrative process, overextends trademark law’s jurisprudence and the TTAB’s authority, drains government and commercial resources, and forces legitimate businesses to spend time and resources defending against frivolous attacks on their commercial trademark rights. This problem is unique to the Morality Provision and is just another reason why the flawed Morality Provision must be overhauled or removed from trademark law.

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63. *Ritchie*, 170 F.3d at 1102 (Newman, J., dissenting).