

USPTO CAN'T BAN OFFENSIVE REGISTRATIONS

By: Jack Greiner on June 26, 2019 on graydon.law

Here's [an interesting piece](#) from Bloomberg on the recent U.S. Supreme Court decision that said the United States Patent & Trade Office can't deny registration of the "FUCTION" mark. The Office had denied registration based on the "highly offensive" nature of the mark. In the PTO's view, the mark contained "decidedly negative sexual connotations."

In doing so, the PTO relied on the statutory ban on "immoral" or "scandalous" marks. The Supreme Court found that the ban violated the First Amendment because it allowed the federal government to discriminate based on the content of speech. "Offensiveness" is a really vague term and it allows for an inordinate amount of discretion on the part of the PTO. Moreover, while it's a cliché, it's nonetheless true that the First Amendment ensures the speakers' right to offend. If all speech were non-offensive, there wouldn't be much use for it.

The Bloomberg piece notes that this decision likely has the unintended consequence of further coarsening our collective dialogue. That is unfortunate, but also unavoidable.

And this decision is not the absolute final word on the issue. Congress could enact legislation to prohibit registration of truly obscene marks. Obscenity is not considered protected speech. So a ban on obscene marks, unlike a ban on merely offensive marks would likely satisfy the First Amendment.