

*Contextual Healing: Morality and Section 2(a) of the Lanham Act*

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This is the third in a series of projects focused on the bar on registration of scandalous and immoral trademarks. Based in part on the findings from an empirical study of rejections under 2(a), this piece argues that trademark examiners should conduct a 2(a) analysis for scandalousness by considering the mark in context of the marketplace. Marks are often rejected in the abstract based on dictionary definitions that note a particular term is “offensive” or “vulgar.” However, these refusals do not consider whether a mark is scandalous in context of the particular marketplace for goods and services. There is precedent for consideration of context in the registration process; examining attorneys routinely consider contextual factors in other areas of trademark law, most notably in a likelihood of confusion analysis. Applying the same contextual analysis to evaluate the scandalousness of a mark would alleviate many of the problems associated with 2(a) and would lead to a better, more thoughtful result.