

LEGAL UPDATES

PUBLISHED: JUNE 26, 2017

Service  
Trademarks

## Professional

ALAN S. NEMES

ST. LOUIS:

314.345.6461

ALAN.NEMES@

HUSCHBLACKWELL.COM

# File Your F\*@king Trademarks – It's Your Speech & It's Protected by the First Amendment

The U.S. Supreme Court ruled this week that derogatory language contained in a trademark is protected under the First Amendment's freedom of speech clause. The Court has ruled that the disparagement clause of the federal trademark statute violates the First Amendment's protection of speech.

Simon Tam, lead singer of an Asian-American band, sought to register the band's name, "The Slants," with the U.S. Patent and Trademark Office ("USPTO"). The USPTO denied his application, ruling that the name was a derogatory reference to persons of Asian descent, thereby violating the "disparagement clause" of the federal trademark statute; this clause prohibits registration of trademarks that "... disparage ... persons, living or dead, institutions, beliefs, or national symbols ...". Tam claimed that he named the band "The Slants" as a way to "reclaim and take ownership of stereotypes about people of Asian ethnicity." He argued that the law violated his rights to free speech under the Constitution.

The Trademark Trial and Appeal Board affirmed the denial. The Federal Circuit ultimately reversed, holding the federal law to be unconstitutional; the government appealed the decision to the Supreme Court, arguing that the statute was constitutional either as "government speech" or "subsidized speech", two exceptions to free speech claims under the First Amendment.

The Court rejected the government's arguments, ruling that the statute was an impermissible attempt by the government to regulate the content of speech. Although the ruling only specifically addresses the prohibition against "disparaging" marks under the statute, it is likely that parallel prohibitions under the statute against "immoral" and "scandalous" marks will eventually fail as well.

## **What this means to you?**

While we are certain that our clients and other well-meaning businesses will not intentionally seek to disparage any individuals or groups, this ruling will certainly expand the boundaries of what is an acceptable trademark for registration purposes. With this decision, companies will be able to push the limits of what it means to be edgy as they develop new brands. In addition, this decision has already caused the Trademark Office to withdraw from litigation challenging its prior decision to cancel the Red Skins football team's trademarks, which the government originally deemed to be disparaging to Native Americans. We should also be ready to "hold our collective noses" for the presumed onslaught of crude and derogatory trademark applications that will undoubtedly be filed as a result of this ruling! The scope of this protection still remains to be seen and courts will be urged to maintain tight limits on what constitutes speech or expression within a trademark.

For more information on how this case may impact your business, please contact Alan Nemes.