



The United States Court of Appeals for the Federal Circuit (“CAFC”) upheld a refusal to register for the name of the Asian-American band, “The Slants,” as a trademark with the United States Patent and Trademark Office (“USPTO”). The CAFC found that THE SLANTS trademark would be perceived as disparaging to persons of Asian descent and was in violation of 15 U.S.C. § 1052(a) (“§ 2(a)”) of the Lanham Act.

The Portland, Oregon-based grunge band first filed for the trademark, THE SLANTS, in 2010 for “[e]ntertainment, namely, live performances by a musical band,” through its “frontman,” Mr. Simon Shiao Tam. The trademark examining attorney found the mark disparaging to people of Asian descent under § 2(a) of the Lanham Act and therefore refused to register it. Tam appealed the refusal, but failed to file an appeal brief so the trademark was deemed abandoned.

Six days later, on November 14, 2011, Tam filed a second application on the trademark, THE SLANTS. The trademark examining attorney once again found the mark disparaging and refused registration. Tam appealed the trademark examining attorney’s refusal to the Trademark Trial and Appeal Board (the “Board”) only to have the Board affirm the refusal. Accordingly, Tam appealed to the CAFC.

Section 2(a) of the Lanham Act provides that USPTO may refuse to register a trademark that includes “immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” 15 U.S.C. § 1052(a). The CAFC applies a two-part test to determine if a trademark is disparaging:

1. What is the likely meaning of the matter in question; and
2. If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols, whether that meaning may be disparaging to a substantial composite of the referenced group.

Despite the arguments from Tam that his band name was selected as a way to *salvage* a term generally considered to be a racial slur, the CAFC disagreed and instead found that THE SLANTS trademark would be perceived as disparaging to persons of Asian descent and was therefore in violation of § 2(a) of the Lanham Act.

Tam also argued that the government’s refusal to grant THE SLANTS trademark violated his free speech rights. The CAFC held that there was no free speech violation since the USPTO refusing to grant a federal trademark registration does not mean that the trademark applicant cannot still use the mark.

Interestingly, although she upheld the Board’s decision, U.S. Circuit Judge Kimberly Moore provided a separate, non-binding opinion in which she indicated that it might be time to reexamine the federal trademark law’s disparagement provision. If Tam and his band have their way, this may happen sooner rather than later, as they have already indicated their desire to appeal the CAFC’s decision. A decision on these issues would potentially affect more than just Tam’s band; many of the issues in the Redskins trademark cancellation appeal parallel the arguments presented by Tam. Accordingly, a ruling on these issues could impact many trademarks currently considered to be “disparaging.”