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Are Legal Restrictions On Disparaging Personal Names Unconstitutional? In re The Slants

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Menu

Browse: [Home](#) » [2015](#) » [December](#) » [Are Legal Restrictions On Disparaging Personal Names Unconstitutional?—In re The Slants \(Guest Blog Post\)](#)

Are Legal Restrictions On Disparaging Personal Names Unconstitutional?—In re The Slants (Guest Blog Post)

December 23, 2015 · by [Eric Goldman](#) · in [Trademark](#)

By Guest Blogger [Laura Heymann](#)

[Eric's introduction: Prof. Heymann has spent more time thinking about the Law of Naming People and Things than anyone else I know. I asked her to weigh in on the potential implications of the Federal Circuit's Tam decision (The Slants decision) for restrictions on personal names. Her thoughts:]

The Federal Circuit's decision in *In re Simon*

The logo for 'THE SLANTS' features the words in a bold, yellow, distressed font against a black rectangular background.

Shiao Tam will, no doubt, be the subject of much commentary in the weeks to come. As readers have no doubt already learned, the majority held that the portion of 15 U.S.C. § 2(a)—that prohibits the registration of a trademark if it “may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute”—is facially unconstitutional under the First Amendment.

Tam had sought to register THE SLANTS as the trademark for his Asian American rock band in an attempt to “reclaim” the word, and it was this expressive function of trademarks that led the majority (and for Judge Dyk, as applied to Tam’s case) to hold that regulation on the basis of the mark’s meaning could not be justified.

I’ll leave it to others to explore the implications of the court’s holding for other areas of trademark law, including the additional section 2(a) prohibitions that are not based on deception or confusion, as well as trademark defenses such as descriptive fair use. For now, I want to highlight the ways in which the Federal Circuit’s holding can have equal application to courts’ consideration of personal name change petitions.

(Personal names are not the only area potentially implicated by the Federal Circuit’s reasoning: Consider, for example, 46 C.F.R. § 67.117, part of the Vessel Documentation Act of 1980, which prohibits names that “contain [or are] phonetically identical to obscene, indecent, or profane language, or to racial or ethnic epithets.”)

As I’ve discussed previously on this [blog](#) and elsewhere ([Naming, Identity, and Trademark Law](#)), personal names have at least three functions. A name’s denotative function allows us to refer. A name’s connotative function is what makes naming a **creative act** — it allows the namer to suggest gender, class, religious or historical connections, or other characteristics. Naming is in this way also a demonstration of power, as in when a nickname or disparaging group name is given to another. And a name also has an associative function in that it signals a connection to a group or family.

As with trademarks, no official recognition is required to establish a name — use and adoption by others is what validates a name. And so when courts are petitioned for official recognition, many will claim — as the PTO has typically done with trademarks — that the process is largely ministerial, and that the only role that the court should play is to

ensure that the name change won't cause fraud or deception.

In the past, however, some courts have grappled with their unease at being asked to register a name that is offensive or otherwise objectionable and have used the discretion granted to them by statute to deny such petitions. A California court affirmed in 1992 a lower court's denial of a petitioner's request to change his name to a racial epithet because, in part, it concluded that granting the request would be seen as "promoting racial disharmony." Similarly, a New Mexico court in 2008 affirmed a lower court's denial of request to change the petitioner's name to "[F***] Censorship!"

As the Federal Circuit has now confirmed, however, these decisions should be seen as unconstitutional. As with trademark registration, a court's approval of a name change petition isn't itself government speech or otherwise an imprimatur; accordingly, to approve some requests and deny others based on the meaning of the proposed name constitutes viewpoint discrimination.

It's true that reported decisions denying name change petitions appear to be waning. Judges have become more accustomed to the fluidity of identity over time and to the desire to have one's name reflect that identity. But some petitioners may never get to the courtroom, discouraged by court websites that continue to tell applicants that they cannot petition for a name that is "bizarre, unduly lengthy, ridiculous, or offensive," as both the New York state court system's [website](#) and the Utah state court system's [website](#) do. (This is simply a different version of what Elizabeth Emens described as "[desk-clerk law](#).") The Federal Circuit's opinion may inspire those courts to take a fresh look at how the information they provide shapes the public's understanding of the First Amendment.

Eric's Comments:

* The Federal Circuit is often castigated as an IP

maximalist court, so it's tempting to dismiss this ruling as just the Federal Circuit once again expanding trademark's boundaries to greenlight more trademark registrations. Perhaps an IP maximalist impulse steered the majority in that direction, but I see this ruling as actually a really savvy pro-free speech ruling. Can the government deny government benefits to prevent "disparagement"? No, that clearly would be a government effort to suppress socially disfavored speech, and the Federal Circuit fully recognized the law's censorious implications. I'm especially impressed that the court wasn't phased by the venerability of this decades-old statute.

* Historically, the Patent Office denied patents on the grounds that the inventions were immoral (a paradigmatic example was gambling machines). That moralistic streak died out decades ago, for good reason. Preserving morality isn't a proper government function, and the government never will do a good job implementing such amorphous standards. I see this ruling as wiping out the analogous principles in trademark law. (The court makes it clear that it isn't opining on the statutory restrictions against registering scandalous or immoral marks, though I think the court's logic should apply equally to those statutory terms).

* I'm sure judges aren't looking forward to the coming legal battles over trademarks using indelicate terms. It's hard to maintain judicial decorum when socially disfavored phrases shows up dozens of times in each party's brief.
