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Entertainment Law Issue

by DREW WILSON

# SLANTS RULE

Now that the prohibition against the use of vulgar, scandalous, or immoral language in branding has been struck down, similarly prohibited language may not be far behind

**THE SAYING** goes: “What’s in a name?” For a company looking to protect—or create—a brand, quite a lot. For companies operating in edgier markets, a traditional trademark like Ford, Apple, or even Google will not let the brand stand out in a crowded field. Thus, they choose to brand themselves with sharper, more shocking marks—something that jumps out at the viewer, possibly in a way that may be considered scandalous, immoral, or disparaging.

Use of these types of marks is not without problems, however. Formerly, marks that fell within certain broadly defined categories that may have comprised “immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead” were long prohibited from obtaining federal registration under 15 USC Section 1052(a). While owners of a mark that might have been scandalous, immoral, or disparaging could sue to defend these marks under a common law theory of trademark infringement, or even under Section 43(a) of the Lanham Act,<sup>1</sup> lack of federal registration meant that users of these marks were missing many of the unique benefits conferred by federal registration.

Chief among these benefits is constructive nationwide notice of the registrant’s claim of ownership of the mark.<sup>2</sup> Registration on the Principal Register of the United States Patent and Trademark

Office (USPTO) makes the mark searchable on the USPTO website. Any moderately sophisticated company searches the Trademark Office before adoption of a trademark to ensure that they do not invest tens, hundreds, or even millions of dollars in developing a mark to which a third party is already claiming trademark rights. A search of the Principal Register not only reveals if a third party claims rights to a mark but also when the party first started using the mark, and if the third party cares enough about the continued use of the mark to file the necessary maintenance paperwork and fees to keep the mark’s status as “live.”

Second, and almost as important, registration on the Principal Register “is prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner’s ownership of the mark, and of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate.”<sup>3</sup> Without the prima facie presumption of ownership, any purported trademark owner must prove ownership of a valid trademark during the course of a lawsuit. For certain categories of marks, such as those that are “descriptive” or based on product design (trade dress) or color, this is accomplished by demonstrating that the mark has acquired “secondary meaning” in the minds of the consuming public.<sup>4</sup> In other words, the mark, color, or design has

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come to signify the source, or origin of the goods. Often, this is accomplished via expensive surveys. For trade dress—a species of mark that is based on the ornamental design of a product—the trademark owner of an unregistered trademark must also demonstrate that the design is not functional.<sup>5</sup>

Third, after five consecutive years of continuous use, a trademark that has been registered on the Principal Register can file a request to have that registration deemed “incontestable.”<sup>6</sup> Although “incontestability” is somewhat of a misnomer, the status pre-

in the marketplace in connection with the goods or services.”<sup>15</sup> The examiner then moves to the second step asking “whether that meaning may be disparaging to a substantial composite of the referenced group.”<sup>16</sup> “If the examiner finds that a ‘substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark...to be disparaging in the context of contemporary attitudes,’ a prima facie case of disparagement is made out.”<sup>17</sup> Notable, too, is “[t]he fact that an applicant may be a member of that group or has good

Amendment. As the Court made clear: “None of our government speech cases even remotely supports the idea that registered trademarks are government speech.”<sup>23</sup> That is in part because “[t]he Federal Government does not dream up these marks, and it does not edit marks submitted for registration.”<sup>24</sup> “Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U.S.C. § 1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there

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vents a registration from being attacked on certain grounds.

There is a plethora of other rights that are conferred as a result of federal registration, including the right to recover treble damages for willful infringement,<sup>7</sup> a complete defense from state or common law claims of trademark dilution,<sup>8</sup> the right to prevent cyber squatters from misappropriating a domain name,<sup>9</sup> and the qualification for a simplified process for obtaining international registrations through the Madrid Protocol.<sup>10</sup> Registration on the Principal Register also allows the trademark to be registered with U.S. Customs and Border Protection. This gives the mark’s owner the ability to block the importation of goods that infringe the mark into the United States.<sup>11</sup>

### The SLANTS Trademark

By now, most people in the intellectual property community are familiar with the landmark U.S. Supreme Court case of *Matal v. Tam*.<sup>12</sup> In *Tam*, the lead singer of an Asian rock band attempted to register the trademark SLANTS for “entertainment in the nature of live performances by a musical band.”<sup>13</sup> “Slant” is considered to be a derogatory or disparaging term for people of Asian descent. The singer wanted to “reclaim” and “take ownership” of stereotypes about people of Asian ethnicity.<sup>14</sup>

During the review of Tam’s application, the USPTO examiner applied the traditional two-part test to determine if the SLANTS mark was disparaging. The examiner first considers “the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used

intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable.”<sup>18</sup>

After reviewing dictionary definitions, which universally identified the term SLANTS as being disparaging to people of Asian ancestry, the mark was quickly rejected. The mark’s offensiveness was further bolstered by the fact that the band’s name had been found offensive a number of times. The examiner cited to a number of bloggers who indicate they find the term and applied-for mark offensive, and even found a performance by the Slants that was canceled due to objection to their name.<sup>19</sup>

Tam appealed the decision to the Trademark Trial and Appeal Board, which upheld the examiner’s rejection. Tam then appealed the board’s decision to the Federal Circuit, which heard the case en banc.<sup>20</sup> The majority found that the disparagement “clause engages in viewpoint-based discrimination, that the clause regulates the expressive component of trademarks and consequently cannot be treated as commercial speech, and that the clause is subject to and cannot satisfy strict scrutiny.”<sup>21</sup> The Federal Circuit rejected the government’s argument that registration constituted government speech and that it was a form of government subsidy. Even if the disparagement clause were analyzed as though it were “commercial speech,” the clause would still fail the intermediate scrutiny test. Ultimately, the prohibition against registering disparaging trademarks was found unconstitutional by the Federal Circuit under the First Amendment’s free speech clause.<sup>22</sup>

The Supreme Court agreed. It began by quickly dismissing the notion that a trademark registration was government speech not bound by the constraints of the First

Amendment. As the Court made clear: “None of our government speech cases even remotely supports the idea that registered trademarks are government speech.”<sup>23</sup> That is in part because “[t]he Federal Government does not dream up these marks, and it does not edit marks submitted for registration.”<sup>24</sup> “Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U.S.C. § 1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there

is no evidence that the public associates the contents of trademarks with the Federal Government.”<sup>25</sup>

The government tried a few additional arguments, none of which prevailed. It first tried to argue that the case should be analyzed from the perspective that trademark registration is a government program that subsidized speech expressing a particular viewpoint. The Supreme Court disagreed, reasoning that the cases that the government cited all involved cash subsidies or their equivalent.<sup>26</sup> In contrast, applicants pay the government in order to acquire a trademark registration. Further, trademarks are not the only government registration scheme. Copyrights too are the subject of registration, yet copyrights are at the heart of the First Amendment.<sup>27</sup>

Finally, the government attempted to argue a new concept, that of a “government program,” which simply merges the government-speech cases and the subsidy cases in order to construct a broader doctrine.<sup>28</sup> This too was dismissed.

The Supreme Court declined to resolve the question if trademarks were commercial speech subject to intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>29</sup> The Court declined to debate the issue as “the disparagement clause cannot withstand even *Central Hudson* review.”<sup>30</sup> Under *Central Hudson*, a restriction on commercial speech must serve a “substantial interest,” and it must be “narrowly drawn.”<sup>31</sup>

The government argued that it is asserting an interest in preventing underrepresented groups from being bombarded with demeaning messages in commercial advertising. Distilled to its most basic level, the “Government [claims it] has an interest in preventing

speech expressing ideas that offend.”<sup>32</sup> However, as the Supreme Court has “explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”<sup>33</sup>

The second interest that the government argued was that of protecting the orderly flow of commerce. The government claimed that invidious discrimination is recognized to have an adverse effect on commerce. The Court countered this argument by pointing out that the clause is not narrowly drawn. It reaches any trademark that disparages any person, group, or institution (including racists and cancer).<sup>34</sup> “It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.”<sup>35</sup>

Ultimately, the disparagement clause was found to violate the free speech clause of the First Amendment.

### Trademark Post-SLANTS

The prohibition against disparaging marks was found to be constitutionally vague, but what about the other limitations on registration of marks? What about marks that are scandalous or immoral? Can I have a registration for a T-shirt that tells the viewer to F\*%# OFF? What about an image of an erect penis as a trademark for a strip club?

These questions and more were left unanswered, but given that the disparagement clause fell even under the lower intermediate scrutiny standard of *Central Hudson*, commentators believed that the prohibition against scandalous and immoral trademarks would fall as well.<sup>36</sup>

The prediction turned out to be correct. On December 15, 2017, the Federal Circuit issued its ruling in *In re Brunetti*, holding that the “immoral and scandalous” provision of the Lanham Act did not advance a substantial government interest, striking that provision as an unconstitutional infringement of the free speech clause of the First Amendment.<sup>37</sup>

In *Brunetti*, the applicant was attempting to register the mark FUCT for clothing.<sup>38</sup> The application was initially rejected for being vulgar, which is sufficient to show that it consists of immoral or scandalous matter.<sup>39</sup> “A showing that a mark is vulgar is sufficient to establish that it ‘consists of or comprises immoral...or scandalous matter’ within the meaning of section 1052(a).”<sup>40</sup>

What makes a mark vulgar and, therefore, scandalous and immoral is a moving target. The “PTO makes a determination as to whether a mark is scandalous ‘in the context of contemporary attitudes’ and ‘in the con-

text of the marketplace as applied to only the goods described in the application.”<sup>41</sup> A “substantial composite of the general public” needs to find the mark vulgar, scandalous, or immoral, or a combination of all three, in order for the mark to be rejected.<sup>42</sup> A mark is determined to be vulgar, scandalous, or immoral, or a combination of all three, if the mark was “shocking to the sense of truth, decency, or propriety; disgraceful; offensive; disreputable;...giving offense to the conscience or moral feelings;...or calling out for condemnation.”<sup>43</sup>

The government conceded that the bar on scandalous marks was a content-based restriction on speech.<sup>44</sup> It then appeared to ignore the Supreme Court’s holding in *Tam* by arguing once again that trademark registrations were a form of a government subsidy program.<sup>45</sup> This was quickly dismissed by the Federal Circuit.<sup>46</sup>

The government next tried to argue that the trademark registration process was akin to a limited public forum subjecting content-based restrictions on speech to a lower degree of scrutiny.<sup>47</sup> The Federal Circuit disagreed: “The Supreme Court has found the existence of a limited public forum only when the government restricts speech on its own property. At one end of that spectrum are venues that are owned and controlled by government entities.”<sup>48</sup> These include schools, telephone poles, and military bases.<sup>49</sup> At the other end of the spectrum, there are “metaphysical” limited public forums, but even in those instances “the effect of its restrictions on speech were felt on the government’s property.”<sup>50</sup> The example that was given was a restriction on a university’s distribution of funds through a student activities fund intended to support a broad range of extracurricular student activities that are related to the educational purpose of the university. Any restrictions on the distributions of these funds would undeniably be felt on the university campus, which was itself a limited public forum.<sup>51</sup>

The Federal Circuit went on to state: Because trademarks are by definition used in commerce, the trademark registration program bears no resemblance to these limited public forums. The speech that flows from trademark registration is not tethered to a public school, federal workplace, or any other government property.... That registered marks also appear on the government’s principal register does not transform trademark registration into a limited public forum. The government does not open the principal register to any exchange of ideas—it is ancillary to trademark registration. The principal register is simply a data-

base identifying the marks approved for use in commerce.... The government fails to articulate a reason why the government’s listing of registered trademarks in a database creates a limited public forum. And if it did then every government registration program including titles to land, registration of cars, registration of wills or estates, copyrights, even marriage licenses could similarly implicate a limited public forum.”<sup>52</sup>

The Federal Circuit then analyzed the scandalous or immoral prohibition under a strict scrutiny framework, reasoning that a trademark was more than merely commercial speech subject to intermediate scrutiny because trademarks also often have an expressive component.<sup>53</sup> Indeed, the test for the immoral or scandalous prohibition that evaluates the marks to determine if they convey offensive ideas is targeted at the mark’s expressive component.<sup>54</sup> The Federal Circuit then found wisdom in the Supreme Court’s statement in *Tam* that “[t]he central purpose of a trademark registration is to facilitate source identification.... Whether a mark is disparaging bears no plausible relation to that goal.”<sup>55</sup> The same holds true for scandalous and immoral marks.<sup>56</sup>

Because the Supreme Court did not state whether or not the restrictions on trademarks should be analyzed under strict or intermediate scrutiny—as the disparagement clause failed both—the Federal Circuit proceeded to analyze whether the prohibition on scandalous or immoral marks would survive intermediate scrutiny. As with the disparagement prohibition in *Tam*, the prohibition against scandalous or immoral marks did not satisfy the “substantial interest” prong of *Central Hudson*.<sup>57</sup>

First, the government does not have a substantial interest in promoting certain trademarks over others.... Second, Supreme Court precedent makes clear that the government’s general interest in protecting the public from marks it deems ‘off-putting,’ whether to protect the general public or the government itself, is not a substantial interest justifying broad suppression of speech. ‘[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it.’”<sup>58</sup>

“Finally, the government does not have a substantial interest in protecting the public from scandalousness and profanities.”<sup>59</sup>

The case at bar was different from the content-based restriction on broadcast profanity of *FCC v. Pacifica Foundation*.<sup>60</sup> Unlike public broadcasts over the radio, which are injected into the homes of listeners nationwide, “[a] trademark is not foisted upon lis-

teners by virtue of its being registered. Nor does registration make a scandalous mark more accessible to children.”<sup>61</sup>

There is also inconsistency in the application of the prohibition that makes the bar on scandalous or immoral marks fail the final prong of the *Central Hudson* test. That is, whether the restriction on speech “is not more extensive than is necessary to serve [a substantial government] interest.”<sup>62</sup> “The Trademark Trial and Appeal Board has itself noted the vague and subjective nature of the scandalous inquiry.”<sup>63</sup> For example, The mark for MILF—an acronym for “Mom I’d Like to F\* \$#”—was rejected 20 of 40 times and allowed the other 20.<sup>64</sup> There is simply no definition of the term scandalous that would allow the prohibition to survive under even intermediate scrutiny.<sup>65</sup> Therefore, as the *Brunetti* court found, it is unconstitutional.<sup>66</sup>

### Deceptive Marks

With three of the major prohibitions of Section 2(a) struck down as unconstitutional, the next logical question is what will happen with the two “deceptive” prohibitions, namely the prohibition against marks that are “deceptive” or that “falsely suggest a connection with persons, living or dead”? The answer should be straightforward. These prohibitions

are likely to survive constitutional scrutiny.

First, “[t]he purpose of the Lanham Trademark Act...is to prevent consumer confusion or deception about the origin or make of a product.”<sup>67</sup> A mark that is “deceptive” or that “falsely suggests a connection with persons” clearly “creates consumer confusion or deception about the origin or make of a product.”

Second, there is not a concern that the prohibition against “deceptive” marks or marks that “falsely suggest a connection with persons” might run afoul of the First Amendment. This is because the Supreme Court has consistently held that “false and misleading commercial speech is not entitled to any First Amendment protection.”<sup>68</sup> “[T]he State may ban commercial expression that is fraudulent or deceptive without further justification.”<sup>69</sup> There is after all, a substantial government interest in preventing confusion in the consuming public and encouraging companies to invest in their brands.<sup>70</sup>

The prohibitions against disparaging, scandalous, and immoral marks are gone. The Trademark Office should expect a flood of profanity-laced, racist slogans about sex at any moment. Less than a month after the decision in *Brunetti*, there were 63 applications for marks containing the word “FUCK” in its full, uncensored, and proper spelling.

But who cares? It is ultimately the consumers’ choice if they want to support a company that resorts to profanity, racism, or vulgarity to promote their products. Let the free market decide what an appropriate trademark is, not an examiner who is inconsistently applying an arbitrary test. ■

<sup>1</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1752-53 (2017).

<sup>2</sup> *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1300 (2015) (citing 15 U.S.C. §1072(b)).

<sup>3</sup> *B & B Hardware*, 135 S. Ct. at 1300 (citing 15 U.S.C. § 1057(b)).

<sup>4</sup> *Wal-Mart Stores, Inc. v. Samara Bros, Inc.*, 529 U.S. 1339, 1344 (2000).

<sup>5</sup> 15 U.S.C. §1125(a)(3).

<sup>6</sup> 15 U.S.C. §1065.

<sup>7</sup> 15 U.S.C. §1117.

<sup>8</sup> 15 U.S.C. §1125(c)(6).

<sup>9</sup> 15 U.S.C. §1125(d).

<sup>10</sup> Protocol relating to the Madrid Agreement Concerning the International Registration of Marks, as amended on September 28, 1979, 828 U.N.T.S. 389; see International Applications/Madrid Protocol FAQs, USPTO, <https://www.uspto.gov> (last viewed Mar. 21, 2018).

<sup>11</sup> 15 U.S.C. §1124; 19 U.S.C. §1526.

<sup>12</sup> *Matal v. Tam*, 137 S. Ct. 1744 (2017).

<sup>13</sup> U.S. Trademark Application No. 85/472,044 (filed Nov. 14, 2011).

<sup>14</sup> *Tam*, 137 S. Ct. at 1754.

<sup>15</sup> *Id.* at 1753 (citing USPTO, Trademark Manual of Examining Procedure §1203.03(b)(i), 1200-150, (Apr. 2017), available at <http://tmap.uspto.gov>).

<sup>16</sup> *Tam*, 137 S. Ct. at 1753-54.

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17 *Id.* at 1754.  
 18 *Id.*  
 19 *Id.*  
 20 *Id.*  
 21 *Id.* (citing *In re Tam*, 808 F. 3d 1321, 1334-55 (C.A. Fed. 2015)).  
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 23 *Id.* at 1759.  
 24 *Id.* at 1758.  
 25 *Id.* at 1760.  
 26 *Id.* at 1761.  
 27 *Id.*  
 28 *Id.*  
 29 *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 477 U.S. 557 (1980).  
 30 *Tam*, 137 S. Ct. at 1764.  
 31 *Id.*  
 32 *Id.*  
 33 *Id.* (citation omitted).  
 34 *Id.* at 1764-65.  
 35 *Id.*  
 36 *See, e.g., Drew Wilson & Gary Nelson, The Best F\*ing Sports Blog Period*, *The Sports & Outdoor Recreation Blog* By Lewis Roca Rothgerber Christie (Sept. 13, 2017), <https://blog.lrrc.com/outdoor/2017/09/13/best-fing-sports-blog-period>.  
 37 *In re Brunetti*, 877 F. 3d 1330 (Fed. Cir. 2017).  
 38 *Id.* at 1335.  
 39 *Id.* at 1339 (citing *In re Fox*, 702 F. 3d 633, 635 (Fed. Cir. 2012)).  
 40 *In re Boulevard Entm't, Inc.*, 334 F. 3d 1336, 1340 (Fed. Cir. 2003).  
 41 *Brunetti*, 877 F. 3d at 1336 (citation omitted).  
 42 *Id.*  
 43 *Id.* (citation omitted).  
 44 *Id.* at 1342.  
 45 *Id.* at 1342-45.  
 46 *Id.* at 1345.  
 47 *Id.*  
 48 *Id.* at 1346 (citation omitted).  
 49 *Id.* at 1346-47.  
 50 *Id.* at 1347.  
 51 *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 824-30 (1995)).  
 52 *Id.* at 1347-48.  
 53 *Brunetti*, 877 F. 3d at 1349 (citing *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017)).  
 54 *Brunetti*, 877 F. 3d at 1349.  
 55 *Id.* (citing *Tam*, 137 S. Ct. at 1768 (Kennedy, J.)).  
 56 *Brunetti*, 877 F. 3d at 1349.  
 57 *Id.* at 1350.  
 58 *Id.* at 1351 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55, 108 (1988)).  
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 63 *Id.* *In re Brunetti*, 877 F. 3d at 1354. (citation omitted).  
 64 *Id.*  
 65 *Id.* at 1356.  
 66 *Id.* at 1357.  
 67 *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F. 3d 477, 484 (9th Cir. 1994); *Sterling Drug, Inc. v. Bayer, AG*, 14 F. 3d 733, 746 (2nd Cir. 1994) (“Lanham Act’s goals of protecting American consumers against confusion”).  
 68 *Central Hudson*, 447 U.S. at 593.  
 69 *Edenfield v. Fane*, 507 U.S. 761, 768 (1993); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F. 2d 1280, 1297 (9th Cir. 1992) (there is no First Amendment defense to actions otherwise infringing because “misleading commercial speech can be restricted”).  
 70 *Pearson v. Shalala*, 164 F. 3d 650, 656 (D.C. Cir. 1999).

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