

Decision on Asian-American band's name is wrong

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Marc J. Randazza

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Members of the Oregon indie band The Slants have been attempting unsuccessfully to trademark the name.

Sarah Giffrow

Editor's Note: Marc J. Randazza is a Las Vegas-based First Amendment attorney and managing partner of the Randazza Legal Group. He is licensed to practice in Arizona, California, Florida, Massachusetts and Nevada. His paper, "Freedom of Expression and Morality-Based Impediments to the Enforcement of Intellectual Property Rights," will be published in the next edition of the Nevada Law Journal. The opinions expressed in this commentary are his.

CNN —

Given that most people couldn't tell the difference between a copyright and a trademark, it usually takes something controversial, such as the Washington Redskins' refusal to change their name, to get people interested in trademark law.

This week, a higher court scrutinized a lesser-known trademark – when the band The Slants sought to protect its name.

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The Slants are five Asian-American musicians from Portland, Oregon, who pay homage to the '80s on stage – and homage to their heritage in an ironic way.

“We want to take on stereotypes that people have about us, like the slanted eyes, and own them,” Simon Shiao Tam, the band’s front-man, said. In other words, the group adopted the Lenny Bruce philosophy of repeating an insulting term until it doesn’t mean anything anymore. To The Slants, “slant” isn’t an insult, it is empowering.



And more power to them.

Unfortunately, a bureaucrat at the U.S. Patent and Trademark Office decided that “Slant” was disparaging to Asians, and denied them a trademark registration under the despised (by me, anyhow) Section 2(a) of the trademark act. This is the section that lets the government deny trademark protection to a mark that is “immoral,” “scandalous” or “disparaging.” In this case, the latter.

But wait a minute. This isn’t billionaire Dan Snyder referring to other people as “Redskins.” In *L’affaire Redskins*, it is the disparaged group, Native Americans, who are complaining – not the government deciding on its own that it knows best. In the Slants’ case, these are Asian guys who say “it doesn’t bother us, so why should it bother you?” And it isn’t as if any Asian American groups got involved.

video

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This is not the first time that someone has “taken back” a marginalizing term in a trademark fight.



About 10 years ago, the motorcycle club “Dykes on Bikes” was similarly rebuffed, and they fought back and won the right to protect their mark. They made similar arguments that resonated: If they wanted to call themselves “Dykes on Bikes,” then what place does the government have in judging that decision?

In another decision, the trademark office initially denied a registration for Buddha Beachwear on the grounds that Buddhists would find it disparaging. But on reconsideration, the Trademark Trial and Appeal Board held that it should go forward stating it is “imperative that the board be careful to avoid interposing its own judgment for that of Buddhists.”

So why aren't the Slants given the same privileges as Dykes on Bikes or Buddha Beachwear? It is largely a sign of the times. We find ourselves mired deeper and deeper in a society where people actually get excited to take offense at virtually anything. Given the lingering controversy over the Redskins' trademark, our five friends from Oregon didn't stand a chance.

This decision offends me.

For starters, by trying to protect Asians from racism, the court issued a disturbingly racist decision based on the fact that these were, in fact, Asians who intended their band name to invoke their ethnicity. But, if a Sicilian (like me) were to seek to register the same exact name, with no such intent, I would enjoy that privilege. This isn't quite *Korematsu v. United States* (the decision that authorized putting Asians in internment camps), but the decision is quite unprincipled.

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Even worse, [this decision](#) gets the First Amendment wrong.

The majority opinion almost flippantly discards the Constitutional issues as much ado about nothing.

Essentially it says, "we did it this way before, so we are going to keep doing it this way." Your Constitution got stepped on before, and who are we to take our feet off of it?



If you're not upset by now, you should be.

Well, the court does give us a sort-of dissent styled as "additional views." While not binding, some of our most cherished First Amendment rights grew from the tiny seeds planted by the dissents of Oliver Wendell Holmes. The dissent in this case recognizes the fact that trademarks are commercial speech, which is protected by the First Amendment.

It also notes that the government should not be in the business of giving out or withholding benefits on the basis of the content of the recipient's speech. This is known as the doctrine of "unconstitutional conditions."

Since Section 2(a) discriminates against First Amendment protected expression on the basis of its content, the court has called for 2(a) to be, finally, deemed unconstitutional.

But, for some reason, it declined to actually go that far. It merely suggested it, without so ruling. And people wonder why my hair is falling out.

I guess I will start a protest band and call them “The Guinea Pigs.” But, I won’t be allowed to register that trademark – although the five Asian guys from The Slants could. Maybe we should just each register the other band’s marks, and trade them after we get past the bureaucrats at the trademark office.

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