

World Trademark Review Daily

**Band name held to be disparaging under Section 2(a)
United States - Leason Ellis LLP**

**Examination/opposition
National procedures**

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In *In re Tam* (Serial No 85472044, September 26 2013), the Trademark Trial and Appeal Board (TTAB) has upheld the refusal to register the mark THE SLANTS for use with live performances by a musical band.

The ground for refusal was that the mark is disparaging to certain persons in violation of Section 2(a) of the [Lanham Act](#). Specifically, evidence showed that:

- the term 'slant' was a highly disparaging reference to people of Asian descent;
- the mark THE SLANTS retained this derogatory meaning in connection with the applicant's musical band; and
- a substantial number of people in the referenced group would find the mark to be disparaging.

The appeal raised two particularly noteworthy issues, namely the viewpoint from which the mark should be considered and the role of extrinsic evidence to support the refusal.

As to the first point, the applicant argued that the refusal was improper for considering the ethnic background of the applicant (who is of Asian descent) and for essentially preventing registration by someone who is a member of the group disparaged by the mark, thereby effectively limiting registration of the mark to people outside the named group. The TTAB disagreed, pointing out that standard for determining whether a mark is disparaging is from the standpoint of a "substantial composite of the referenced group" (ie, not the applicant). Using this standard, the TTAB found, based on the evidence, that:

- the mark was intended to and did in fact have the effect of evoking people of Asian descent; and
- the public's perception of the term 'the slants' in connection with the applicant's musical band was as a derogatory reference to people of Asian descent.

The TTAB specifically relied upon the manner in which the applicant promoted the band (with Asian imagery on its website and advertisements) and on the applicant's statements that the name is a way to "embrace this slang meaning and to 'own' the stereotype represented by THE SLANTS". The TTAB pointed to precedent holding that the good intentions of the applicant in using a derogatory name do not change the fact that a substantial composite of the referenced group finds the term objectionable, and noted that the inquiry focuses on how that group is disparaged, not on how the individual applicant is injured by not being able to "own" or redefine the meaning of the term to further his message.

Regarding the second point, the applicant objected that the examiner had made of record evidence from outside the "four corners" of the application, particularly the applicant's use of the mark pre-dating the filing of the application. The TTAB noted that it is common procedure to use extrinsic evidence, such as dictionary definitions, to support disparagement and other types of refusals (eg, genericness). Additionally, the nature of the test, which requires consideration of how the mark is viewed by a group of people in the context of how it is used, necessitates looking at extrinsic evidence.

The TTAB concluded that its decision relates only to whether the applicant may avail itself of the benefits of federal registration, not whether the applicant may use the mark. Because the applicant may continue to use the mark without a registration, the applicant's First Amendment rights were not impacted.

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