

# “Hot Topics” in Intellectual Property

Presented by The Michelson 20MM Foundation & Intellectual Property Owners Education Foundation



## Should the Slants Get a Trademark?

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The latest release from Simon Tam's dance rock group The Slants is called "The Band Who Must Not Be Named" — and for good reason.

Despite making music for more than a decade, the world's first all Asian-American dance rock band has been unable to get its name registered as a federal trademark. The U.S. Patent and Trademark Office (PTO) has rejected Tam's trademark applications on the grounds that "Slants" is a disparaging term under the Trademark Act's 2(a) section. So in January of 2017, The Slants took their case to the U.S. Supreme Court.

The issue partly involves the First Amendment right of free speech. But it also centers on the real meaning of section 2(a) of the Trademark Act (also known as the Lanham Act), which bars trademarks if the word or mark consists of “immoral, deceptive, or scandalous matter; or matter which may disparage persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”

During oral arguments, Justice Ruth Bader Ginsburg asked, "Does it not count at all that everyone knows that The Slants is using this term not at all to disparage, but simply to describe? It takes the sting out of the word."

In response, the representative from the Trademark Office acknowledged that “Mr. Tam's sincere intent appeared to be to reclaim the word, to use it as a symbol of Asian-American pride rather than to use it as a slur.” However, he added, there is also “a lot of evidence in the form of Internet commentary that many Asian-Americans, even those who recognized that this was Mr. Tam's intent, still found the use of the word as a band name offensive.”

Closely watching this case are the owners, players, and fans of the Washington Redskins NFL football team. Team owner Daniel Snyder's effort to keep six trademark registrations that were cancelled by the Trademark Office in 2014 may hinge on how the Supreme Court rules in the Slants case. The Redskins' own appeal is still pending in federal court.

To be sure, Tam and his fellow band members don't like to compare their case to that of the Redskins — a name that the rock group's website says represents "a long history of oppression." But at their core, both their cases speak to the subjective nature of trademarks.

Consider, for example, that while denying trademarks for the Slants and the Redskins, the government has approved hundreds of other arguably “immoral, scandalous, or disparaging” names — including Yellowman, Retardipedia, Crippled Old Biker Bastards, and Boobs as Beer Holders.

Besides, say The Slants' lawyers, Tam chose that name as a way of regaining respect for Asian-Americans. "Simon Tam is not a bigot," they noted in court papers. "He is fighting bigotry with the time-honored technique of seizing the bigots' own language."

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Their cause has been endorsed in friend-of-the-court briefs from 20 other groups, ranging from the American Civil Liberties Union to the U.S. Chamber of Commerce. One brief was filed by San Francisco Dykes on Bikes, a group of motorcycle-riding lesbians whose name won federal registration but whose logo did not. According to the brief filed by Dykes on Bikes, the Trademark Office has stood by its rejection “despite the fact that not one lesbian has ever raised any objection to registration of 'Dykes on Bikes.’”

On the other hand, the Supreme Court has also received briefs from some minority groups who agree with the government's position that The Slants should not receive a trademark. The court is expected to issue its ruling in June of 2017.