



The Federal Government Can't Reject Trademarks for Offensiveness, Appeals Court Rules

Client Advisories

12.23.2015

Archer's Ron Coleman, [John Connell](#) and Joel MacMull won a landmark ruling from the United States Court of Appeals for the Federal Circuit on Tuesday following an *en banc* hearing in October. The firm's client, Simon Tam, was seeking a federal trademark registration for his band - 'The Slants.'

In reversing its earlier decision in May of this year in which it affirmed the decision of the Trademark Trial and Appeal Board (the "Board") refusing registration of the mark, the Federal Circuit held that Section 2(a) of the Lanham Act is unconstitutional, on its face and as applied, because it violates the freedom of speech clause of the First Amendment under both strict and intermediate scrutiny. Section 2(a) provides that the Board may refuse an application when a trademark "consists of or compromises...matter which may disparage...persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute." In holding the statute facially unconstitutional, the Court invalidated a nearly 70-year old provision of federal trademark law.

Writing for the nine member majority, Circuit Judge Kimberly Moore wrote "It is a bedrock principle underlying the First Amendment that the government may not penalize private speech merely because it disapproves of the message it conveys."

The decision has a direct bearing on the Washington Redskins' case currently on appeal before the United States Court of Appeals for the Fourth Circuit. In July, a federal judge in Virginia upheld the government's cancellation of the NFL team's trademarks on grounds the term "Redskin" was disparaging to Native Americans at the time the marks were registered decades earlier.

The government must now decide whether to appeal The Slants decision to the United States Supreme Court or wait for the Fourth Circuit to decide the Redskins' appeal. And, while the Supreme Court may elect to hear the government's appeal of The Slants' decision regardless of what happens in the Redskins' case, a contrary decision by the Fourth Circuit would create a split among the Circuit courts, further ripening the issue for appeal before the Supreme Court.

If you have questions about United States Court of Appeals for the Federal Circuit's ruling please contact Ron Coleman, **John Connell** or Joel MacMull in Hackensack, N.J., at (201) 342-6000, in Haddonfield, N.J., at (856) 795-2121, or in New York, N.Y., at (212) 292-4998.

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Related People



John C. Connell

Of Counsel

✉ jconnell@archerlaw.com

☎ 856.354.3074

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