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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85472044

MARK: THE SLANTS



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

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EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant, Simon Shiao Tam, an individual citizen of the United States, has appealed the examining attorney's refusal to register the proposed mark, THE SLANTS, for "entertainment in the

nature of live performances by a musical band,” because the mark is disparaging under Trademark Act Section 2(a), 15 U.S.C. §1052(a).

On November 17, 2011, the applicant filed the current application.¹ On January 6, 2012, the examining attorney refused registration on the grounds that the applied-for mark consists of or includes matter which may disparage or bring into contempt or disrepute persons, institutions, beliefs or national symbols under Trademark Act Section 2(a). Applicant responded on May 29, 2012, submitting arguments in favor of registration. The examining attorney found the arguments unpersuasive and issued a final refusal under Section 2(a) on June 20, 2012. On December 10, 2012, the applicant filed its appeal, along with a request for reconsideration, which was denied on December 20, 2012.

ARGUMENT

Registration is refused because the applied-for mark consists of or includes matter which may disparage or bring into contempt or disrepute persons, institutions, beliefs or national symbols. Trademark Act Section 2(a), 15 U.S.C. §1052(a); see *In re Squaw Valley Dev. Co.*, 80 USPQ2d 1264, 1267-79 (TTAB 2006); *Harjo v. Pro-Football, Inc.*, 50 USPQ2d 1705, 1740-48 (TTAB 1999), *rev'd*, 284 F. Supp. 2d 96, 125, 68 USPQ2d 1225, 1248 (D.D.C. 2003) (finding “no error in the TTAB’s articulation of [the Section 2(a)] test for disparagement”), *remanded on other grounds*, 415 F.3d 44, 75 USPQ2d 1525 (D.C. Cir. 2005), *and aff'd*, 565 F.3d 880, 90 USPQ2d 1593 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 631 (2009); TMEP §§1203.03, 1203.03(c).

¹ By way of background, applicant previously applied-for the same trademark for nearly identical services – Serial No. 77952263. That application was also refused under Section 2(a) as disparaging. Applicant appealed to the TTAB, but the case was ultimately dismissed for failure to file a brief.

Specifically, the applied-for mark – THE SLANTS – was refused registration because the term is disparaging to persons of Asian descent.

The following two factors must be considered when determining whether matter may be disparaging under Trademark Act Section 2(a):

- (1) What is 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 and/or services, and the manner in which the mark is used in the marketplace in connection with the goods and/or services; and
- (2) If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols, whether that meaning may be disparaging to a substantial composite of the referenced group.

In re Squaw Valley Dev., 80 USPQ2d at 1267 (citing *Harjo*, 50 USPQ2d at 1740-41); TMEP §1203.03(c).

LIKELY MEANING OF THE MARK

A. Nature of the Inquiry

To determine the likely meaning of the applied-for mark, one must look not only at dictionary definitions and the nature of the goods and services but also to “the manner in which it is used in the marketplace.” See *In Re Heeb Media, LLC*, 89 USPQ2d 1071, 1074 (TTAB 2008) (citing *In re Squaw Valley Develop. Co.*, 80 USPQ2d 1264, 1267 (TTAB 2006)). Looking to the manner in which a mark is used in the

marketplace is especially important because, as here, “many words have multiple definitions (denotative meanings), and the connotation of a word, phrase or graphics is usually dependent upon the context in which it appears.” *See Harjo*, 50 U.S.P.Q.2d at 1736 (1999). Moreover, consideration of the writings and actions of third-parties is important because these “indicate the public’s perceptions of the meanings attributable to, and associations made in connection with” applicant’s applied-for service mark. *Id.* at 1742, n.111.

Thus, in contrast to applicant’s repeated assertions that a finding of disparagement must be based “on the four corners of the application,” (Applicant’s brief at 10; *see c.f., id.* at 2, 7, 9, 14-15), precedent, and common sense, dictate that use in the marketplace, i.e., evidence outside the four-corners of the application, must be considered. *See In re Lebanese Arak Corp.*, 94 USPQ2d 1215, 1217 (TTAB 2010).

Notwithstanding, looking beyond the pages of the application in this case was necessitated as the word “slant” has multiple definitions, including one that is inherently disparaging towards Asians. Thus, a further inquiry into marketplace use and perception was required to determine which definition of “slant” was applicable in this case.

B. The Likely Meaning of THE SLANTS is a derogatory reference to Asians

The word “slant” is defined in the following ways by the American Heritage Dictionary:

- As a verb:
 - To give a direction other than perpendicular or horizontal to; make diagonal; cause to slope
 - To present so as to conform to a particular bias or appeal to a certain audience

- As a noun:
 - A line, plane, course, or direction that is other than perpendicular or horizontal; a slope
 - Sloping thing or piece of ground
 - A personal point of view or opinion; a bias
 - **Offensive slang used as a disparaging term for a person of East Asian birth or descent**

See American Heritage Dictionary of the English Language, “Slant”, Credo Reference, <http://www.credoreference.com/entry/hmdictenglang/slant> (captured on June 13, 2011) (emphasis added) (attached as page 97-98 to the January 6, 2012 Office action).

While there are six potential meanings of “slant,” the marketplace evidence shows that the only definition of THE SLANTS that is applicable to this application is “offensive slang used as a disparaging term for a person of East Asian birth or descent.” *Id.* This conclusion is supported by the manner in which the mark is used by the applicant, applicant’s public statements about the applied-for mark, and the public reaction to the applicant’s use of the proposed mark, The Slants.

To determine which of several potential definitions is applicable to an applied-for trademark, an obvious first place to turn is applicant’s webpages. Here, applicant’s Myspace page shows use of the mark in connection with Asian imagery – a stylized depiction of the Rising Sun Flag design and a Chinese dragon. See The Slants, Myspace, <http://www.myspace.com/theslants> (captured on Jun 11, 2010) (attached as page 16 to the Jan. 6, 2012 Office action). Moreover, applicant’s website theslants.com directly addressed the name THE SLANTS and its derogatory meaning:

- Q: Isn’t the band name, “The Slants” an offensive racial slur?
 - Yes and no. It’s amazing that the only people that seem to be offended by this term are non-Asians! We’re proud of who we are and aren’t afraid to say that ‘yes, we do have slanted eyes.’ Although we aren’t a socio-political band, we do feel strongly

that Asians should be proud of their cultural heritage, and not offended by stereotypical descriptions. Stand proud, stand strong – it is why our strongest support comes from the Asian community itself!

See http://theslants.com/about_f.html (captured on June 11, 2010) (attached as page 9 to the January 6, 2012 Office action).

Another strong indication of the meaning of the wording as used by the applicant can be found in statements made by the applicant and members of his band. As noted in the examining attorney's Office actions, applicant and his band are self-described as being an Asian-American band, and they intentionally chose the words "THE SLANTS" because of, not in spite of or oblivious to, the association of that term with people of Asian descent.² As shown by the various excerpts below, the applicant and his band intentionally chose the name THE SLANTS because of its derogatory meaning:

- "For the band, the name was a way to **reclaim a racial slur and to assert Asian pride**; it never aimed to be political." See "Rock Band to Trademark Office: 'Our name is not Disparaging to Asians,'" NORTHWEST ASIAN WEEKLY, Mar. 17, 2011, (emphasis added) <http://www.nwasianweekly.com/2011/03/rock-band-to-trademark-office-%E2%80%99our-name-is-not-disparaging-to-asians%E2%80%99/> (captured June 9, 2011) (attached as pages 86-90 to the January 6, 2012 Office action).
- "I was trying to think of things that people associate with Asians. Obviously, one of the first things people say is that we have slanted eyes,' says [Simon] Young³. 'I thought, 'What a

² Applicant argues that the USPTO is improperly considering the ethnicity of the applicant in determining the likely meaning of the mark. The applied-for mark is not being refused because of applicant's ethnicity. The refusal is based on the evidence of record, including applicant's own statements as to the meaning of the mark, and the application of Trademark Act Section 2(a).

³ The examining attorney, based on the context of the statements, believes Simon Young is the stage name of the applicant.

great way to reclaim that stereotype and take ownership of it' – and in doing so, take away the power from those who try to use it as a term of hate.” *Id.*

- “The band name, *The Slants*, is derived from an ethnic slur for Asians. Of the band name, bass player Young has said: ‘We want to take on these stereotypes that people have about us, like the slanted eyes, and own them. We’re very proud of being Asian – we’re not going to hide that fact. The reaction from the Asian community has been positive.’” See *The Slants*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Slants (quoting “The Slants: No Dirty Knees Here,” *AsianWeek*) (captured on June 11, 2010) (attached as page 13-15 to the January 6, 2012 Office action).
- “Simon Young ... left another band in 2005 to create a group that would celebrate Asian and Asian American culture.” See “Despite name, band aims for diverse dance rock,” *THE OREGONIAN*, Dec. 4,

The evidence shows that the public does, in fact, associate the derogatory meaning of “slant” with the band rather than any of the other potential meanings of the word. As noted above, the comments and writings of third-parties are also relevant to the likely meaning of the mark. See *Harjo*, 50 USPQ2d at 1742, n.111. The comments made by third parties in reference to applicant’s band and the applied-for mark suggest that viewers of the mark in the marketplace attach the derogatory definition to the word SLANTS, rather than any of the alternative definitions. For example, the Oregon Commission on Asian Affairs withdrew support from an Asian Youth conference noting that the name THE SLANTS was disparaging to the Asian community, and following, the Asian American Youth Leadership Conference withdrew a speaking invitation to Simon Young concerned that other sponsors would react similarly. See “Oregon Governor Cancels Asian Band The Slants’ Performance at Asian Youth Conference...,” <http://64.34.174.165/headlines/Oregon-governor-cancels-slants-performance->

asian-youth-conference (captured on Dec. 23, 2010) (attached as page 54-55 to the January 6, 2012 Office action).

Moreover, the applicant participated in a back-and-forth exchange with two bloggers regarding whether the name THE SLANTS was offensive or a source of pride as used by the applicant. During these conversations, the applicant did not argue that THE SLANTS meant anything other than the derogatory reference to Asians. Rather, the applicant argued that he was reappropriating the term and attempting to remove its derogatory sting. For example, note the following excerpted exchanges between two bloggers and the applicant:

- “I agree with the U.S. Patent and Trademark Office.... [T]hey shouldn’t register ‘Slants.’ It’s offensive.” See Blog post of BigWOWO, “The Slants and big WOWO’s Support of the U.S. Patent and Trademark Office,” <http://www.bigwowo.com/2011/04/the-slants-and-bigwowos-support-of-the-u-s-patent-and-trademark-office> (captured on June 9, 2011) (attached as page 48, 57-75 to the January 6, 2012 Office action).
 - “We are not alone in our use of the term Slant in a positive, self-referential manner... For us, it is important to inject pride into Asian American culture, not disparage it.” *Id.* at comments of Simon Tam in response to blog post of bigWOWO, May 4, 2011.
- “The article [written by Simon Tam] then goes on to explain that the band ‘deliberately chose this outdated, generational term to inject pride into Asian American culture...’” See Blog post of Ben Efsaneyim, “Chinkies and Gooks and Slants Oh My!,” <http://benefsanem.blogspot.com/2011/04/chinkies-and-goods-and-slants-oh-my.html> (captured on June 9, 2011) (attached as page 76-81 to the January 6, 2012 Office action). “The worst thing about this idea of ‘owning a derogatory slur as a means of empowerment or to inject pride into Asian-American culture...is that it seems to be a case of simple imitation.” *Id.*

- “We’re seeking [a] trademark for ‘The Slants’ to be used by an Asian American live music group. I believe that API’s have the right to use a self-referential term in a positive manner.” *Id.* at comments of Simon Tam on May 5, 2011 at 10:25 pm in response to blog post of Ben Efsaneyim.

Thus, when directly engaged by two members of the Asian American community who found the mark offensive, rather than respond that THE SLANTS was not a reference to Asian Americans, applicant argued that his self-referential use was prideful not disparaging.

In sum, the marketplace evidence in the form of: (1) applicant’s own webpages, (2) applicant’s own statements on the meaning of the mark, and (3) the public’s perception of the applied-for mark in commerce shows that there is only one pertinent meaning to the applied-for mark. There is nothing in the manner in which the mark is used in the marketplace, in how it is promoted by the applicant, nor in how it is received by the public, from which one would understand any other meaning to be applicable. Accordingly, the applied-for mark will only evoke the definition of “slants” that is a disparaging term applied to persons of Asian descent.

THAT MEANING IS DISPARAGING TO PERSONS OF ASIAN HERITAGE

A. Nature of the Inquiry

To “disparage” means “to speak slighting[ly] of: run down: depreciate.” *In re Squaw Valley Dev. Co.*, 80 USPQ2d 1264, 1276 (TTAB 2006) (internal punctuation omitted) (quoting *Webster’s Third New International Dictionary* (unabridged ed. 1993)). The determination of whether a mark is

disparaging depends upon the perspective of the object of disparagement. *In re Lebanese Arak Corp.*, 94 USPQ2d 1215, 1217 (TTAB 2010); *see also* TMEP §1203.03(c). A mark may be disparaging in two ways:

- (1) Matter that is not, in and of itself, disgusting or otherwise unpleasant, may be applied or combined in such a way that it is offensive to the disparaged party. *See, e.g., In re Anti-Communist World Freedom Cong., Inc.*, 161 USPQ 304, 305 (TTAB 1969) (holding design of an "X" superimposed over a hammer and sickle to disparage, and to bring into contempt and disrepute, a national symbol of the U.S.S.R.); or
- (2) Matter may be inherently offensive, and, when directed at a specific individual or entity, may become even more offensive. *See, e.g., Greyhound Corp. v. Both Worlds Inc.*, 6 USPQ2d 1635, 1640 (TTAB 1988) (noting "the offensiveness of [applicant's mark, depicting a defecating dog,] becomes even more objectionable because it makes a statement about opposer itself").

The targeted or relevant group must be determined on the basis of the facts of each case. *Harjo v. Pro-Football, Inc.*, 50 USPQ2d 1705, 1739 (TTAB 1999), *rev'd*, 284 F. Supp. 2d 96, 124 & n.25, 125, 68 USPQ2d 1225, 1247 & n.25 (D.D.C. 2003) (finding no error in the TTAB's application of this approach), *remanded on other grounds*, 415 F.3d 44, 75 USPQ2d 1525 (D.C. Cir. 2005), *and aff'd*, 565 F.3d 880, 90 USPQ2d 1593 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 631 (2009). For cases involving disparagement of a non-commercial group, such as a religious or racial group, or beliefs or national symbols, the perceptions of "those referred to, identified or implicated in some recognizable manner by the involved mark are relevant to this determination." *In re Hines*, 31 USPQ2d 1685, 1688 (TTAB 1994), *vacated on other grounds by* 32 USPQ2d 1376 (TTAB 1994); *see also* TMEP §1203.03(c). A term or symbol can be disparaging even when not known or understood by the public at large if it would be clearly understood

by members of a particular religious or ethnic group. See *In re Lebanese Arak Corp.*, 94 USPQ2d 1215, 1219 (TTAB 2010).

B. The wording “THE SLANTS” is Disparaging to Asian Americans

The denotative and connotative meaning of THE SLANTS in this case is inherently offensive⁴ and disparaging. As shown above, one of the definitions of “slant” is as a disparaging term to persons of East Asian descent. That definition has been shown to be the only one applicable here.

There can be no legitimate dispute that the word “slants” has a sordid history as a racial slur against Asians and that it retains that sting. See Online Etymology Dictionary, “Slant,” (noting that the ‘[d]erogatory slang sense of ‘Oriental, slant-eyed person’ is recorded from 1943”) <http://www.eymonline.com/index.phy?search=slant&searchmode=none> (captured on June 11, 2010) (attached as page 40-41 to the January 6, 2012 Office action). The Office actions refer to and attach numerous reference works⁵ which define “slants” as a derogatory or offensive term, a sampling of which follows:

⁴ The applicant argues that the term “SLANTS” is not inherently offensive. That argument confuses the meaning of inherently offensive. This is not a case in which the mark is made up of parts that, standing alone, do not have any disparaging meaning. Rather, this is a case where the applied-for mark has both typically innocuous meanings and one meaning that is disparaging in and of itself. As discussed above, the only definition applicable in this case is the one meaning a disparaging term to person of East Asian descent. Thus, by its very definition, the word “slant” is offensive and disparaging. That the term also has non-offensive definitions does not mean it is not inherently offensive. It might fail to be inherently offensive if another definition was applicable in this case, but that is not the case. By contrast, the definition of “slant” applicable here is one that is inherently offensive – it does not require additional matter to transform the word.

⁵ Applicant asserts that these reference materials are of little evidentiary value. First, many of these publications are published by large and reputable providers of reference work, e.g., Oxford. Second, even for those that are only found online, Internet evidence is generally accepted as competent evidence. See *In re White*, 80 USPQ2d 1654, 1662 (TTAB 2006) (accepting Internet evidence to show false suggestion of a connection); *In re Joint-Stock Co. “Baik”*, 80 USPQ2d 1305, 1308-09 (TTAB 2006) (accepting Internet evidence to show geographic significance);

- “Offensive slang used as a disparaging term for a person of East Asian birth or descent.” *See supra*, American Heritage Dictionary of the English Language.
- “slant *noun* US, derog and offensive = slant-eye.” *See* Oxford Dictionary of Modern Slang, by John Ayto and John Simpson, OXFORD REFERENCE ONLINE, <http://www.oxfordreference.com/views/ENTRY.html?entry=t291.e4631&srn=1&ssid=685890776#FIRSTHIT> (captured on June 22, 2011) (attached as page 102 to the January 6, 2012 Office action).
- “slant, *noun*, a South Asian person. *US 1942*. Offensive.” *See* New Partridge Dictionary of Slang and Unconventional English, “slant” at pg. 1773 (attached as page 99-101 to the January 6, 2012 Office action).
- “**slant, slanteye, slant-eye.** A derogatory reference to Asians, based on the epicanthic fold, or flap, over the eyes of some Asian peoples, giving the eyes a slanted look.” *See* The Color of Words: An Encyclopedic Dictionary of Ethnic Bias in the United States, “slant” at pg. 207 (attached as page 125-27 to the January 6, 2012 Office action).
- “**slant/slant-eye** n. [1950s+] a derog. Term for an Oriental person.” *See* The Cassell Dictionary of Slang, WELLINGTON HOUSE, 1998 (attached as page 133-36 to the January 6, 2012 Office action).
- “**slope** and **slant, slanteye(s)** an East Asian or Southeast Asian person having the ‘oriental’ epicanthic folds. (Intended and perceived as derogatory. User is considered to be racially bigoted....)” *See* Spears, Richard, FORBIDDEN

TBMP §1208.03; TMEP §710.01(b). Moreover, the evidence at a minimum, shows that the word “slants” has a derogatory meaning, while the discussion above shows that this meaning is the one applicable to the matter at hand.

AMERICAN ENGLISH (Passport Books 1995) (attached as page 150-53 to the January 6, 2012 Office action).

- “**slant** a derogatory nickname for any Oriental.” *See* Spears, Richard, **SLANG AND EUPHEMISM: A dictionary of oaths, curses, insults, sexual slang and metaphor, racial slurs, drug talk, homosexual lingo, and related matters** (Signet 1991) (attached as page 154-56 to the January 6, 2012 Office action).

It is not just the reference works that demonstrate “slants” is an offensive and derogatory term. Notably, the Japanese American Citizens League, which states it is “the oldest and largest Asian American civil rights organization in the United States,” has a brochure on its website as part of its anti-hate program declaring “slants” a derogatory word. *See* “About the Japanese American Citizens League,” JACL, <http://www.jacl.org/about/about.htm> (June 10, 2011) (attached as page 95-96 to the January 6, 2012 Office action). That brochure states, “Words can kill the spirit... ‘Jap’ is a derogatory term! ... And so are terms like ... ‘slants.’” *See* Japanese American Citizens League Anti-Hate Program brochure, (1st two ellipses original) http://www.jacl.org/public_policy/documents/Brochure%20Words%20Can%20Kill%%20the%20spirit.pdf (attached as page 5-6 to the January 6, 2012 Office action). Additionally, the record contains other instances of people being offended by the word “slant.” *See* articles from Lexis Nexis and screen captures from Fantasy Café and ErollisiMarr.com (attached as page 3-4, 7, 104-116 to the January 6, 2012 Office action).

In addition to these more general commentaries on the word “slants,” the record also includes evidence that Asian Americans have found the specific use of the applied-for mark by applicant offensive. Among these are the blog commentaries of bigWOWO and Ben Efsaneyim referenced above. *See e.g.*, “The Slants and bigWOWO’s Support of the U.S. Patent and Trademark Office” (“I’ve got nothing against the Slants other than their name, which is racially offensive...”). Another commenter

stated, "I find the name of this band offensive," on a forum page about one of The Slants upcoming performances. See comment on "The Slants to Give Away Admission to Conventions They will be Playing," Animecons.com, <http://forums.animecons.com/showtopic.pho?tid/531/post/1882> (captured on Dec. 23, 2010) (attached as page 49-50 to the January 6, 2012 Office action). In fact, the record contains numerous instances in which the name has been found offensive and disparaging:

- "And given a community as diverse and heterogeneous as Asian American, it is inevitable that there is no unified response to the band's music and **some objections to the name.**" See "Where EAST meets the Northwest," *The Asian Reporter*, Aug. 4, 2009, pg. 16 (emphasis added) (attached as page 51-53 to the January 6, 2012 Office action).
- "Earlier this year, the band experienced first-hand the complex and diverse political perspectives of Asian Americans. Young was initially slated to give the keynote address at the 2009 Asian American Youth Leadership Conference in Portland. But some conference supporters and attendees felt the name of the band was offensive and racist, and out of respect for those opinions the conference organizers decided to choose someone less controversial." *Id.*
- "[Simon] Young called the new band The Slants – a name that has been controversial from the start. 'When I thought of (the name) at the time, I just thought it was funny. I didn't think it was controversial at all,' Young said. It wasn't until he posted advertisements for Asian Bandmates and people responded by calling him racist that Young realized the name pushed some hot buttons." See "Despite name, band aims for diverse dance rock," *THE OREGONIAN*, Dec. 4, 2010 (attached as page 8, 2 to the January 6, 2012 Office action).

- “Although The Slants continues to be a controversial name, according to Young, ‘Everyone in the band really loves the fact that we can try and empower Asian Americans and say, ‘You know what? We are slanted. Who cares? We’re proud of that.’” *Id.*

The thrust of all of this evidence is that, not only is the word “slants” offensive to persons of Asian descent in the abstract, but that a substantial composite of the referenced group may find the specific use by applicant to be disparaging.

CONCLUSION

Based on the record evidence and case law, the applied-for mark consists of matter which may disparage or bring into contempt or disrepute persons, institutions, beliefs, or national symbols. Accordingly, the examining attorney respectfully requests that the Board affirm the refusal to register that mark under Trademark Action Section 2(a), 15 U.S.C. § 1052(a).

Respectfully submitted,

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