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Sports & Entertainment Beat

Redskins Trademark's Cancellation Upheld by Eastern District Court of Virginia

07.24.15

As anticipated, the T

rademark Trial and Appeal Board ("TTAB") decision of June 2014 cancelling six trademark registrations for the Washington Redskins team was appealed by Pro Football, Inc. In August 2014, Pro Football, Inc. filed a lawsuit in federal court against the five Native Americans involved in pursuing the TTAB cancellation in an effort to try to overturn the TTAB's holding that the term "Redskins" is offensive to Native Americans and thus is not eligible for trademark registration under the federal Lanham Act. Section 2(a) of the Lanham Act prohibits protection for terms that "may disparage" or bring people into contempt or disrepute. 15 USC §1052; TMEP §1203. On July 8, 2015, the US District Court for the Eastern District of Virginia ruled against Pro Football, Inc., affirming the TTAB's ruling that the REDSKINS marks do disparage Native Americans and that such a decision is not unconstitutional.

In the case, Pro Football, Inc. argued that the TTAB decision and the Lanham Act upon which it was based deprived it of a valuable commodity of the team "without just compensation" because of the large monetary investment the team had made in using, promoting, and policing its trademarks. However, a recent Supreme Court ruling in June 2015, Walker v. Sons of Confederate Veterans, upheld the decision by the state of Texas to ban specialty license plates proposed by the Sons of Confederate Veterans that bore the confederate flag, holding that such action didn't violate the First Amendment. The Native Americans argued that, as in the Walker v. Sons of Confederate Veterans case, the US Trademark Office doesn't have to issue or sustain registrations for marks it determines to be offensive, since doing so would otherwise carry the federal government's stamp of approval.

The federal court agreed, stating further that Section 2(a) of the Lanham Act does not implicate the First Amendment, that the federal trademark registration program is government speech and is therefore exempt from First Amendment scrutiny, that any claim by Pro Football, Inc. regarding the Takings or Due Process clauses fail, because a trademark registration is not considered property under the Fifth Amendment, that the Native American defendants did not unreasonably delay in petitioning the TTAB, and

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that because of the public interest at stake, the doctrine of laches does not apply.

This is a significant win for Native Americans, taking this lengthy dispute further than it has gone in the past. Yet, the decision can of course still be appealed, even to the Supreme Court. As Dan Snyder, the owner of Pro Football, Inc., has vowed that he will never change the name, an appeal is expected in the coming months.

Although in this case the "disparagement" language and justification for denial of registration has been preserved and upheld by the courts, there are interesting developments in another case that are worth noting. In September 2013, the TTAB issued a similar decision holding that the mark THE SLANTS is barred from registration for being "a highly disparaging reference to people of Asian descent." However, the trademark owners, a rock band consisting of people of Asian descent, insist that they adopted the band name to reclaim it and celebrate Asian identity.

Registration of terms that are historically considered disparaging has been allowed in some circumstances. Self-disparaging trademarks have been allowed where the applicant has shown that the mark as-used is not considered by the relevant group to be disparaging. One example of such a mark is the registration for Dykes on Bikes. However, The Slants' appeal to the federal circuit was not successful, and in April 2015, the higher court determined that a substantial composite of Asians would find the term disparaging, that the refusal to register was not an abridgment of First Amendment rights, and that the consideration of disparagement under the Lanham Act is a well-established test that is sufficiently precise to both notify and instruct trademark applicants. The next step in The Slants' case is oral arguments at the Federal Circuit, scheduled for October 2015, at which point the court will have an opportunity to correlate this situation with that of Pro Football, Inc. and other relevant cases.

The outcome of the Pro Football, Inc. case on July 8th will surely have an effect on public opinion regarding the team, though the decision is not final until all appeals have been exhausted or declined. Even then, common law protections might still be available should the team continue use of the marks, though loss of the federal registrations hampers the team's ability to block the importation and sale of counterfeit goods.

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Posted in NFL, Sports, Trademark

Tagged as Dan Snyder, Inc., Lanham Act, NFL, Pro Football, REDSKINS, Trademark registration, Trademark Trial and Appeal Board, TTAB, United States Patent and Trademark Office, Walker v. Sons of Confederate Veterans, Washington Redskins

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