SULLUM: Offensive trademarks are free speech

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In 2004, the U.S. Patent and Trademark Office agreed to register Heeb as the name of a magazine covering Jewish culture. Four years later, the PTO refused to register Heeb as the name of a clothing line conceived by the magazine's publishers, because the term is "a highly disparaging reference to the Jewish people."

Such puzzling inconsistency is par for the course at the PTO, which has been charged with blocking registration of trademarks that "may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute" since 1946. A case the Supreme Court will hear today [Jan. 18] could put an end to that vain, vague and highly subjective enterprise, which sacrifices freedom of speech on the altar of political correctness.

The case involves an Asian-American dance rock band called The Slants, a name that self-consciously repurposes a racial slur. In 2011, the band's founder, Simon Tam, tried to register the name but was rejected by a PTO examiner who deemed it disparaging to "persons of Asian descent."

An administrative appeals board affirmed that decision, even while conceding that the band's name was "an attempt not to disparage, but rather to wrest 'ownership' of the term from those who might use it with the intent to disparage." The board said "the fact that applicant has good intentions underlying the use of the term does not obviate the fact that a substantial composite of the referenced group find the term objectionable."

In 2015, a federal appeals court agreed that Tam "may offend members of his community with his use of the mark" but noted that "the First Amendment protects even hurtful speech." The court ruled that the ban on registration of disparaging trademarks amounts to viewpoint-based speech regulation, which the Supreme Court has said is constitutional only if it is narrowly tailored to serve a compelling government interest. The interest in this case — protecting the feelings of people who might be offended by an outre trademark — does not even qualify as legitimate, let alone compelling.

The PTO maintains that it's not really regulating speech, since Tam is free to call his band whatever he wants. But denying him the trademark-protecting benefits of registration clearly imposes a burden on his speech, analogous to denying copyright registration for a book that bothers a bureaucrat.

The PTO also argues that trademark registration should be viewed as government speech, similar to messages on license plates. But as the Cato Institute notes in a friend-of-the-court brief, that

contention is pretty implausible when the list of registered trademarks "includes such hallowed brands as 'Capitalism Sucks Donkey Balls' and 'Take Yo Panties Off.' "

Those examples also appear in a brief filed by the corporate owner of the Washington Redskins, which is engaged in its own legal battle over an allegedly disparaging trademark. The brief lists hundreds of arguably disparaging registered trademarks, including band names such as N.W.A., White Trash Cowboys, Whores From Hell, Cholos on Acid, The Pricks, Barenaked Ladies and The Roast Beef Curtains.

Since disparagement is in the eye of the beholder, registration decisions vary with the moods and sensibilities of the PTO's examiners. It is therefore not surprising that "the PTO's record of trademark registrations and denials often appears arbitrary and is rife with inconsistency," as the appeals court found.

Among other examples, the court noted that "the PTO denied the mark HAVE YOU HEARD SATAN IS A REPUBLICAN because it disparaged the Republican Party...but did not find the mark THE DEVIL IS A DEMOCRAT disparaging."

Uncertainty about the PTO's decisions has a chilling effect on applicants' choices, encouraging them to steer wide of trademarks that might be controversial. In fact, avoiding controversy is the whole idea of enforcing the rule against disparagement, and that goal is plainly inconsistent with freedom of speech.