Immoral Trademarks and a Scandalous Disregard for The First Amendment
November 10, 2015
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Last July, the Eastern District of Virginia upheld the cancellation of various trademarks of the Washington Redskins on the grounds that the marks were disparaging to Native Americans. I am neither a fan of football, nor of offensive names for sports teams—what I am is a fan of free speech. Although the Redskins may be well advised to change their team name, interfering with both the team’s right to free speech as well as its property right in the registered mark is the wrong way—both legally and in principle—to achieve socially desirable ends.

Various theories have been advanced, but the really interesting part of the dispute—a topic upon which I published a paper this year—is the likelihood that the Lanham Act’s prohibition of immoral, scandalous, or disparaging marks runs afoul of the First Amendment. I was cheered to see this week that the First Amendment Lawyers Association filed an amicus brief largely along the lines of my paper. However, there were a couple of points that I still feel deserve more attention when thinking about the § 2(a) (the Lanham Act’s so-called “morality clauses”).

**Trademarks Are Not License Plates**

The district court tried to sidestep the First Amendment issue by declaring that the trademarks themselves are not at issue, but merely the right to register the trademarks. To reach its result, the court relied on the recent Walker case wherein the Supreme Court declared that Texas was at liberty to prevent Confederate flags from appearing on its license plates, since license plates could be considered the speech of the government.

However, there is an important distinction between license plates and trademarks. License plates are a good totally of government manufacture. One cannot drive a car on a public road without applying to the government for permission and affixing a government registration tag on the vehicle. The plate is not a blank slate upon which one may express one’s self, but is a state-issued information placard used for law enforcement purposes.

Trademarks, arising as they do from actual use, preexist federal recognition. The Lanham Act merely provides a mechanism for registering trademarks that happen to be used in interstate commerce. The federal government then chooses to recognize that trademark when contested or offered for registration.
This is a major distinction: the social field of trademarks already exists – the federal government has chosen to regulate and provide an enforcement mechanism for these property rights and speech acts when used in interstate commerce. Thus it is the market for trademarks that constitutes the forum, and not the physically recorded government register. Given that the government has interfered in a preexisting market in a way in which it protects some state-created trademark property rights, but not others, is it proper to regulate speech by virtue of its content? I think not.

Further, license plates are obviously government property to anyone who looks at them. Plates bear the very name of the state directly on their face. The system of trademark registration is a largely invisible process that only becomes relevant during legal proceedings. When the public looks at a given trademark I would argue that the state’s imprimatur is certainly one of the last things of which they would think.

Thus, a restriction on “immoral” or “disparaging” trademarks constitutes viewpoint discrimination. Eugene Volokh echoed this sentiment when he wrote on the refusal to register “Stop the Islamisation of America”:

Trademark registration ... is a government benefit program open to a wide array of speakers with little quality judgment. Like other such programs ... it should be seen as a form of “limited public forum,” in which the government may impose content-based limits but not viewpoint-based ones. An exclusion of marks that disparage groups while allowing marks that praise those groups strikes me as viewpoint discrimination.

The Lanham Act endows registrants with government-guaranteed legal rights in connection with the words and symbols by which they are recognized in society. Particularly in a globalized, interconnected society, the brand of an entity is a significant component of how it speaks to society. Discriminating against marks as “immoral” or “disparaging” can be nothing short of viewpoint discrimination.

**Commercial Speech Is Protected Speech**

As everyone is well aware, the First Amendment provides broad protection for a wide spectrum of speech. The definition of speech itself is likewise broad, including not only words, but also non-verbal gestures and symbols. Any governmental curtailing of such speech will be presumptively invalid, with the burden of rebutting that presumption on the government.

When speech is undertaken as part of commerce it does not magically lose any political, social or religious dimension it had when in a noncommercial context. Cartoons issued bearing the image of the Prophet as part of a commercial magazine are surely a political
statement deserving of protection. The situation is the same if an organization adopts a logo that is derisive to a particular political or religious ideology – that publication is making a protected, expressive statement through its branding.

At first glance, one might think that defenders of § 2(a) would attempt to qualify scandalous and immoral trademarks as “obscene” and thereby render them subject to censorship. But, in McGinley the Federal Circuit explicitly refused to apply the obscenity standards from the Supreme Court to §2(a) on the grounds that the Lanham Act does not itself use the word “obscenity.” Instead, the Federal Circuit, following the TTAB, was of the opinion that “[w]hat is denied are the benefits provided by the Lanham Act which enhance the value of a mark” and that the appellant still had legal recourse under state common law. Therefore, so the court in McGinley reasoned, since the right to use the mark is not actually abridged, no expression is abridged. And this is the primary basis upon which the district court in Pro-Football built its argument that no First Amendment concerns were implicated in canceling the Redskins trademark.

This of course willfully ignores once again the notion that in intervening in the field of trademarks, and in favoring certain speakers over others, courts effectively allows the Lanham Act to amplify preferred speech and burden disfavored speech. This is true whether or not we classify the trademark right as a bundle of procedural rights (which in turn make speech competitively possible) or as pure speech directly.

That said, it’s much more in keeping with the tradition of the First Amendment to understand trademarks as a protected category of commercial speech. The Supreme Court has noted that otherwise commercial information may at times be more urgent than even political dialog, and that information relating to a financial incentive was not necessarily commercial for First Amendment purposes. “[S]ignificant societal interests are served by such speech.” This is so because even entirely commercial speech “may often carry information of import to significant issues of the day.”

Even were commercial speech not fully protected–as I believe it to be—the Supreme Court has also recognized that commercial speech may be so intertwined with noncommercial speech so as to make them inseparable for First Amendment purposes. In particular, commercial messages do more than merely provide information about the characteristics of goods and services:

[S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.

The analogy to trademarks is rather clear in this context. Although trademarks may refer to a particular product or service, that product or service is not of necessity a purely commercial object. Further, even if the product or service is a commercial object, the
The trademark itself can be, or can become, a symbolic referent and not a mere sales pitch. Consider, for instance, Mickey Mouse. The iconic mouse ears certainly represent a vast commercial empire generally, and specifically operate as a functional trademark for Mickey Mouse cartoons and merchandise. However, is there not much more of cultural significance to the mark than mere commercial value? The mouse ears represent something culturally – about childhood, about America, and about art – that is much more than merely a piece of pricing or quality information.

The Unconstitutional Conditions Doctrine Prevents Trading Rights for Privileges

The district court (and Federal Circuit, for that matter) have missed a very important dimension in summarily dismissing First Amendment concerns of trademark holders. These courts dismiss owners of “immoral” or “disparaging” trademarks on the belief that no actual harm is done – the mark holders still own the mark, and, as far as the court is concerned, no speech has been suppressed. However, trademark registration, in addition to providing a forum in which to speak, also provides real procedural benefits for the mark holder. For instance, businesses and individuals enjoy a nationwide recognition of their presence and can vindicate their interests in federal courts. Without the federal registration that is presumptively supplied to marks that are not “immoral” or “scandalous,” an individual can find himself attempting to protect his interests in a mark in the courts of every state in which he does business.

However, under the unconstitutional conditions doctrine even though the benefits of trademark registration are not constitutionally guaranteed rights, those benefits cannot be offered in exchange for a trademark owner’s loss of actually guaranteed rights. Thus, the tight link between trademark registration and First Amendment protections that the courts just keep ignoring.

It’s also worth noting that this doctrine did not emerge in constitutional jurisprudence until after the period in which the Lanham Act was drafted. Instead, the Lanham Act era was characterized by the rights-privileges distinction made famous by then Chief Justice of the Massachusetts Supreme Judicial Court Oliver Wendell Holmes. In *McAuliffe*, a police officer sued for reinstatement after he was dismissed for his participation in a political organization. In dismissing the case, Chief Justice Holmes held that “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” This quote from Holmes captures precisely the sense in which the Federal Circuit dismisses the First Amendment concerns of mark holders.

In contrast to this rather antiquated view, the Supreme Court has recently reaffirmed the proposition that “the government may not deny a benefit to a person because he exercises a constitutional right.” Although this principle contains exceptions, it has been applied to a wide variety of situations including refusal to renew teaching contracts over First
Amendment-protected speech acts, and infringement of the right to travel by refusing to adequately extend healthcare benefits to sick persons who had not been residents of a county for at least a year.

Basically, the best defense one can offer for § 2(a) is rooted in an outmoded view of the First Amendment that is, to put it mildly, unconstitutional. We don’t shut down speakers who offend us (at least for the time being), and we should stop attacking trademarks that we find to be immoral.

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