Written by **Selwyn Duke** on December 28, 2015

Landmark Court Ruling: Gov't Can't Deny Trademark Protection to Politically Incorrect Names

Recent times have seen the revocation of six trademarks owned by the Washington Redskins. But now bureaucrats at the U.S. Patent and Trademark Office (USPTO) may be red-faced — as a federal court just ruled that the government may not deny trademark protection based on the notion that a mark is "disparaging."

While the ruling will have a bearing on a host of marks, it was not the Redskins' case, per se, that was before the court when it issued its ruling. The American Freedom Law Center provides the details:

> As a kind of Christmas present to liberty and the U.S. Constitution, the Federal Circuit Court of Appeals, sitting en banc (the entire court), today [12/23] reversed more than 30-years of jurisprudence by holding that trademark registration under the Lanham Act deserves First Amendment protection.
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> … In the case In re Tam, the federal court, which specializes in patent and trademark cases, found that the USPTO's rejection of the musical group name "The Slants" because it disparaged Asians was unconstitutional because there was no "compelling state interest" to censure the viewpoint of the trademark owner. As a result, Simon Tam will now be able to register his band name as a federal trademark, thus allowing him to protect the name and products and services sold using that name against encroachers and counterfeiters.
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> What made this decision possible was the recent litigation waged by the American Freedom Law Center ("AFLC") on behalf of Pamela Geller and Robert Spencer to register their trademark, "Stop the Islamisation of America" ("SIOA"). Like the Slants trademark, the USPTO rejected the SIOA trademark on the ground that it disparaged Muslims and even Islamists by suggesting they should be "stopped."

The case of Geller — the organizer of the Texas "Draw Muhammad" contest — was especially troubling to many, as it involved the censorship of a point of view. As Geller herself reported, presenting the USPTO's reasoning and quoting the AFLC:

> "Islamisation" means converting to Islam or "to make Islamic;" and (2), "Stop" would be understood to mean that "action must be taken to cease, or put an end to, converting or making people in America conform to Islam." Thus, the trademark, according to the "Office Action" ruling, disparaged Muslims and linked them to terrorism. (AFLC)
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> The court concludes that "Stop the Islamization of America" mark, as used by its promoters, is likely to be understood as "disparaging to a substantial composite" of Muslims, whether "Islamization" refers to conversion to Islam or to "a political movement to replace man-made laws with the religious laws of Islam."

Geller, not known for mincing words, called the USPTO's ruling a "fascist-style ban" and "in effect, an application of sharia law ('do not criticize Islam.')." And in agreeing that such judgments are unconstitutional, the federal court 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. That principle governs even when the government's message-discriminatory penalty is less than a prohibition. Courts have been slow to appreciate the expressive power of trademarks. Words — even a single word — can be powerful." This is no doubt true. Nonetheless, one could wonder if this really is a First Amendment issue.

After all, the First Amendment offers protection against government suppression of speech, but this concerns something else entirely: government protection of speech used for commercial gain from competition from other private entities that might use the same speech for commercial gain. Was the First Amendment truly designed for this purpose?

To be clear, in question here is not whether it's a "good idea" for government to dispense trademarks based on politically correct fashions; being silent on most matters, the Constitution allows the effectuation of many bad ideas (the people must be wise enough to prevent such). Rather, the question is whether correcting bad trademark policy is a constitutional matter — a role of the courts or that of Congress.

Whatever the case, most do agree (including this writer) that our government shouldn't discriminate among trademark applicants based upon an ever-morphing politically correct social code. And while some might liken such behavior to a prohibition against blasphemy, the USPTO's actions were of a different character altogether.

Whether the matter is blasphemy prohibitions in today's Muslim world or yesterday's Christendom, there's a commonality: What's forbidden is considered a violation of Truth, of unchanging and eternal divine law. You may disagree with that conception of Truth; you may disagree with that application of Truth. But Christians didn't say that using the Lord's name in vain was blasphemy, and then a century later say speaking of a Christmas tree frivolously is also so; Muslims didn't follow their ban on the drawing of Mohammed with one on the drawing of a minaret. And, again, the claim was that these laws were the will of God, the Creator of the Universe.

Modern secularists scoff at such assertions, but on what are politically correct prohibitions based? There is not even the *claim* that a conception of Truth is used as a guide; in fact, the thought police are relativists. Rather, the notion of "disparagement" is based on a perception of a term's current usage and people's *feelings*. We're supposed to laugh at the concept of laws of a deity, but then deify the dictates of man's emotion.

And since usage and feelings are ever-changing, the thought police ever move the goalposts. Not long ago, for instance, no one batted an eye at the Redskins name. And how many really do today? With an oft-cited poll showing that *even 90 percent of American Indians take no offense to it*, it illustrates what Ronald Reagan once called the "difference between critics and box office." It's akin to what the Donald Trump phenomenon has exposed: The "elites" underestimated him because they live in and help perpetuate a faux reality, a media-academia-entertainment "Matrix," in which political correctness appears far more popular and prevalent than it actually is. Here's how it works: Academia will pick a target (e.g., the "Redskins") and present a pseudo-intellectual argument for why it should be eliminated, the media will disseminate the idea widely and continually while suppressing dissenting

arguments, and entertainment entities/figures may chime in to make the position seem cool. The result? A (small) minority view can appear a consensus, and its advocates then may wield majority-like social pressure. It's a fashion that's a fiction.

Another fiction is the idea that a bunch of time-clock-punching statist bureaucrats could be legitimate arbiters of propriety. It's also something that most Americans will find far more offensive than any football team's name.