No. 14-1203

IN THE

United States Court of Appeals for the Federal Circuit

IN RE: SIMON SHIAO TAM,
Appellant

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in No. 85/472,044

BRIEF OF PUBLIC KNOWLEDGE
AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for Amicus Curiae certifies that:

1. The full name of every party or amicus represented by me is:

Public Knowledge

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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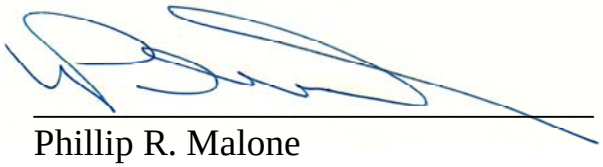
Dated: June 18, 2015



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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Knowledge is a nonprofit organization that is dedicated to preserving the public's access to knowledge and promoting creativity through balanced intellectual property rights. As part of this mission, Public Knowledge advocates on behalf of the public interest for balanced approaches to extending intellectual property rights.

Public Knowledge submits this brief pursuant to the Court's order of April 27, 2015.[2]

SUMMARY OF ARGUMENT

Trademark law involves a balancing of the rights of trademark owners and the rights of the public at large. While language normally exists in the public domain, a trademark vests exclusive rights in private entities to make certain uses of the trademarked language. These exclusive rights can sometimes be in tension with the public's interest in using that language for a variety of expressive, political, critical, comparative or other purposes.

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[1] No party or party's counsel authored any part of this brief or contributed money towards its preparation or submission. No one, other than amicus and its counsel, contributed money towards the preparation or submission of this brief.

[2] Amicus wishes to thank Stanford Law School Juelsgaard Intellectual Property and Innovation certified law student Eric Dunn for his substantial assistance in drafting this brief.

Public Knowledge agrees with the applicant and other amici that the panel's decision that the First Amendment does not apply at all to trademark applications is incorrect. However, amicus writes here to emphasize that the applicant's First Amendment rights must always be balanced against the First Amendment rights of the public. Amicus take no position on how that balance plays out in this particular case.

Congress and courts have recognized that the First Amendment serves as a limiting principle for the grant of trademark rights in three important ways: first, courts have recognized that the First Amendment demands a justification for granting exclusive rights in words or phrases; second, courts have construed the Lanham Act to permit the public to use existing trademarks expressively; and finally, the Lanham Act was designed with safeguards for free expression. These limitations together protect the public's interest in free speech. "[O]verextension of [the] Lanham Act . . . intrude[s] on First Amendment values." *Rogers v. Grimaldi,* 875 F.2d 994, 998 (2d Cir. 1989).

The decision of the Patent and Trademark Office ("PTO") to deny Mr. Tam's trademark application because the agency determined that the mark would disparage people of Asian descent merits demanding First Amendment scrutiny. Although denying a trademark does not prevent Mr. Tam from continuing to make music or to use the name "The Slants" in his music, it does deny him the benefits

of trademark registration for that name, and does so pursuant to a justification that must receive demanding scrutiny under the First Amendment.

However, in this and all other application decisions, this Court must also consider the First Amendment interests of the public. Granting a trademark in the first place limits speech, which is why Congress and the courts have cabined the grant and enforcement of trademark rights within boundaries imposed by the First Amendment. Considering the public interest at stake when trademarks are granted, alongside the interests of the trademark applicant, is necessary to preserve the delicate balance between private and public interests at the heart of the Lanham Act.

ARGUMENT

I. Trademark Law Balances the First Amendment Interests of the Members of the Public and the Interests of Trademark Owners

A long history of jurisprudence from this Court and others informs how the First Amendment applies in the present case. This jurisprudence recognizes that if a trademark monopoly were without limits, then trademark owners would be allowed to prevent anyone from engaging not only in commercial speech but also in speech that is critical or expressive.

Congress and courts have thus carefully circumscribed the grant of trademark rights and their enforcement. *Cf. Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 201 (1985) (noting safeguards in Lanham Act to prevent

commercial monopolization of language); *see also Eldred v. Ashcroft*, 537 U.S. 186, 221-22 (2003) (discussing "free speech safeguards" included in the Copyright Act to address First Amendment concerns). Judge Moore's claim that "*McGinley* is the only case of ours to consider . . . the First Amendment implications of § 2(a)" implicitly ignores this entire body of law.

A. Well-Established Limits on Granting Trademarks Protect First Amendment Interests of the Public at Large

When a trademark monopoly is granted, the interests of a single speaker collide with the First Amendment rights of everyone else whose expression is affected. This tension is at least partially resolved through limits on how trademarks are granted and the requirement that the extension of trademarks be justified in each case.

The public has a strong interest in preserving the availability of words for criticism, commentary and creative expression. As courts have long recognized, "language . . . was always deemed in the public domain." *J. Kohnstam, Ltd. v. Louis Marx & Co.*, 280 F.2d 437, 438 (C.C.P.A. 1960).

But a trademark "allows anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first." *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122 (2004). And "[w]hile the public and the trademark owner have an interest in preventing consumer confusion, there is

also a broad societal interest in preserving common, useful words for the public domain." *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1148 (9th Cir. 2002).

The Lanham Act and trademark law also generally have accommodated these interests by avoiding encroachment on common language unless and until that encroachment has been sufficiently justified. The public has an interest in ensuring access to this public domain to enable members of the public to engage in criticism, commentary and creative expression.

To remove *any* word from the public domain the government must thus justify the burden it places on free expression by doing so. Where a mark is the generic term for referring to a product, the mark is "not registerable." *Park 'N Fly*, 469 U.S. at 194. If a mark is merely descriptive, the applicant must overcome a barrier to protection by proving that some secondary meaning, an association with *its* particular brand, justifies obtaining exclusive rights in the word or phrase. *Decorations for Generations, Inc. v. Home Depot USA, Inc.*, 128 F. App'x 133, 136 (Fed. Cir. 2005).

The tension between these interests is illustrated in an analogous context by *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987), where the U.S. Olympic Committee, which had been granted the exclusive right to use the word "Olympic" by the Amateur Sports Act of 1978, sought to enforce these rights against the City and County of San Francisco. *Id.* at 526. The

Court noted that the U.S. Olympic Committee, like a trademark owner, was a private entity with exclusive rights in a particular word. *Id.* at 542. San Francisco had planned to use that word in the name of their "Gay Olympic Games," an event featuring games similar to the actual Olympic Games. The title of the event "convey[ed] a political statement about the status of homosexuals in society." *Id.* at 535. The Court carefully considered whether the underlying statute was constitutional in light of the First Amendment. *Id.* at 536-37 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)) .[3] The Court ultimately upheld the statute, but did so only after concluding that Congress had a variety of substantial and unique interests that justified vesting the word "Olympic" exclusively with the U.S. Olympic Committee. *Id.* at 537-39.

While these interests ultimately were held to justify the Amateur Sports Act, the rigor of the Court's analysis is indicative of the First Amendment interests at stake when monopoly rights in language are granted, and the rigor that should be applied in all cases.

[3] The Court also cited its precedent in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) as a potential basis for resolving the case, but it did so without "directly engag[ing] the first prong of *Central Hudson*." Rebecca Tushnet, *Trademark Law As Commercial Speech Regulation*, 58 S.C. L. Rev. 737, 756 n.59 (2007). "Instead, the Court applied the *O'Brien* test for evaluating content-neutral regulations." *Id.*

B. Once a Trademark is Granted, Rights Are Construed Narrowly to Avoid Stifling Protected Speech by the Public

The First Amendment likewise narrows the extent to which trademark owners can enforce their trademarks. Just as the government may not restrain free speech, trademark holders cannot use a government-provided monopoly to censor criticism, creative expression, competitive comparisons, or other speech protected by the First Amendment. These necessary limits once again reflect how the contours of trademark rights are shaped by a concern for the public's interest in free expression.

Trademark rights provide a mechanism for private entities to restrain speech by others, including potential critics and parodists. *See* Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1710-12 (1999) (discussing dozens of trademark disputes that raise free speech concerns); *see also* Scott Wells, *Sunlight Challenges a Trademark Takedown*, SUNLIGHT FOUNDATION (Sept. 30, 2014), http://sunlightfoundation.com/blog/2014/09/30/sunlight-challenges-a-trademark-takedown/ [http://perma.cc/MZB5-A924] (discussing a trademark takedown notice sent to a transparency-oriented nonprofit for providing information about a company's financial contributions to political candidates on a website). These suits diminish the public's ability "to discuss, portray, comment, criticize, and make fun of companies and their products." Lemley, *The Modern Lanham Act*, *supra* at 1710-11. Identifiable brands

can also become symbolic of ideas or beliefs worthy of criticism, parody, and discussion. "Trademarks often fill in gaps in our vocabulary and add a contemporary flavor to our expressions." *See Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 898-900 (9th Cir. 2002).

For these reasons, "Courts have uniformly understood that imposing liability under the Lanham Act for such speech is rife with First Amendment problems." *Radiance Found., Inc. v. NAACP*, _ F.3d _, No. 14-1568, 2015 WL 2372675 at *5 (4th Cir. May 19, 2015) . As a result, courts "construe the [Lanham] Act narrowly to avoid . . . conflict" with the First Amendment. *Rogers*, 875 F.2d at 998. In *Mattel*, for example, the Ninth Circuit considered whether a song "pok[ing] fun at Barbie" constituted trademark infringement. 296 F.3d at 901. The court held that the Lanham Act did not permit trademark owners to restrain artistic expression, endorsing the view expressed in *Rogers*. *Mattel*, 296 F.3d at 902. The song was outside the purview of the Lanham Act because "the use of Barbie in the song title clearly [was] relevant to the underlying work, namely, the song itself." *Id.*

In *Radiance Foundation, Inc. v. NAACP*, 2015 WL 2372675, the Fourth Circuit endorsed the view expressed in *Rogers* and *Mattel*. The court held that using a trademark in an article criticizing the NAACP's position on abortion was also outside the purview of the Lanham Act because "commentary . . . [is] not . . . infringing so long as the use of the mark does not create confusion as to source,

sponsorship, or affiliation." *Id.* at *11. "Any other holding would severely restrict all kinds of speakers from criticizing all manner of corporate positions and activities and propel the Lanham Act into treacherous constitutional terrain." *Id.*

Restricting the subjects available to speakers stifles First Amendment guarantees that are available to everyone in spite of trademark registration by a single person. In these cases, "applying the traditional test [of consumer confusion] fails to account for the full weight of the public's interest in free expression." *Mattel*, 296 F.3d at 900.

C. Congress Has Expanded Trademark Rights Carefully to Avoid Conflict with the First Amendment

The text of the Lanham Act and the legislative history of subsequent amendments reveal a sensitivity among members of Congress to the tension between the First Amendment and trademark law. Congress therefore took steps to minimize this tension, as *Rogers* and its progeny have done.

The classic fair use defense enshrined in the Lanham Act is one example of how Congress narrowed the scope of trademark rights to avoid friction with the First Amendment.[4] The use of a mark "which is descriptive of and used fairly and

[4] The Lanham Act includes other mechanisms as well. For example, third parties are empowered to petition for a trademark to be cancelled when the mark has become the generic way to refer to a particular type of product. 15 U.S.C. § 1064(c) (2012). This process reflected a compromise to appease critics who worried that federal trademark registration would create monopolies. *McCarthy on*

in good faith only to describe . . . goods or services" is not trademark infringement. 15 U.S.C. § 1115(b)(4) (2012).[5] This defense prevents entities from "depriv[ing] commercial speakers of the ordinary utility of descriptive words." *See KP Permanent Make-Up, Inc.*, 543 U.S. at 122. Even where the use of a mark results in some consumer confusion, courts have declined to read fair use out of the Lanham Act. *Id.* at 112. "The Lanham Act is carefully crafted to prevent commercial monopolization of language that otherwise belongs in the public domain." *See San Francisco Arts & Athletics*, 483 U.S. at 573.

In 1995, Congress expanded the reach of the Lanham Act by adding a cause of action for trademark dilution through the Federal Trademark Dilution Act ("FTDA"), but not without attempting to address concerns that overextending trademark rights might harm free expression. Congress explicitly provided that "parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner," "[a]ll forms of news reporting," and any

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Trademarks and Unfair Competition § 5:4 (4th ed. 2004). Cancelling existing marks once they become descriptive sets aside the interests of a trademark owner where a word's primary significance is expressive rather than source identifying.

[5] Courts have also recognized a *nominative* fair use defense, but "unlike classic fair use, nominative fair use is not specifically provided for by statute." *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1183, n.11 (9th Cir. 2010). Nominative fair use is yet another example of a judicially created release valve for the First Amendment. In passing the Federal Trademark Dilution Act ("FTDA"), Congress provided that "nominative or descriptive fair use" "shall not be actionable as dilution by blurring or dilution by tarnishment." 15 U.S.C. § 1125(c)(3)(A) (2012).

"noncommercial use" would not be actionable under the FTDA. 15 U.S.C. § 1125(c)(3)(A)(i) (2012), (3)(B), (3)(C) (2012).

The legislative history of the FTDA also reflects a recognition among members of Congress that at least these safeguards in the FTDA were necessary to preserve free expression. "[T]he FTDA's sponsors in both the House and the Senate were aware of the potential collision with the First Amendment." *Mattel*, 296 F.3d at 905, *see also* H.R. Rep. No. 104-374, 4, 1996 U.S.C.C.A.N. 1029, 1031 (discussing various "legitimate" First Amendment problems with the FTDA). The first attempt at adding antidilution provisions to the Lanham Act in 1988 failed "based on a concern that it might have applied to expression protected by the First Amendment." *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 431 (2003) (citation omitted). To address these concerns, Congress added the parody, commentary, noncommercial use exemptions noted above. *See Mattel*, 296 F.3d at 905. Congress also set a high threshold for a mark to qualify as famous, reserving dilution for "extraordinary" cases. *Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C.*, 212 F.3d 157, 173 (3d Cir. 2000).

The Lanham Act and the FTDA were not designed to eliminate criticism or diminish free speech, and in fact were crafted to minimize such diminishment. "The Lanham Act and First Amendment may be in tension at times, but they are not in conflict so long as the Act hews faithfully to the purposes for which it was

enacted." *Radiance*, 2015 WL 2372675 at *3. Adhering to these purposes has repeatedly required Congress and courts to accommodate the First Amendment rights at stake for third parties and the public at large.

II. The First Amendment Prevents the Government From Abridging Freedom of Speech Whether that Freedom is Exercised By a Trademark Applicant or a Member of the Public

Trademark law and the Lanham Act must, in accordance with the First Amendment, balance the interests of both trademark applicants and the public at large. This leads to three particular conclusions: First, *In re McGinley* was wrongly decided in ignoring the First Amendment interests of the trademark applicant. Second, the speech interests of the public must be accounted for (in addition to those of the registrant) in analyzing the Lanham Act under the First Amendment. Third, applying the First Amendment solely on behalf of trademark applicants will undermine the PTO's legitimate efforts to accommodate free speech—a priority that Congress and courts have preserved elsewhere in trademark law and should continue to preserve here.

A. An Applicant Has First Amendment Interest in Registering A Trademark; Thus Application Denials Must be Subject to First Amendment Scrutiny

The core principle of the First Amendment that the government may not censor speech it dislikes must apply in the trademark context just as it does in every other context involving private speech. *In re McGinley*, in which the

predecessor to this Court held that the PTO's refusal to register a mark did not implicate the applicant's First Amendment rights because the refusal did not prevent the applicant from using the mark or expressing himself as he wished, should thus not be followed. 660 F.2d 481, 484 (C.C.P.A. 1981). Over the past thirty years since *In re McGinley* was decided, however, other courts have increasingly recognized that the government may not circumvent the First Amendment by denying benefits to particular speakers who express disfavored or unpopular views. These cases undermine the continuing validity of *In re McGinley* and establish that applicants in fact have First Amendment interests at stake when their trademark application is denied.[6]

Effectively, the TTAB and the PTO, in applying the subjective disparagement standards, have "created a regime that allows [them] to select what . . . speech is safe for public consumption." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010). Examples from past denials reflect the extent

[6] An argument could be made that issuance of a trademark could be characterized as "government speech" properly subject to discretion similar to the issuance of specialty license plates just upheld in *Walker v. Texas Division, Sons of Confederate Veterans*, No. 14-144, 576 U.S. _, slip op. at 5-7 (June 16, 2015). The grant of a trademark, however, can be distinguished from the government speech at issue in *Walker*. Here, the grant of a trademark is not government speech; it involves far less government endorsement as the mark will be used by and, in fact, serve to identify the registrant, and will potentially be used by the public. Those interests are significantly different than those implicated by issuing license plates, items that, unlike trademarks, "'are often closely identified in the public mind with the [State]'" and are, "essentially, government IDs." *Id.* at 10.

to which the Trademark Trial and Appeal Board ("TTAB") and the PTO scrutinize the content of a mark and the viewpoint the mark will be used for in commerce when rejecting marks as "disparaging" or "immoral." For example, the TTAB denied registration for a mark used "in close proximity" to "imagery . . . of extreme nihilism . . . and dozens of examples of other imagery lacking in taste." *In re Brunetti*, 85310960, 2014 WL 3976439, at *2, *4 (Aug. 1, 2014). Not only has the TTAB denied registration for marks that relate directly to political speech, it has done so in an inconsistent manner. *Compare Office Action*, Serial No. 85/077647 (Oct. 13, 2010) (denying a mark for "Have you heard that Satan is a Republican?" because it disparaged the Republican party), *with Office Action*, Serial No. 85/525066 (Aug. 14, 2012) (approving a mark for "The Devil is a Democrat").

Accordingly, the denial of an application must be subject to First Amendment scrutiny and *In re McGinley* should not be followed on this point.

B. The Public's First Amendment Interests Also Must Be Considered Alongside Those of An Applicant

While the First Amendment interests of trademark applicants are significant, it is equally important to recognize that the decision to grant or deny a trademark (as well as to enforce it after it is issued) does not solely concern the applicant's First Amendment interests—it implicates First Amendment interests of members of the public, as well. This potential to impact both sets of rights is a distinct

feature of trademark law that differentiates the denial or grant of a trademark from instances where the First Amendment militates unilaterally against government censorship and the only consideration is the speaker's rights against any government interests.

Promoting free speech generally adds to the volume of ideas and speakers in the marketplace. *See Citizens United*, 558 U.S. at 314. Granting a trademark, however, does not do so; rather, it restricts the abilities of members of the public to speak using the trademarked words. It is for this reason that Congress and courts have consistently shaped trademark rights in light of the public interest in free speech.

Compare how the First Amendment applies when the government directly censors speech and when it declines to grant a trademark: In *Perry v. Sindermann*, 408 U.S. 593 (1972), which established the foundation for the unconstitutional conditions doctrine in the context of the First Amendment, the Court held that the government could not deny a professor the benefits of employment in retaliation for criticizing his university. *Id.* at 597. Protecting the professor's speech in that case under the First Amendment ensured more speech by the professor but did not burden the speech of others. Thus the appropriate balance involved his First Amendment rights against any government interests in restricting those rights.

If protecting the speech rights of the professor in *Perry* had resulted in only him being able to speak on a particular topic and others being excluded, however—analogous to granting the professor a trademark—different interests would need to be balanced. The professor's rights would come at the expense of other members of the public, and would need to be analyzed specifically with regard to the speech interests of those third parties, not just relevant government interests. In this case, if the PTO refuses to grant a trademark for use of "THE SLANTS," Mr. Tam's speech interests will be affected but the public will remain free to use the name. But if the PTO grants the trademark, only Mr. Tam will be able to use it in commerce and any other bands wishing to use it will be prevented from doing so. Thus, there are important First Amendment interests on the parts of both trademark applicants and members of the public, and courts should carefully consider both interests when analyzing the denial of a trademark application.

The original panel considering this case did not fully credit the public interest in free expression that is at stake when a trademark is granted. Even in expressing her additional views, Judge Moore focused on the First Amendment interests of Mr. Tam and the lack of any compelling interest offered by the government. *In re Tam*, 785 F.3d 567, 573-85 (Fed. Cir.) *reh'g en banc granted*, *opinion vacated*, 600 F. App'x 775 (Fed. Cir. 2015). Amicus expresses no view on whether the public's speech interests justify denying trademark registration to the

plaintiff, but the First Amendment does not unilaterally exert a force on behalf of trademark applicants. If the grant of a trademark provides a benefit, it is one at least partly paid for by the public.[7] Granting the plaintiff's mark takes a word from the public domain, which should not be done without acknowledgement of the costs for free expression.

C. Considering the Public's Interest in Free Expression Maintains the Proper Balance Between the First Amendment and the Lanham Act

Emphasizing only the rights of trademark owners without considering the public interest in free expression may disrupt safeguards in place to accommodate the First Amendment. For example, unilaterally wielding the First Amendment to protect trademark applicants could undermine the PTO's ability to deny descriptive or generic marks, which is critical to maintaining free speech.

Future cases may present a circumstance where denial is justified by a different, and likely substantial, government interest, such as denying descriptive or misleading marks. In these cases, the PTO must make content-based distinctions

[7] Although administration of the PTO is largely paid for by user fees, *Figueroa v. United States*, 466 F.3d 1023, 1028 (Fed. Cir. 2006), these fees do not minimize non-monetary costs to free expression. Congress and courts have consistently recognized that these non-monetary costs are significant, however, and they have developed limitations on the Lanham Act with these costs in mind. *See* pp 3-12, *supra*.

in deciding whether to grant a trademark.[8] Such denials can be distinguished from the PTO's decision in this case when the public's First Amendment interests are accounted for. The public's interest in their ability to use arguably disparaging terms to describe themselves in commerce is far weaker than their interest in being able to use generic terms, or terms similar to that of the mark in commerce.

Because this case may serve as precedent in future challenges to denials of marks, we urge the court to craft a rule that gives proper consideration to all of the First Amendment rights at stake. Explicitly noting that the public interest in free expression is at least an important part of the analysis in evaluating the grant of a trademark, as recognized by Congress in designing the Lanham Act and courts in interpreting the Act, will establish a basis for future courts and the PTO to deny overly descriptive or misleading marks. If the public interest in free expression is not included as a necessary ingredient, in this case and future cases, then the PTO's power to deny descriptive or misleading trademarks may be eroded. A clear signal to the PTO will reinforce an important tool for balancing private and public interests in trademark law.

Likewise, sensitivity to the public's interest in free expression in the grant of a trademark could add momentum to the trend, from *Rogers* to *Radiance*, of

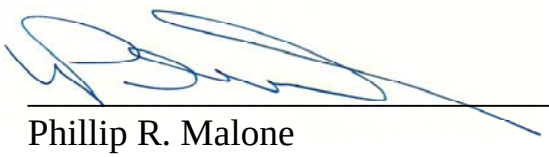
[8] A descriptive mark "describes the qualities or characteristics of a good or service." *Park 'N Fly*, 469 U.S. at 194. Denying a mark because of what it describes could be considered a content-based restriction on speech.

guarding free expression from overextended trademark enforcement. "Trademark theory offers no justification for . . . suppression of speech. It is an unintended consequence of the tendency to give unfettered property rights to trademark owners." Lemley, *The Modern Lanham Act*, *supra*, at 1713.

It may be that the Lanham Act as a whole is ripe for examination under the First Amendment. Rebecca Tushnet, *Trademark Law As Commercial Speech Regulation*, 58 S.C. L. Rev. 737, 755 (2007). However, the First Amendment has always played a role in the development of trademark law. The First Amendment permits neither unfettered trademark rights nor plenary power to deny trademark rights. *See San Francisco Arts & Athletics*, 483 U.S. at 532. Instead, it acts as a moderating force on behalf of trademark owners and the public. The balancing of these interests is necessary for a healthy relationship between trademark rights and free speech to continue.

CONCLUSION

For the aforementioned reasons, this Court should ensure that its decision explicitly considers the First Amendment interests of *both* trademark applicants and the public.



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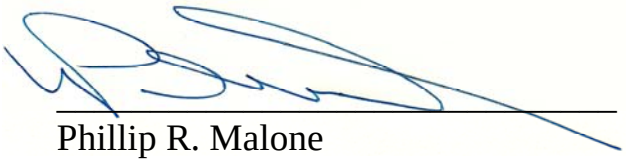

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e). The brief contains 4639 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

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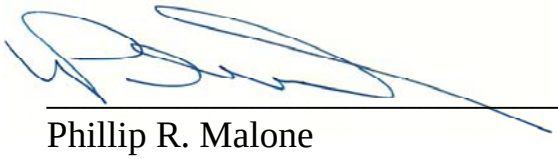

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

IN RE: SIMON SHIAO TAM
No. 14-1203

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for Amicus Curiae certifies that:

1. The full name of every party or amicus represented by me is:

Public Knowledge

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

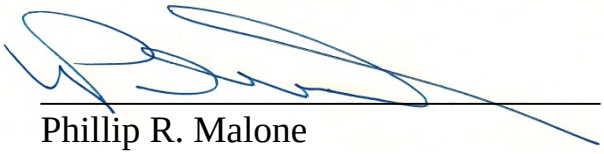
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Phillip R. Malone and Jef Pearlman
Juelsgaard Intellectual Property and Innovation Clinic
Mills Legal Clinic at Stanford Law School

Dated: June 18, 2015



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