

**Trading Sex, Marking Bodies:  
Pornographic Trademarks and the Lanham Act**

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**INTRODUCTION**

In late 2007, reports of the racially motivated rape, torture, and false imprisonment of Megan Williams hit local and national news circuits.<sup>1</sup> Williams, a black woman, accompanied a friend named Christa to what Williams thought was a party in Logan County, West Virginia. Upon arrival to their destination, which turned out to be a mobile home and shed, Christa told Williams to go inside and wait while Christa went down the road to a friend's house, promising to return momentarily (which she never did).<sup>2</sup> For

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<sup>1</sup> See generally, *No hate crime charges in W. Va. torture*, USA TODAY, Sept. 13, 2007, [http://www.usatoday.com/news/nation/2007-09-10-woman-tortured\\_N.htm](http://www.usatoday.com/news/nation/2007-09-10-woman-tortured_N.htm); *Two More Sentenced in Logan Torture Case*, WOWK-TV, Mar. 13, 2008, <http://wowktv.com/story.cfm?func=viewstory&storyid=35981&catid=43>; *Fifth Person Pleads Guilty in Megan Williams Case*, WOWK-TV, July 17, 2008, <http://wowktv.com/story.cfm?func=viewstory&storyid=41369>; Gil McClanahan, *Megan Williams Torture Case Is Over*, WOWK-TV, Sept. 29, 2008, <http://wowktv.com/story.cfm?func=viewstory&storyid=44682>.

<sup>2</sup> Interview by The Final Call with Megan Williams, in Charleston, W. Va. (Oct. 9, 2007), available at [http://www.finalcall.com/artman/publish/article\\_3997.shtml](http://www.finalcall.com/artman/publish/article_3997.shtml) [hereinafter The Final Call]. It is unclear whether Christa was actually a friend of Megan's. In this interview, Megan Williams describes Christa as "a girl I knew..." Megan's Williams' adopted mother recalled:

at least one week, six white assailants allegedly “physically, mentally and sexually abused” Williams while she was trapped inside the mobile home.<sup>3</sup> Williams accused her captors of trying to cut her foot off, noting that this was “what [they did] to niggers up here.”<sup>4</sup> The threat to cut her foot off was a not so thinly veiled reference to what slave masters often did to their slaves in order to prevent their escape.<sup>5</sup> Williams further accused her captors of whipping her while forcing her to “pick green beans out of the garden”<sup>6</sup>, and making her eat feces and drink urine. Williams was saved when a local boy caught a glimpse of her in a window and called the police. After Megan Williams’ captors were convicted on multiple criminal counts,<sup>7</sup> Williams

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it was a setup, [Christa] left her there. When Megan was in the hospital, Christa called and I answered the phone. Christa was asking, ‘how is my friend?’ I told her that she wasn’t a friend of Megan’s because she left her. Christa then hung up the phone. We have not seen or heard from Christa since that time.

When reporters asked Megan whether she believed Christa was involved in arranging her capture, she nodded in the affirmative. *Id.*

<sup>3</sup> Jennifer Dorr, *Torture suspects may face hate crime charges*, CNN.COM, Sept. 11, 2007, <http://www.cnn.com/2007/US/09/11/woman.tortured/index.html>.

<sup>4</sup> *The Final Call*, *supra* note 2; *see also* Logan County, West Virginia Sheriff’s Department Criminal Complaints, Sept. 8, 2007 (on file with author), *available at* <http://www.thesmokinggun.com/archive/years/2007/0911071logansix1.html>. Case numbers: 07F89597, 07F89194, 07F88990, 07F88687, 07F888.

<sup>5</sup> More specifically, this was a reference to Kunta Kinte. Megan notes:

They kicked me in the head with steel toed boots, they hit me in the head with several objects, I remember seeing a knife, and they tried to cut my foot off. *They told me that is what they did to Kunta Kinte when they cut his foot off so he couldn’t run* and that is what they were going to do to me.

*The Final Call*, *supra* note 2 (emphasis added). Kunta Kinte was the central character in Alex Haley’s novel, and subsequent mini-series, *Roots: The Saga of an American Family*. The character was a Muslim of the Mandinka tribe who was captured and brought as a slave to Annapolis, Maryland, and later sold to a plantation owner in Spotsylvania County, Virginia near the present-day rural community of Partlow. After several escape attempts, the slave masters in the story cut off Kunta’s foot so as to prevent future escape attempts.

<sup>6</sup> *The Final Call*, *supra* note 2.

<sup>7</sup> The six whites involved in this attack are Frankie Brewster (49), Bobby Brewster (25), Danny Combs (20), George Messer (27), Karen Burton (46), and Alisha Burton (23). Frankie Brewster, Bobby’s mother, had been previously convicted of manslaughter and served five years in prison for the death of an 84-year old woman

recanted parts of her story.<sup>8</sup> Despite this, former Logan County prosecutor Brian Abraham told reporters that the seven defendants were convicted on their own statements and physical evidence – not on Williams' statement or account of what happened.<sup>9</sup> Regardless of their veracity, the alleged events paint a dark picture of racial hatred and sexual violence.

Suppose now that an adult film company decides to make a film that exhibited similar themes of racially sexualized violence. Let's say that the company opens their pornographic scene with a black woman named Olivia shackled, like a slave, in a small room with a couch. Two white men approach Olivia and ask for her name. Olivia first responds that her name is "Toby,"<sup>10</sup> before telling the men her real name. While being hit repeatedly on

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in 1994. She is now facing 10 to 25 years in prison for the sexual assault of Megan Williams. Bobby Brewster plead guilty to second-degree sexual assault, conspiracy to commit kidnapping and malicious assault. He has been sentenced to between 13 and 40 years in prison. Danny Combs could spend up to 20 years in prison, as he plead guilty to sexual assault, assault during the commission of a felony, and conspiracy to commit kidnapping. Karen Burton plead guilty to malicious assault and assault during the commission of a felony. Karen was the only perpetrator charged with a hate crime, for her use of a racial slur while she stabbed Megan in the ankle. She is facing up to 30 years in prison. Finally, Karen's daughter Alisha plead guilty to kidnapping and assault, receiving a 10-year sentence.

*See generally supra* note 1.

<sup>8</sup> Gary A. Harki, *Williams Abuse Case: Torture victim's story changes again*, THE CHARLESTON GAZETTE, Nov. 6, 2009, available at 2009 WLNR 22446591.

<sup>9</sup> *Woman says she lied about torture by whites to get back at boyfriend*, THE GRIO, Oct. 22, 2009, <http://www.thegrio.com/2009/10/west-virginia-woman-says-she-lied-about-torture-by-whites.php>. The article continues:

Brian Abraham, the former Logan County prosecutor who pursued the cases, said authorities realized early in the investigation that they could not rely on statements from Williams, who tended to embellish and exaggerate details. Instead, he said, the seven defendants were convicted on their own statements and physical evidence. "If she's going to say that she made it all up, that's absurd," Abraham said. "This looks like another attempt to generate more publicity."

*Id.*

<sup>10</sup> This is another reference to Alex Haley's *Roots*. In one of the film's most memorable scenes, a slave master ties Kunta Kinte to a tree with his back exposed. The slave master proceeds to whip Kunta, while demanding that he respond to what was to be his slave name, "Toby." This re-naming ceremony, an attempt to rob Africans of their cultural identity, was a tactic commonly used during slavery. As

the buttocks with a makeshift whip, the two men begin inspecting Olivia's shackles. One of the men notices that Olivia's left shackle is loose. He explains that a "Northerner" must have tied it.<sup>11</sup> The men then begin to penetrate Olivia, gagging her with their penises, causing her to wretch and cry. Olivia stays shackled for 28 minutes while enduring constant verbal abuse, and extreme oral and vaginal penetration. The film then fades into a shot of Olivia sweeping the floor with a broom. As she sweeps, she hums what sounds like a slave hymn – songs sung by slaves as they worked on plantations. After several minutes, the two white men return to penetrate Olivia again, ejaculating on her face when they were done.

Finally, assume that before distribution, the filmmakers petitioned the United States Patent and Trademark Office ("PTO") to register the name *Ghetto Gaggers* for use in connection with the sale of the above-mentioned scene. Registration of a trademark with the PTO allows a company to exclusively use a mark in connection with the sale of its products (e.g., the image of the contour-shaped bottle, as well as the name *Coca-Cola*, are trademarked by Coca-Cola in connection with the sale of non-alcoholic, carbonated soft drinks). Registration also gives companies the rights to sue trademark infringers. Not all trademarks, however, are eligible for registration. The Lanham Act<sup>12</sup> ("Act") prescribes limits on the types of trademarks that can be registered with the government. Section 2(a)<sup>13</sup> of the Act prohibits the registration of trademarks which "consist[] of or comprise[] immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute...."<sup>14</sup> Despite this seemingly restrictive limit on the registration of trademarks with the federal government, Section 2(a) did not prevent the PTO from registering *Ghetto Gaggers* for use in connection with the material in Olivia's pornographic scene.<sup>15</sup>

If *Ghetto Gaggers*, when used in connection with the scene above, does not constitute matter that "may disparage... persons living or dead... or bring them into contempt or disrepute," then what does? This Note will examine

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Kunta resisted the re-naming, he was beaten further.

<sup>11</sup> *Ghetto Gaggers: Olivia*, <http://www.ghettogaggers.com/tour3/index.php?page=9&nats=MzEzODoyOjEx,0,0,0,0>.

<sup>12</sup> 15 U.S.C. § 1052.

<sup>13</sup> 15 U.S.C. § 1052(a).

<sup>14</sup> *Id.*

<sup>15</sup> <http://www.uspto.gov/index.html> (follow "Search Marks" hyperlink; then follow "New User Form Search (Basic)" hyperlink; Search "Ghetto Gaggers;" then follow "Ghetto Gaggers GG" hyperlink).

the case law surrounding Section 2(a)'s prohibition on disparaging trademarks. In doing so, I point to several examples of pornographic trademarks registered with the federal government to illustrate the way pornographic trademarks "make[] [racism, sexism, and homophobia] sexy, thereby legitimating, nourishing, and reinforcing... stereotypes, bigotry, and mistreatment."<sup>16</sup> Further, I contend that the registration of these trademarks both amounts to a governmental sanction of the goods and/or services the trademark represents, and works to undermine the nation's normative commitment to equality by assisting those who profit from sexual and racial subordination.<sup>17</sup>

In Part I of this Note, I will provide a brief background on the Act and how the trademark process works. I will describe what a trademark is, how the PTO determines what trademarks can and cannot be registered, and how, through a process known as cancellation, a person can challenge the registration of a trademark that they believe violates Section 2(a).

Part II provides a list of privileges that come along with trademark registration. After explaining these privileges, I interrogate the normative implications of court decisions regarding the validity of a trademark under Section 2(a). I note that when courts make a seemingly neutral decision regarding the disparaging nature of a mark, they are in effect making normative assessments, which create relative levels of repute amongst society. In other words, when the PTO says that *Ghetto Giggers* is not disparaging to black women, they are saying that it is not disreputable, disparaging or offensive to black women to present them as (sex) slaves available for (sexual) abuse by white men.

The current doctrinal framework for determining the disparaging nature of a registered trademark was expressed in *Harjo v. Pro-Football, Inc.*<sup>18</sup>

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<sup>16</sup> GAIL DINES, ROBERT JENSEN, & ANN RUSSO, *PORNOGRAPHY: THE PRODUCTION AND CONSUMPTION OF INEQUALITY* 20 (1998).

<sup>17</sup> *Id.*

<sup>18</sup> *Harjo v. Pro-Football, Inc.*, 284 F. Supp. 2d 96 (D.D.C. 2003). In *Harjo*, a group of Native Americans brought an action to cancel the registration of several trademarks owned by Pro-Football, Inc., the parent company of the Washington Redskins football team. Among these marks were "REDSKINS," "WASHINGTON REDSKINS," and "REDSKIN-ETTES," as well as the profile image of a Native American that generally represents the Washington Redskins. Those who brought the suit argued that the trademarks were "pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for a Native American person... [and that] in the context used by registrant, is offensive, disparaging and scandalous... and that registrant's use of the marks in the identified registrations 'offends'... Native Americans." *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 5 (T.T.A.B. 1999).

In *Harjo*, the district court framed the test as one in which the court asks two questions: (1) What is the meaning of the matter in question, as it appears in the marks and as those marks are used in connection with the services identified in the registrations?<sup>19</sup> and (2) Is this meaning of the mark “one [that a] substantial composite of those referred to, identified or implicated in some recognizable manner by the mark, [would] view... as dishonoring them by comparison with what is inferior, slighting them, deprecating them, degrading them, or affecting or injuring them by unjust comparison?”<sup>20</sup> In analyzing these inquiries, the court looks to dictionary definitions, surveys of the affected groups, historical evidence, and anything else the court may think relevant to the determination.

Part III applies the *Harjo* test to several trademarks used in connection with sexually explicit material and currently registered with the PTO. I first analyze each mark by evaluating its meaning in relation to its dictionary definitions. These dictionary definitions are to be read in the context of the good and services it is used in connection with. As such, I describe the scenes and marketing material used in connection with the registered trademark. Then I approach the second prong of the *Harjo* test, which calls for the opinions of the affected population. Here, I draw on the commentary on race, gender, sexuality and the law by critical race theorists, feminist legal theorists, and queer theorists.<sup>21</sup> The range of opinions

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The TTAB agreed with the Native American plaintiffs, but the district court reversed. In its reversal, the district court did not explain what *would* constitute a substantial composite of the affected population. Instead, the court simply concluded that a substantial composite of the Native American population did not find the term “redskin” offensive, despite survey results indicating “that 46.2% of the general population sample would be personally offended by the use of the term ‘redskin’ and 36.6% of the Native American population sample would be personally offended by the use of the term ‘redskin.’” In addition, the court noted that “in [the context of professional football, the] term ‘redskin(s)’ was not considered offensive.” *Harjo*, 284 F. Supp. 2d at 130.

<sup>19</sup> *Harjo*, 284 F. Supp. 2d at 125.

<sup>20</sup> *Id.* at 123.

<sup>21</sup> One may take me to task for looking to academic circles for opinions on the disparaging nature of pornographic trademarks. I use this material for two reasons, one normative, and one practical. Normatively, these scholars, wherever they fall on the spectrum regarding this question, have very interesting insights into issues of race, sexuality and the law. They are experts in their respective fields, and as such, their comments are valuable. Practically, there is no way for me (other than to conduct a survey, which is beyond the scope of this Note) to accurately measure the feelings of a substantial composite of the affected population. In fact, this is one of the evidentiary hurdles facing those who move for trademark cancellation. As such, I ask the reader to bear with the fact that the voice of the “average affected person” may

regarding sexually explicit content, particularly from within traditionally subordinated communities,<sup>22</sup> is illustrative of the diversity of the subordinated experience, as well as the unique nature of identity reclamation.<sup>23</sup> Thusly, depending on the trademark and the content it is used in connection with, subordinated groups may come to different outcomes on what the content means. This diversity, along with other evidentiary issues facing Section 2(a) challenges, make gaining consensus on the question of disparagement difficult.

Part IV addresses the general critique of Section 2(a)'s prohibition, namely that it violates the right to free speech. While the judiciary has generally avoided answering this question in great detail, some argue that Section 2(a) may implicate the First Amendment's viewpoint discrimination or commercial speech doctrines. While a deep engagement in First Amendment jurisprudence is not the aim of this comment, I acknowledge and attempt to ease concerns regarding free speech. I discuss the importance of the government spending its resources promoting positive images of subordinated people, as well as the fact that Section 2(a) does not actually prevent the use of the trademarks in question.

Part V concludes that simply cancelling disparaging trademarks via a Section 2(a) challenge will not end subordination and oppression. Nonetheless, I argue that there are two net benefits to this cancellation. First, it is important to recognize the government's involvement in this endeavor. The government's protection of trademarks used in connection with sexually explicit and pornographic goods and services that disparage subordinated groups of people is functionally, though not legally, an endorsement of such content. While I would not want the government to provide, among other things, judicial protection to disparaging marks, I would not necessarily trust determinations of disparagement against subordinated groups to a largely politically and judicially conservative, white, heterosexual, male judiciary.

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not be heard in this Note.

<sup>22</sup> I use the term "subordinated" and "marginalized" throughout this comment coextensively. The terms "subordinated" and "marginalized" describe disadvantaged social groups, including queer people, people of color, and women.

<sup>23</sup> By "reclamation," I speak of proactive methods that subordinated groups take to re-define their identities (e.g., racial, sexual, and/or gender identities). When I refer to anti-pornography advocates, I speak of those who argue that pornography cannot be used for positive purposes as it is, in and of itself, an oppressive institution that serves as the lynchpin of male supremacy. When I refer to sex-positivists, I am talking about those who believe that pornography and sexually explicit material can serve as a site of contestation for oppression. Sex-positivists, therefore, would believe that the reclamation of identity through pornography is possible, while anti-pornography advocates would eschew this position.

Whatever one's conclusions, however, the role of the PTO and the judiciary in this process is important to examine. Secondly, I hope to continue the project of critical race theory, namely by understanding and identifying the interconnections and symbiotic nature of law, race, gender, and sexuality. Adding to the critical discussion, the role trademark law plays in protecting symbols of subordination is an interesting and valuable inquiry.

## I. Trademark Law

### A. The Lanham Act – 15 U.S.C. § 1052

In 1946, President Truman signed into law the Lanham Act,<sup>24</sup> setting forth the right of entities (both individuals and companies) to attain federal registration of the trademarks they used in connection with their goods or services. Federal registration protects an owner's right to the exclusive use of a trademark and provides a remedy if a non-registrant uses the trademark without the owner's permission. A "trademark" is "a word, name, symbol, device, or other designation, or a combination of such designations, that is distinctive of a person's goods or services and that is used in a manner that identifies those goods or services and distinguishes them from the goods and services of others."<sup>25</sup> Although trademarks can consist of symbols, characters, sounds, and much more, "[w]ords remain the most common type of trademark."<sup>26</sup> These words (like other marks) are registered for use in connection with the particular goods or services provided.<sup>27</sup>

### B. The Trademark Process

When a company or individual wishes to register a trademark with the PTO, they must first ensure that the trademark is not already registered for exclusive use by another registrant.<sup>28</sup> A company or individual can do this by accessing the Trademark database on the PTO website.<sup>29</sup> After making sure the trademark is not already registered, an entity should begin to use the

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<sup>24</sup> 15 U.S.C. § 1052.

<sup>25</sup> JANE C. GINSBURG, ET AL., *TRADEMARK AND UNFAIR COMPETITION: CASES AND MATERIALS* 43 (4th ed. 2007).

<sup>26</sup> *Id.* at 44.

<sup>27</sup> "[S]uch as the word FORD used in connection with the sale of automobiles or KODAK used in connection with cameras." *Id.*

<sup>28</sup> *Id.* at 172.

<sup>29</sup> United States Patent and Trademark Office, <http://www.uspto.gov/index.jsp> (follow "Search Marks" hyperlink; then follow "New User Form Search (Basic)" hyperlink).

mark in connection with the goods and services in question, as well as file an “intent-to-use” application for federal registration.<sup>30</sup> The party then files an application to register the mark with the PTO, which is reviewed about six months after receipt by the PTO.<sup>31</sup> This review includes an analysis of whether the proposed mark violates prohibitions set forth in Section 2(a) of the Act.

Section 2(a) of the Act states, in relevant part, that no trademark shall be refused registration on the federal register on account of its nature unless it “[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”<sup>32</sup> A trademark attorney (“examiner”) examines the application for the proposed trademark and, if the application is approved, the trademark is registered and published in the *Official Gazette of the U.S. Patent and Trademark Office*.<sup>33</sup> The publication of the trademark gives owners the right of exclusive use, incontestability, import rights, protection against counterfeiting, evidentiary advantages, use of the ® symbol, and can give the registrant a basis to register their trademark internationally.<sup>34</sup> Registration also starts a statute of limitations for those who wish to cancel the registration of the trademark because they believe it violates Section 2(a).<sup>35</sup> While Section 14 of the Act states that if a registered mark violates Section 2(a) “[a] petition to cancel a registration of a mark... may... be filed... [a]t any time,”<sup>36</sup> this action is limited by the equitable defense of laches.<sup>37</sup>

If, however, a registrant’s application is not approved, a registrant can ask the PTO attorneys to review the application again. If this fails, registrants

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<sup>30</sup> GINSBURG, *supra* note 25, at 172.

<sup>31</sup> *Id.* at 174.

<sup>32</sup> 15 U.S.C. § 1052(a). Most states also include similar provisions in their regulations regarding the registration of trademarks with the state government. See Theodore H. Davis, Jr., *Registration of Scandalous, Immoral, and Disparaging Matter Under Section 2(a) of the Lanham Act: Can One Man’s Vulgarity Be Another’s Registered Trademark?*, 83 TRADEMARK REP. 801 (1993).

<sup>33</sup> GINSBURG, *supra* note 25, at 175; *The Official Gazette* is available online at <http://www.uspto.gov/web/trademarks/tmog/>.

<sup>34</sup> *Id.* at 177-78.

<sup>35</sup> *Id.* at 176.

<sup>36</sup> 15 U.S.C. § 1064 (emphasis added).

<sup>37</sup> *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 47 (D.C. Cir. 2005) (explaining the equitable defense of laches as “founded on the notion that equity aids the vigilant and not those who slumber on their rights,” thus requiring a party to prove prejudice in order to successfully invoke laches) (internal citations omitted).

can bring an appeal to the Trademark Trial Appeals Board ("TTAB").<sup>38</sup> The TTAB is an adjudicatory board within the PTO. The TTAB's decisions operate as internal precedent.<sup>39</sup> The TTAB's determinations are subject to review before the federal district court sitting in the District of Columbia, the Court of Appeals for the Federal Circuit, and the U.S. Supreme Court.

## II. What Does Trademark Registration Mean?

In *Ritchie v. Simpson*,<sup>40</sup> the TTAB stated in dicta that "the issuance of a registration does not indicate any endorsement of the goods on which the mark is used, [and] it also does not imply the government's pronouncement that the mark is a good one, from an aesthetic or any other viewpoint."<sup>41</sup> Others have claimed that because PTO is funded through user-fees, rather than through tax revenue,<sup>42</sup> the government is not situating itself as a proponent of any particular speech the trademark may represent.<sup>43</sup> These arguments fail to recognize the importance of governmental action regarding qualitative, subjective decisions. Registration's conferral of substantive rights acts as an endorsement of the content's worthiness to be protected by the federal government. Furthermore, legal decisions do not merely reflect racial

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<sup>38</sup> See e.g., *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 1370 (Fed. Cir. 1994).

<sup>39</sup> This Article III-like phenomenon of quasi-*stare decisis* in administrative boards is the general custom with administrative adjudicatory boards. See RONALD A. CASS, ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 503 (5th ed. 2006).

<sup>40</sup> *Ritchie v. Simpson*, 41 U.S.P.Q.2d 1859 (T.T.A.B. 1997), *rev'd on other grounds*, 170 F.3d 1092 (Fed. Cir. 1999).

<sup>41</sup> *Id.*

<sup>42</sup> Danwill Schwender, *Congressional Trademark Delusion: Section 2(a) Expands the Unclean Hands Doctrine Too Far*, 48 IDEA 225, 239 (2008) (citing the Omnibus Budget Reconciliation Act of 1990 § 10101, Pub. L. No. 101-508, 104 Stat. 1388, 1391); see also Davis, *supra* note 32, at 835. Other fee-supported departments include the Federal Communications Commission, the Securities and Exchange Commission, and the Federal Trade Commission. See UNITED STATES GENERAL ACCOUNTING OFFICE, 105TH CONG., *FEDERAL USER FEES: BUDGETARY TREATMENT, STATUS, AND EMERGING MANAGEMENT ISSUES*, (1997), available at <http://www.gao.gov/cgi-bin/getrpt?GAO/AIMD-98-11>; Sabra Chartrand, *Patents; The patent office argues that the government should just let it live off what it gets from inventors*, N.Y. TIMES, Feb. 9, 2004, <http://query.nytimes.com/gst/fullpage.html?res=9A06E4DF173AF93AA35751C0A9629C8B63>; but see Thomas J. Engellenner, *How I See It:*

*U.S. Patent office's new rules are way off the mark*, J. OF NEW ENG. TECH., Sept. 3, 2007, <http://www.masshightech.com/stories/2007/09/03/editorial2-U.S.-Patent-office%27s-new-rules-are-way-off-the-mark.html> (arguing that the PTO is severely underfunded because of revenue diversion from the federal government).

<sup>43</sup> Schwender, *supra* note 42, at 239.

realities, but in fact assist in the construction of our conception of racial realities, creating quasi-universal understandings of right and wrong, true and false.<sup>44</sup> When it becomes a legal fact that the use of the term “Black Tail” in connection with sexually explicit depictions of black women does not disparage black women, the fact is naturalized. That is, because the law is understood as coming to empirical conclusions, based on seemingly pre-discursive facts, black female hypersexuality becomes natural, rather than disparaging. This makes contestations of this caricature of black female identity very difficult.<sup>45</sup> As such, when an examiner or a Judge makes a factual determination<sup>46</sup> on whether a subordinated group is being disparaged, there is invariably a normative impact.

#### A. Benefits of Trademark Registration

Even though the PTO operates on registrant-fees, rather than tax-dollars, both the federal government and the registrant(s) benefit greatly from the transaction. First, the federal government diverts revenue from the PTO to fund other federal government programs. In *Figueroa v. United States*,<sup>47</sup> the Court of Appeals for the Federal Circuit heard the challenge of a patent registrant who argued that the federal government, through the PTO, could not charge more than its operating costs, and then siphon the excess revenue. The court “reject[ed] Figueroa's contention that the fees were categorically beyond Congress's power under the Patent Clause because Congress under that Clause cannot impose fees that exceed the costs of operating the PTO.”<sup>48</sup> Because of their ability to siphon funds from the PTO, the federal government is, at the very least, incentivized to approve the registration of trademarks, even if they are disparaging, so that it can pay for programs in other areas.

Secondly, the federal government provides registrants with several rights and benefits not afforded to those denied registration. Jane Ginsburg's trademark treatise notes ten “Advantages of Trademark Registration on the

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<sup>44</sup> IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 9-10 (1997) (noting that “[the law's] centrality in the constitution of society is especially pronounced in highly legalized and bureaucratized late-industrial democracies such as the United States.”).

<sup>45</sup> See *infra* Part II.C.

<sup>46</sup> “The Court concludes that the ultimate question of whether the six trademarks at issue ‘may disparage’ Native Americans is a question of fact.” *Harjo*, 284 F. Supp. 2d at 122.

<sup>47</sup> 466 F.3d 1023 (Fed. Cir. 2006), *cert. denied*, 550 U.S. 933 (2007).

<sup>48</sup> 466 F.3d at 1030-31.

Principal Register.”<sup>49</sup> Among these is the right of registrants to get nationwide propriety against “a party adopting the same or similar mark after the date of the registrant’s application.”<sup>50</sup> Furthermore, after a registrant uses a registered mark for five years, their rights become incontestable.<sup>51</sup> This means that after five years, would-be trademark infringers are limited in their available defenses in suits against registrants.<sup>52</sup> Because registered marks are published in the *Official Gazette*, as well as online on the PTO website,<sup>53</sup> registered marks can be easily searched for. As such, potential infringers are put on notice as to what marks they can and cannot use. This also serves to limit potential infringers’ ability to claim in court that they mistakenly infringed on the rights of a registrant. Most importantly, however, are a registrant’s rights against counterfeiters by way of a statutory right of action against infringers.<sup>54</sup>

### B. The Normative Impacts of Trademark Registration

Both the federal government and trademark registrants benefit from the registration of sexist, racist, and homophobic trademarks and their content. The provision of rights, particularly a right of action to protect a registrant’s mark, acts as a governmental statement that the rights in question are of value (valuable enough that they are worthy of governmental protection). Even if Congress did not *intend* for the registration of trademarks to amount to a governmental endorsement of its message, this does mean that it cannot function as one. When a court or tribunal makes a determination about whether a mark consists of immoral or scandalous material that would degrade a living person, these entities invariably make normative statements that are solidified in legal fact. Law is “one of the most powerful mechanisms by which any society creates, defines, and regulates itself.”<sup>55</sup> That is, when courts say *Ghetto Gaggers*, in the context of the goods and services it is used with, does not “bring [black women] into disrepute,”<sup>56</sup> they make a normative assessment about what it means to be a (reputable) black woman. The notion that the PTO and the courts can act neutrally in making these qualitative

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<sup>49</sup> GINSBURG, *supra* note 25, at 177-78.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 177.

<sup>53</sup> United States Patent and Trademark Office, <http://www.uspto.gov/index.html> (follow “Trademarks” hyperlink; then follow “Search Marks” hyperlink; then follow “New User Form Search (Basic)” hyperlink); *see* GINSBURG, *supra* note 25, at 177.

<sup>54</sup> 15 USC § 1117(a).

<sup>55</sup> Haney López, *supra* note 44, at 9-10.

<sup>56</sup> 15 U.S.C. § 1052(a).

decisions actually institutionalizes “inequality in law and [makes it] look just like principle.”<sup>57</sup> Furthermore, when the question of disparagement is adjudicated, the PTO and the court automatically implicate normative commitments to equality and acceptance in American society.

### C. “Black Tail”: Race, Gender, and Trademark Law

The case of *In re Mavety Media Group, Ltd.* illustrates how the TTAB has adjudicated the question of whether the registration of a trademark brought women in general, and black women specifically, into disrepute.

In 1990, Mavety Media Group, Ltd. (“Mavety”) applied to register the trademark “Black Tail” in connection with its production of “an adult entertainment magazine featuring photographs of both naked and scantily-clad”<sup>58</sup> black women. After some procedural back and forth between Mavety and the PTO,<sup>59</sup> the examiner denied registration of the trademark on the grounds that the term “Tail” implied sexual intercourse, was scandalous, and thus prohibited by Section 2(a) of the Act. Mavety responded to the Examiner’s actions, arguing that if the PTO were to “[consider] the more popular meanings of [Tail] and [Black Tail]... a substantial composite of the

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<sup>57</sup> Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 7 (1985). Catharine MacKinnon is a well-known anti-pornography, feminist legal scholar. She is best known for her work around theorizing pornography as sex discrimination, as well as her attempts to draft and pass municipal ordinances that would treat pornography as a violation of women's civil rights, and to allow women harmed by pornography to seek damages through lawsuits in civil court.

<sup>58</sup> *Mavety*, 33 F.3d at 1368-69.

<sup>59</sup> The Circuit court explained the procedural history:

Mavety filed an application in the PTO seeking federal registration of its trademark [Black Tail] under 15 U.S.C. § 1051(b) (1988), based on Mavety's bona fide intention to use the mark in connection with goods identified as "Magazines." On July 25, 1990, Mavety filed an Amendment to Allege Use declaring July 2, 1990 as the date of the first use of the mark. In accordance with the regulation governing the filing of an Amendment to Allege Use, Mavety provided published issues of its magazine Black Tail.

On November 20, 1990, the Examiner issued an Office Action requiring Mavety to identify the goods as "adult entertainment magazines" and to "disclaim the descriptive wording 'Black' apart from the mark.

*Mavety*, 33 F.3d at 1369 (internal citations omitted).

population would not interpret the mark to be a reference to sexual intercourse."<sup>60</sup>

Mavety asserted that "Tail" should be defined as "rear end." They further explained that this was the pertinent definition, as the name "Black Tail" was used in connection with a "magazine cover above a photograph of a woman displaying, *inter alia*, her *derriere*."<sup>61</sup> Mavety concluded the use of a euphemism for "rear end" was not vulgar in this context. Mavety also noted that "Black Tail" would be interpreted as a reference to clothing worn at formal occasions; thus making readers think of the class, style, and elite status of its magazine – a ploy to be "consistent with the familiar genre of adult entertainment magazines such as *Playboy* and *Penthouse*."<sup>62</sup> Finally, Mavety justified the registration of "Black Tail" by pointing to the Principal Register, noting the "numerous marks consisting of words with non-sexual primary meanings that nonetheless had sexual connotations."<sup>63</sup>

The examiner issued a second decision, affirming the earlier decision on the grounds that "Tail" was a vulgar term referring to sexual intercourse and that a substantial composite of the general public would look to a dictionary and become aware of the word's alternative usage.<sup>64</sup> Mavety filed a request for reconsideration; this request was denied and Mavety appealed to the TTAB.<sup>65</sup>

When the TTAB heard the case, they affirmed the examiner's decision, but provided an alternative reasoning. The TTAB held that:

The mark [Black Tail] essentially conveys, in vulgar terms, the idea of African-American women as sexual objects.... [W]e believe that women in general and African-American women in particular would be especially offended by the mark.... [We find that a substantial composite of the] general public would find the mark to be "offensive, "disreputable," "disgraceful to reputation," and shocking to their "sense of decency or propriety."<sup>66</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *In re Mavety Media Group Ltd.*, No. 74/066893, 1993 TTAB LEXIS 25 (TTAB May 5, 1993).

<sup>66</sup> *Mavety*, 33 F.3d at 1370. In order to prove that a mark is scandalous, the PTO looks to whether the mark is:

[S]hocking to the sense of truth, decency, or propriety; disgraceful;

On appeal to the Federal Circuit, Mavety claimed that the usage of "Tail" "on the identified [adult entertainment] magazines... suggests a woman's rear end."<sup>67</sup> The Court of Appeals determined that the TTAB erred in relying solely on dictionary definitions to examine the meaning of "tail." The court found that "[t]he Board's conclusion that '[r]ather than as a playful reference to the buttocks of an African-American woman, the mark would be viewed as a purely vulgar, sexual reference to African-American women as sexual objects' simply has no basis in the record."<sup>68</sup> As such, "Black Tail" is currently a registered trademark on the Principal Register.

This case highlights several issues facing the PTO's adjudication of whether marks bring black women into disrepute. While I do not want to dismiss the efforts of the initial examiner to prevent the registration of "Black Tail," I can identify three flaws in the overall analysis of this trademark. Firstly, it is abhorrent that it took an appeal to the TTAB before any authority considered "Black Tail" a reference to black female bodies as sexual objects. Secondly, lost in this entire case was a discussion of the role black female sexual availability has played in U.S. history.<sup>69</sup> Thirdly, the Federal Circuit

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offensive; disreputable; . . . giving offense to the conscience or moral feelings; . . . [or] calling out [for] condemnation." The PTO must consider the mark in the context of the marketplace as applied to only the goods described in Mavety's application for registration. Furthermore, whether the mark [Black Tail], including innuendo, comprises scandalous matter is to be ascertained (1) from "the standpoint of not necessarily a majority, but a substantial composite of the general public," and (2) "in the context of contemporary attitudes."

*Id.* at 1371 (internal citations omitted).

<sup>67</sup> *Id.* at 1369.

<sup>68</sup> *Id.* at 1373 (emphasis added).

<sup>69</sup> For example, plantation owners recognized that it was far cheaper to simply breed slaves, using the bodies of black women as a vessel, rather than continuously importing slaves from Africa. Patricia Hill Collins has elaborated the normative consequences of this practice. She notes that "[t]he objectification of African-American women parallels the portrayal of women in pornography as sex objects whose sexuality is available for men. Exploiting Black women as breeders objectified them as less than human because only animals can be bred against their will." PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 135 (2nd ed. 2000).

Even after slavery, women of color have been susceptible to the violence inherent in perceived sexual availability. Immediately following the Civil War, segregation in many streetcars presented a scenario in which "conditions [offered to blacks] were

fails to identify the ways in which “Tail,” defined as a “‘playful’ reference to the buttocks of an African-American woman,” and “Tail,” defined as a “sexual reference to African-American women as sexual objects,” stem from the same racist presumptions, namely the sexual availability and perversity of black females and their bodies.<sup>70</sup> This legal ignorance operationalizes the essentialism of black women, reducing them to their sexual parts.<sup>71</sup> When seen within a backdrop of the pornographic industry, which in many instances relies on racism, sexism, and homophobia to market its products, it is clear that it is overly simplistic to assert that “Black Tail” means nothing more than a “‘playful’ reference to the buttocks of an African-American woman.”<sup>72</sup>

The intersection of pornography and trademark law is an important site to contest racial and gender subordination. If law does indeed assist in

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particularly problematic for Black women and children.” As Professor Cheryl Harris explains, “[w]hile the policy of racial separation was often justified on the grounds of protecting white women from Black men’s lust, subjecting Black women to encounters with white men in smoking cars was treated as unproblematic despite the longstanding practice of white male sexual violation of black women.” Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in CONSTITUTIONAL LAW STORIES 190 (Michael Dorff ed., 2003). For more on the historical construction of the sexual availability of women of color, see COLLINS).

<sup>70</sup> For an example of historical conceptions of black female bodies as deformed, perverse, and representative of hypersexuality, simply look to the story of “Sarah” Saartjie Baartman. Saartjie, also known as The Hottentot Venus, was an Eastern Cape Khoisan woman who was orphaned as a teenager and sold into slavery. The family that she was sold to ran into financial difficulties and looked to Baartman as their next source of income. They believed that a black woman with notable buttocks would be a popular attraction in Europe, where curiosity about Africa ran rampant. Saartjie was then taken to Britain, paraded around like a freak show in a carnival, catering to the curious eyes of Europeans who had never seen a naked black woman. Throughout her time of exhibition, she was the subject of study by the French anatomist George Culver. After she died, scientists cut out her brain and vagina in order to study them. A mold was then made of her vagina and it was put on display until 1974 at the Musée de l’Homme in Paris, France. For more on Saartjie Baartman, see Maria Meltzer, *Venus Abused*, SALON, Jan. 9, 2007, <http://www.salon.com/books/review/2007/01/09/holmes/index.html>; RACHEL HOLMES, *AFRICAN QUEEN: THE REAL LIFE OF THE HOTTENTOT VENUS* (2007).

<sup>71</sup> COLLINS, *supra* note 69, at 137. In discussing Saartjie Baartman, she notes how “Baartman was used as a pornographic object similar to how women are presented in contemporary pornography. She was reduced to her sexual parts, and these parts came to represent a dominant icon applied to Black women throughout the nineteenth century.”

<sup>72</sup> *Maverly*, 33 F.3d at 1373.

defining “the spectrum of domination and subordination that constitutes race relations,”<sup>73</sup> then one must be cognizant of the racial and gendered meanings that are made through the registration of trademarks used in connection with sexually explicit services. Because pornography “finds ways to titillate through production design and narrative, such as in its intertitle texts or its dialogue,”<sup>74</sup> the trademark is extremely important for identification and marketing purposes. This is not to say, however, that all registered marks construct negative images of subordinated people. On the contrary, the registration of trademarks can, in some instances, assist subordinated groups in reclaiming their racial and gender identities.<sup>75</sup> Despite the availability of sexually explicit content for the project of racial and sexual identity reclamation, it must be recognized that Mavety’s “Black Tail” is but one of many potentially problematic trademarks registered with the PTO in connection with the sale of pornography. In Part III of this Note, I will apply the current doctrinal standard for determining a mark’s validity under Section 2(a) to several trademarks registered in connection with the sale of pornography.

### III. Registered Pornographic Trademarks

#### A. The *Harjo* Test

The test for determining whether a registered mark is disparaging is essentially a two-pronged analysis that asks:

- (1) what is the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services; and
- (2) if that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols, whether that meaning may be disparaging to a substantial composite of the referenced group.<sup>76</sup>

In the examples I provide below, I consider both prongs of the *Harjo*

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<sup>73</sup> Haney López, *supra* note 44, at 10.

<sup>74</sup> Celine Parreñas Shimizu, *Queens of Anal, Double, Triple, and the Gang Bang: Producing Asian-American Feminism in Pornography*, 18 YALE J.L. & FEMINISM 235, 244 (2006).

<sup>75</sup> See *infra* Part III.

<sup>76</sup> GINSBURG, *supra* note 25, at 210 (citing *Harjo*, 284 F. Supp. 2d at 125).

test. An analysis of the second-prong of the *Harjo* test is illustrative of the issues facing the substantial composite test. I do want to note, as a threshold matter, that in *Harjo*, the district court does not explain what constitutes a substantial composite of the affected population. The court noted that “even if the Court [considered] all of the findings of fact related to the survey evidence,”<sup>77</sup> the survey was not dispositive because it failed to ask whether they thought “redskin” meant Native American “in the context of Pro-Football’s services”<sup>78</sup> (professional football). While this inquiry may be a bit easier in relation to sexually explicit goods and services, one must still be wary of the lack of clarity surrounding the *Harjo* standard. Despite this obstacle, I move on to examine the validity of several registered trademarks under Section 2(a).

## B. Trademarks Currently Registered with the PTO

### i. Ghetto Gaggers

*Ghetto Gaggers* is a registered trademark used in connection with “adult entertainment services, namely, providing an adult entertainment website featuring photographic, audio and video presentations.”<sup>79</sup> Films made by *Ghetto Gaggers* purport to portray “White Cocks Gaggling Ebony Hoodrats.”<sup>80</sup> To analyze this mark under the *Harjo* standard, we must determine the likely meaning of the mark in question. To make this determination, the PTO and courts look to dictionary definitions and the views of the affected population. The trademark must be viewed in relation to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services.

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<sup>77</sup> *Harjo*, 284 F. Supp. 2d at 127.

<sup>78</sup> *Id.*

<sup>79</sup> <http://www.uspto.gov/index.html>. This is a description of the goods and/or services which the mark is used in connection with. The *Harjo* test requires a contextual understanding of the mark in question. As such, we must analyze the titles presented in this comment in the context of the production of sexually explicit material. The fact that these marks are being used in connection with sexually explicit material is integral to an inquiry regarding the ability of the mark to disparage subordinated people. For example, Jennifer Nash notes that pornography serves as site where “raced meanings and... cultural narratives about black women’s bodies” are created. As such, it is imperative to understand how the mark and its content are constitutive of each other, working to produce a racial narrative about black women. Jennifer C. Nash, *Bearing Witness to Ghosts: Notes on Theorizing Pornography, Race, and Law*. 21 WIS. WOMEN’S L.J. 47, 52 (2006).

<sup>80</sup> GhettoGaggers.com.

In analyzing the first prong of the *Harjo* test, courts look to dictionary definitions in an attempt to determine the meaning of the trademark in question. The Merriam-Webster English Dictionary defines “Ghetto”<sup>81</sup> as (1) a quarter of a city in which Jews were formerly required to live, (2) a quarter of a city in which members of a minority group live especially because of social, legal, or economic pressure, (3a) an isolated group, and (3b) a situation that resembles a ghetto especially in conferring inferior status or limiting opportunity. Merriam-Webster defines “Gag”<sup>82</sup> as (1a) to restrict use of the mouth by inserting a gag, (1b) to prevent from exercising freedom of speech or expression, (1c) to pry or hold open with a gag, (2) to provide or write quips or pranks for, and (3) to choke or cause to retch.

To understand the relationship between the mark and the goods or services in question, the following is a brief description of what occurs in a *Ghetto Gaggers* film. In the scene featuring Olivia, referenced in the introduction, we see a black woman shackled like a slave, referred to as a slave, working like a slave, and treated like a slave. The two white men who were in the scene with Olivia accused Northerners of loosening her chains of bondage – a reference that reflects not only Olivia’s supposed slave status, but also the seemingly Southern or Confederate allegiance of the men and the historical efforts of Northerners to free slaves. They penetrated her, gagged her, made her sweep the floor, and continued to penetrate her until they were ready to ejaculate on her face. In the context of the content promoted in this scene, “Ghetto” is likely a reference to a quarter of a city in which members of a minority group live especially because of social, legal, or economic pressure, an isolated group, and/or a person that has been conferred inferior status or limited opportunity. To put it bluntly, “Ghetto” is clearly a stand-in word for “black.” As for “Gaggers,” it is used to describe those either who “choke or cause [others] to retch” (i.e. the white man), or those who “choke or... retch” (i.e. the black woman). As such, if we were to look at this name in relation to the goods and services it promotes, we can determine *Ghetto Gaggers* to mean ‘black women who choke on the penises of white men.’ The second inquiry for courts is to assess whether the meaning, as derived from reading dictionary definitions in the context of the goods or services provided, would be perceived as disparaging by a substantial composite of the affected population. With regard to this scene from *Ghetto Gaggers*, I examine the positions of anti-pornography activists, as well as sex-positivists.

With particular reference to the use of black women in pornography,

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<sup>81</sup> “Ghetto,” MERRIAM-WEBSTER ENGLISH DICTIONARY, available at <http://www.merriam-webster.com/dictionary/ghetto>.

<sup>82</sup> “Gagger,” MERRIAM-WEBSTER ENGLISH DICTIONARY, available at <http://www.merriam-webster.com/dictionary/gagger>.

Patricia Hill Collins has noted that pornography sexualizes racialized oppression by building upon the theory of white supremacy through the exploitation of black female bodies for white male sexual pleasure.<sup>83</sup> She notes that the “pornographic treatment of the bodies of enslaved African women... has since developed into a full-scale industry.”<sup>84</sup> Collins continues:

Pornographic images are iconic in that they *represent realities* in a manner determined by the historical position of the observers and by their relationship to their own time and to the history of the conventions which they employ.... African American women are usually depicted in a situation of bondage and slavery.<sup>85</sup>

Furthermore, “[the societal] objectification of black women parallels the portrayal of women in pornography as sex objects whose sexuality is available for men.”<sup>86</sup> As such, one can easily see the connections between trademarked titles like *Ghetto Gaggers* and the alleged plight of Megan Williams in West Virginia. While some argue that increased access to pornography decreases the amount of rape in society,<sup>87</sup> this assertion misses the point: while the movie itself may not have *forced* six whites to brutalize a black woman, its content, imagery, and message re-enshrines the notion of the “black whore” that was used to characterize black females during and after slavery.<sup>88</sup> Furthermore, the registration of these trademarks, used in connection with pornography, legitimizes and normalizes this understanding. The idea of black women as sexually available sets the foundation upon which their sexual exploitation takes place. That is to say, the availability and

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<sup>83</sup> COLLINS, *supra* note 69, at 138.

<sup>84</sup> *Id.* at 137.

<sup>85</sup> *Id.* at 136-37 (emphasis added). Collins recalls “these settings remind us of the trappings of slavery: chains, whips, neck braces, wrist clasps” (quoting GOOD GIRLS/BAD GIRLS: FEMINISTS AND SEX TRADE WORKERS FACE TO FACE 59 (Laurie Bell ed. 1987)).

<sup>86</sup> COLLINS, *supra* note 69, at 135.

<sup>87</sup> See, e.g., Anthony D'Amato, *Porn Up, Rape Down* (Northwestern University School of Law, Pub. L. Research Paper No. 913013, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=913013](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913013) (arguing that there is a correlation between a decrease in rape by 85% during the past 25 years while access to pornography has expanded, suggesting pornography has reduced social violence); see also Steven E. Landsburg, *How the Web Prevents Rape*, SLATE, Oct. 30, 2006, <http://slate.com/id/2152487/>.

<sup>88</sup> See COLLINS, *supra* note 69. See also Jewel D. Amoah, *Back on the Auction Block: A Discussion of Black Women and Pornography*, 14 NAT'L BLACK L.J. 204 (1997).

perpetuation of the narrative of black female sexual availability makes it easier for people, pornographers and rapists, to imagine their actions as natural, justified, and normative. As Richard Fung notes “[i]t is not the representation of the fantasy that offends... rather [it is] *the uniformity with which these narratives reappear and the uncomfortable relationship they have to real social conditions.*”<sup>89</sup> It is the constant reification of black female sexuality as perverse and available for use by men that prevents the collective re-imagining of black women as anything other than “symbolic of... unbridled female sexuality.”<sup>90</sup> For the most part, both anti-pornography advocates and sex-positivists would likely agree (amongst themselves) that *Ghetto Gaggers* disparages black women. Nonetheless, they may have a falling out regarding the potential for pornography’s use for positive sexual representations of women of color.

With regard to the sexuality of women of color, Celine Parreñas Shimizu notes that “[w]hile we acknowledge the sexuality of women of color in history and Black feminist theory regarding the dangers of pornography, women of color who are cultural producers advocate for what I term ‘race-positive sexuality,’<sup>91</sup> which resonates with the work of women of color in pornography.”<sup>92</sup> While sex-positivists, like Shimizu, would almost certainly disagree with pornography rejectionists like Collins and Catharine MacKinnon<sup>93</sup> on the prospect of positive pornography, Shimizu would

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<sup>89</sup> Richard Fung, *Looking for My Penis: The Eroticized Asian in Gay Video Porn in, A COMPANION TO ASIAN AMERICAN STUDIES* 235, 243 (Kent A. Ono ed., 2005) (discussing the “wealthy white man/Asian house boy-couple” narrative in Gay porn) (emphasis added).

<sup>90</sup> COLLINS, *supra* note 69, at 139.

<sup>91</sup> Celine Parreñas Shimizu asserts that race-positive sexuality:

emerges from the literature of Chrystos, Cherrie Moraga, Audre Lorde, and others, who present pleasure, pain, and trauma simultaneously, in ways that embrace the liberating possibilities of sexuality while also acknowledging the risks of reifying perversity and pathology that are traditionally ascribed to women of color in popular culture.... Race-positive sexuality connects gender and sexuality in pornography to slavery and colonial history, while keeping open pornography’s anti-racist and sex-positive potentialities.

See Shimizu, *supra* note 74, at 240-41.

<sup>92</sup> *Id.* Shimizu notes that this theory of sexuality is rooted in “[k]eeping open the complexity of images as well as the experience of their production and consumption... [taking] seriously the challenge of defining sexuality in terms of Asian/American feminist women’s practices in pornography.”

<sup>93</sup> For information on Catharine MacKinnon, see *supra* note 57.

almost certainly agree that *Ghetto Gaggers* disparages black women. She would also note, however, that sexually explicit content (and the trademarks used in connection with that content) is not always *per se* disparaging and can, in some instances, assist in the reclamation of sexual and racial identity for subordinated groups.<sup>94</sup> An example of what Shimizu advocates may be found in the films of Pink & White Productions, as well as the film *Afro-Dite Superstar*.

Pink & White Productions describes itself as a proprietor of “adult entertainment that exposes the complexities of queer sexual desire. Taking inspiration from many different sources, Pink & White is dedicated to producing sexy and exciting images that reflect today’s blurred gender lines and fluid sexualities.”<sup>95</sup> While the titles of Pink & White Productions are not registered with the PTO, one can easily imagine a situation in which a term, such as “dyke,” could be used in the name of a film and potentially subject to a Section 2(a) challenge.<sup>96</sup> This challenge, however, may fail given the context of the content, namely an attempt by a subordinate group to reclaim their sexuality. Shine Louise Houston,<sup>97</sup> Director of Pink & White Productions,

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<sup>94</sup> It should be noted, however, that there is likely a lack of continuity not only between anti-pornography advocates and sex-positivists, but also within the sex-positive activist community.

<sup>95</sup> <http://pinkwhite.biz/PWWP/about/>.

<sup>96</sup> See, e.g., *McDermott v. S.F. Women's Motorcycle Contingent*, 81 U.S.P.Q.2D 1212 (2006), *aff'd*, 240 Fed. App'x. 865 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1109 (2008). In *McDermott*, a man sued to cancel the registration of “Dykes on Bikes,” on the grounds that it was disparaging to men. The TTAB and Court of Appeals for the Federal Circuit decided that McDermott did not have standing to challenge this registration, as he did not provide adequate evidence that he was disparaged by the term “dyke.” Neither the TTAB, nor the Federal Circuit, however, came to a conclusion as to whether the term was disparaging in general.

<sup>97</sup> The website for her film *Champion* describes Houston.

As the pioneering producer and director of Pink and White Productions, Shine has always had unique vision. Graduating from San Francisco Arts Institute with a Bachelor's in Fine Art Film, her works have become the new gold standard of adult cinema. During a 5 year position at the women-owned, sex toy purveyor Good Vibrations, Shine recognized an underserved demand for authentic woman and queer made porn. Shine's films have been recognized as the next big wave of women produced porn and have been internationally screened from Berlin to New Zealand.

Champion – The Cast – Shine Louise Houston, <http://champion-movie.com/castcrew/shinelouisehouston.html>.

notes “[t]here is power in creating images, and for... a woman of color and a queer to take that power... I don’t find it exploitative; I think it’s necessary.”<sup>98</sup> Similarly, *Afro-Dite Superstar* is described by its Director Abiola Abrams<sup>99</sup> as “a feminist empowerment film that is reclaiming the sexual voice and expression of women of color.”<sup>100</sup> Abiola notes that she “joins... filmmakers seeking to make intelligent mainstream work with explicit sexual content.”<sup>101</sup> Abiola has called her film a sex education film for the hip-hop generation.

Another example of sex-positive re-definition can be seen through the directing decisions of Mika Tan, a famous mainstream Japanese/Taiwanese American pornographic actress that has started her own production company called GenerAsianXXX Productions. Tan started this company, she explains, in response to the “shortage of Asian guys in porn.”<sup>102</sup> As such, she “decided to get the word out that we were looking for [Asian] guys in our movie[s].”<sup>103</sup> On her website, she has a casting call out for her newest film *Year of the Cock*, claiming that she is “trying to dispel the rumors that all Asian men are small. I need large-cocked Asian men for this project.”<sup>104</sup> Here, Tan is attempting to dispel, through the use of pornography, the racist stereotype that Asian men have small penises.<sup>105</sup> Just as Pink & White Productions, *Afro-Dite Superstar*, and Mika Tan show the potential for sex-positive re-definition, *Ghetto Gaggers* clearly shows that the ability of trademark registration to disparage subordinated groups. As we continue to explore the trademarks that are registered with the PTO, we will encounter more instances in which sexually explicit material can be both oppressive and liberating.

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<sup>98</sup> <http://pinkwhite.biz/PWWP/about/>.

<sup>99</sup> Abiola directs under the name Venus Hottentot. See *supra* text accompanying note 70 for the history of Saartjie Baartman, also known as The Venus Hottentot. Abiola states that she chooses to direct under this name so as to “reclaim her sexual voice, and the voice of all of us. Even though women of color are over-sexualized in our society, our own voice is absent.”

<sup>100</sup> <http://www.abiolaabrams.com/id138.html>.

<sup>101</sup> *Id.*

<sup>102</sup> <http://www.raincoatreviews.com/forums/showthread.php?p=23570>

<sup>103</sup> *Id.*

<sup>104</sup> <http://www.generasianxxx.com/pages/projects/projects.htm>.

<sup>105</sup> The racist presumptions regarding penis size for Asian men and black men are relational to that of the supposedly natural white man. Asian men, within this paradigm, are undersized (and therefore undersexed), black men are oversized (and thus oversexed), and white men evenly balanced (and thus normal).

## ii. Tamed Teens

The website for *Tamed Teens* claims that their films are “all about initiation [sic] teen girls into porn by showing them the roughest sex they will ever have... [t]hese teens do anal for the first time, double penetration, deepthroating and they swallow cum.”<sup>106</sup> All of the women on the website are white,<sup>107</sup> as are all of the male participants.

Our initial inquiry focuses on the dictionary definition of *Tamed Teens*. According to Merriam-Webster, “Tame”<sup>108</sup> is defined as (1) reduced from a state of native wildness especially so as to be tractable and useful to humans, (2) made docile and submissive [or] subdued. The term “Teen”<sup>109</sup> is defined as a teenage person. To understand the relationship between the mark and the goods or services in question, the following is a brief description of what occurs in a scene from *Tamed Teens*.

The scene, starring Flory and Cornelia,<sup>110</sup> begins with them sitting together, fondling each others’ clothed breasts and vaginas while the camera operator comments that they are “two nice bitches.” The cameraman then says “Hi bitch” to Cornelia, asking her for her name, as well as the name of Flory, who they note does not speak English. The cameraman then asks Cornelia, who at this point in the film is acting as a type of liaison between Flory and the cameraman, “how old is this bitch?” Cornelia responds that both she and Flory are 18 years of age. The cameraman then tells Flory, while grabbing her head, “she has to learn something but I think you are on the right way.” In the scene that follows, both women are on their hands and knees, much like animals would be, facing the camera. The cameraman tells them to open their mouth “ahh,” and asks if “[you and her] are ready for some dicks?” The two women show visible signs of affirmation. He then calls one woman a bitch, and slaps both of them in the face. The cameraman says “Come on bandits, here we are” as two men begin forcefully inserting their penises into the women’s mouths, while another man stands at the side, awaiting his turn. You can hear one woman choking while performing oral sex. One man removes his penis, asks “you like [it] like this?” Cornelia

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<sup>106</sup> TamedTeens.com

<sup>107</sup> That is to say that the women are, by appearance, of Anglo-Saxon heritage.

<sup>108</sup> “Tame,” MERRIAM-WEBSTER ENGLISH DICTIONARY, available at <http://www.merriam-webster.com/dictionary/tame>.

<sup>109</sup> “Teen,” MERRIAM-WEBSTER ENGLISH DICTIONARY, available at <http://www.merriam-webster.com/dictionary/teen>.

<sup>110</sup> Both phenotypically white women from Bucharest, Romania.

responds “yes” – he then spits in her mouth and slaps her. At this point, she is also being penetrated vaginally by another man, who is also forcing her head back and forth on the first man’s penis. For the next seven minutes, Cornelia deep-throats<sup>111</sup> a man’s penis, gagging repeatedly, and constantly being told not to use her hands (presumably because the use of her hands would inhibit the ability of the man to insert the entire shaft of his penis into her mouth). Throughout the rest of the film, Cornelia is slapped, asked if she likes being slapped (to which she affirmatively replies), and vaginally double-penetrated as the cameraman tells her to “look at me bitch.” The cameraman turns to Flory as she is slapped and says “Happy Birthday.” Finally, with her mascara running, Cornelia is ordered to put her tongue inside her mouth so that one man may ejaculate inside of it. He tells her not to swallow (to “keep it”) so she can take “the next one,” “and the next one” – three ejaculations in total.

When put into the context of the film, *Tamed Teens* appears to mean the submission of female “Teens” who lived in a state of native wildness, so as to make them tractable and useful to men. When read in the context of the definition given by Merriam-Webster, the term seems to mean the taming of female teens, given that they are wild, sexual animals that need to be made docile and submissive. It is also important to note that “teens,” as used in this mark is meant to refer exclusively to women, as men are doing the “taming” in the content in question. Additionally, the meaning of the mark, in relation to the aforementioned content, can best be explained by the reviews on the *Tamed Teens* website. One person noted that “some guys might stop and give her a break [after the woman was tearing up]... but these guys are having too much fun, *he slams it in even harder to say "take that, you fucking bitch!" Now that's good fun taming!*”<sup>112</sup> Another spectator commented:

How cool is this cumshot! *Imagine pumping away at a young whore's cunt with your fat cock, then feeling your balls tighten, pulling out and aiming the head of your cock squarely at her eyes! The cum blasts out and her face gets plastered, then your buddy steps in to finish the job! Then you both can sit back, relax, and make the whore stay there wearing your cum while you make her say "thank you"! That's what we did with Nicole....*<sup>113</sup>

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<sup>111</sup> Deep-Throating is a sexual act in which one person inserts the entirety of the penis (up to the scrotum) into his or her mouth. The name comes from the pornographic film *Deep Throat*, released in 1972.

<sup>112</sup> [http://www.tamedteens.com/x1c8b6/review\\_movies.html](http://www.tamedteens.com/x1c8b6/review_movies.html). (emphasis added).

<sup>113</sup> *Id.* (emphasis added). It should be noted, however, that there is no indication

It is clear that *Tamed Teens* refers, at the very least, to young, 'barely legal,' white women who are presumed to be in need of taming.

The second prong of the *Harjo* test requires an examination of the views of the affected group. Anti-pornography feminists have long argued that "[t]he mass distribution of pornographic [images]... perpetuate[s] sexual abuse and discrimination in the real world of social inequality," thus legitimating "sexual... harassment and abuse as forms of sexual pleasure and entertainment."<sup>114</sup> More specifically, in the case of *Tamed Teens*, there is a particularly pervasive element of this mark: the focus on young women. The content on the site seems to imply that these women, because they were underage, have been waiting to get trained and tamed. The narrative then, is that once the obstacle of the law is removed for these now 'barely legal' women, their female sexual inhibitions drop and, as such, they are finally able to engage in all of the sexual intercourse they can handle. In response, men must tame the animalistic sexual desire of these young, 'barely legal,' women. Anti-pornography advocates would likely agree that *Tamed Teens*, in connection with the goods and services the trademark promotes, operates in a way that perpetuates the sexual subordination of women by men,<sup>115</sup> and is thus disparaging to women.

However, not all sex-positivists may take this view. Annabel Chong, for instance, is probably best known for her role in *The World's Biggest Gang Bang* where she engages in roughly 251 acts of sexual intercourse with about 70 men. She notes that her motivations for the film were partially humorous "because there's this stereotype of the stud who fucks anything that moves... this is a parody of what men are supposed to be like."<sup>116</sup> In addition, Chong questioned the double standard that denies women the ability to act as the dominant "stud" in pornographic films, thus transgressing normative understandings of the depths of female sexuality. Finally, Chong asserts that she wanted to "explore [her] own personal sexuality, [her] boundaries... [t]o

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that this reviewer actually did any of these things to a person s/he knew. The use of the name Nicole appears to be in reference to the woman in the scene, listed as Nicole.

<sup>114</sup> DINES, *supra* note 16, at 19.

<sup>115</sup> Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); *See also* DINES, *supra* note 16, at 20 (noting that "heterosexual male pornography's profitability is dependent on gender, racial, economic, political, and social inequalities at several levels... [including] the constricted stories and images surrounding sexual identities and desires in the industry's produces...").

<sup>116</sup> Interview by Amy Goodman with Annabel Chong, in Park City, Utah (posted June 22, 1999), *available at* <http://www.nerve.com/Dispatches/Goodman/chong/>.

see how far [she] could go off the beaten track of the passive female who likes to be romantically seduced."<sup>117</sup> Thusly, just as Chong used pornography as an avenue to challenge traditional notions of sexuality, some may argue that this is what the women in *Tamed Teens* were doing. While it may be true that the women in *Tamed Teens* were not playing the role of the “stud” like Chong was, some sex-positivists may argue that the women in *Tamed Teens* are simply testing their sexual limits on a road to sexual self-understanding. However, one could push back more generally against Chong, arguing that her specific rejection of the passive female sexual norm allowed for the construction of another sexual norm, that of the sexually available and domineering Asian female, known stereotypically as a “Dragon Lady.” It is likely, however, that given the level of physical and verbal abuse in *Tamed Teens*, both sex-positivists and anti-pornography advocates would find *Tamed Teens* disparaging to women.

### iii. Blacks On Boys

*Blacks On Boys* is a gay interracial pornographic website where white and Latino men are cast as “bottoms” and black men are cast as “tops.”<sup>118</sup> The website is described as one in which “Black thugs break down Sissy White Boys.”<sup>119</sup> Sissy, in this context, seems to refer to the submissive position of the “bottom” in gay pornography, as opposed to singularly referencing those known in gay pornography as “twinks.”<sup>120</sup> As such, the website notes that both white “bears” and “jocks” can be penetrated by black men. The website describes scenes as portraying “[w]hite studs receiving internal anal cumshots and cum facials from huge black studs with uncut big

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<sup>117</sup> Paul Clinton, *Sex sobers in controversial Sundance documentary*, CNN.com, Feb. 10, 1999, <http://www.cnn.com/SHOWBIZ/Movies/9902/10/annabel.chong/>.

<sup>118</sup> “Top” is meant to represent the person taking the “insertive” role in sexual intercourse, where as “bottom” is meant to represent a person who anally “receives” insertion by a “top.”

<sup>119</sup> <http://www.blacksonboys.com/tourx/>. As I noted, the “bottoms” in the videos are either white or Latino. Despite the presence of Latino men in these films, the fact that they are portrayed as “bottoms” operationalizes the sexual superiority and hypersexuality of the black men involved just as if the “bottoms” had been exclusively white. The title *Blacks On Boys* supports this assertion, as it represents not only a ‘black/non-black’ dichotomy, but also a ‘black=superior, non-black=inferior’ dichotomy through the usage of the term “boy” as juxtaposed with “black.”

<sup>120</sup> The term “Twink” is used to describe a young or young-looking gay man with a slender build and little or no body hair. Inherent in this comparison is the implication that this man is effeminate. In gay pornography, this man typically plays the role that a woman would in heterosexual pornography.

dicks.”<sup>121</sup>

The first prong of the *Harjo* test demands an examination of dictionary definitions. According to Merriam-Webster, “black”<sup>122</sup> is defined in relevant part as (2) of or relating to the African-American people or their culture. “On”<sup>123</sup> in this context can be understood to mean (1a) used as a function word to indicate position in contact with and supported by the top surface of. Finally, “Boys”<sup>124</sup> could mean several things. Merriam-Webster defines “Boys” as (1) often offensive: a male servant, (2a) a male child from birth to adulthood, (2b) son, and (2c) an immature male. While the first definition seems to echo the racism of U.S. history, the servant example provided by Merriam-Webster is nonetheless illustrative. In gay pornography, “bottoms” are imagined as, among other things, servile. As such, the “sissy” white man can also be envisioned as servants to their black dominators. Additionally, traditional understandings of “boy” as distinguished from men can also be understood to make a statement about manhood, submission, as well as womanhood.<sup>125</sup> However, in order to truly give definition to the words “Blacks On Boys,” we must look to the content of the adult film.

In a scene starring a Latino male named Josh Carter, the scene begins with Josh sitting on a couch between two black men. One of the black men aggressively sniffs Josh, asking him if he is “tight.”<sup>126</sup> Throughout the first part of the scene, both black men stand as Josh kneels, in much the same way Olivia (from *Ghetto Gaggers*), and Flory and Cornelia (from *Tamed Teens*) performed fellatio on the men in those scenes. In addition, both black men constantly rub on Josh’s chest, in much the same way men in the other scenes touch women’s breasts. As Josh turns around, exposing his anus to the two black men, one of the men notes that it is “pretty,” while the other claims that he “knows what to do” and that it is going to be a “good trip for [Josh].” One blog puts it bluntly by explaining that “Josh gets down to feeling, then sucking, then fucking...until another explosive ending. I don’t think poor Josh knew what was cumming, cause when it was all said and done, this spicy [L]atino was cooled off with about a gallon of man-milk sprayed all over his face and head!”<sup>127</sup>

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<sup>121</sup> <http://www.blacksonboys.com/>

<sup>122</sup> “Black,” MERRIAM-WEBSTER ENGLISH DICTIONARY, available at <http://www.merriam-webster.com/dictionary/black>.

<sup>123</sup> “On,” MERRIAM-WEBSTER ENGLISH DICTIONARY, available at <http://www.merriam-webster.com/dictionary/on>.

<sup>124</sup> *Id.*

<sup>125</sup> For the connections between effeminate gay men and women, see MACKINNON & DWORKIN *infra* note 132.

<sup>126</sup> A reference to whether his anus is tight.

<sup>127</sup> <http://www.whiteslutwives.com/blackonboys/?p=76>.

Given this scene, the question becomes whether the trademark *Blacks On Boys* is disparaging to gay men.<sup>128</sup> Anti-pornography advocate Christopher Kendall discusses the role gay pornography plays in re-affirming heterosexual gender roles, as well as the use of gay pornography to perpetuate violence against queer people. He argues:

The forced coupling of two biological males does nothing to undermine (indeed, it only reinforces) those sexual and social power inequalities divided along gender lines if those behaviors central to the preservation of gender hierarchy (cruelty, violence, aggression, homophobia, sexism, racism, and ultimately compulsory heterosexuality through which heterosexual male dominance is preserved) are not themselves removed from the presentation of sexuality as power-based.<sup>129</sup>

One can easily see the dominant, homophobic messages that are transmitted through the content protected by trademarks like *Blacks On Boys*. This scene involving Josh not only reifies the idea that black men are hypersexual and sexually dominant over non-black men,<sup>130</sup> but also constructs a heterosexual norm through the conversion of Josh, the “bottom” in this scene, into a feminine role vis-à-vis the other performers. Furthermore, it is notable that much of what Josh did in this film replicates what Flory and Cornelia were

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<sup>128</sup> This question could be disaggregated to whether the trademark is disparaging to black gay men, white gay men, and Latino gay men. Christopher Kendall and others would argue that this is bad for all gay men, regardless of color. Others may agree with this, but contest whether it impacts these groups similarly (i.e., whether they suffer differential harms as a function of differential identities).

<sup>129</sup> Christopher N. Kendall, *Gay Male Liberation Post Oncale: Since When Is Sexualized Violence Our Path to Liberation?*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 226 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

<sup>130</sup> It is not surprising that the proprietors of this content, DogFart.com (another registered trademark) also host *BlacksOnBlondes* (interracial, straight, gangbang website), *CumBang* (where “Gorgeous Black Women Sucking And Fucking White Redneck Hillbillies!” who wear Confederate Flag t-shirts during the sex act), and *WifeWriting* (where “Hung Black Studs Treat Your White Wife As Their Human Graffiti!”). All of these names are also registered trademarks.

It should also be noted that this trope operates in a society where blacks are generally cast in certain positions of power, such as that of the threatening social deviant (i.e., criminal), rather than in other positions of power, namely those of political or social dominance.

asked to do in *Tamed Teens*.<sup>131</sup> Anti-pornography activists Catharine MacKinnon and Andrea Dworkin note that “[g]ay men are often used literally in the same ways women are in pornography; their status being lowered to that of a woman is part of the sex.”<sup>132</sup>

One can imagine anti-pornography advocates finding many of the trademarks registered in the Principal Register to be disparaging. These anti-pornography advocates find the root of their argument in the idea that the sexual fantasies produced in pornography “both mirror[] and cement[] the actual position of”<sup>133</sup> subordinated groups under conditions of patriarchy and racism. As such, pornography can serve as a site for the sexualized oppression of gay men. While some sex-positivists may agree with these sentiments, and the idea that *Blacks On Boys* is disparaging to gay men, they would reject blanket assertions that pornography can never serve as an avenue by which marginalized groups can liberate themselves and reclaim their identity.

Sex-positive advocates “emphasize a differentiation between fantasy and reality[, arguing that] fantasy can find politically productive expression, such as gay men’s usage of pornography to seek sexual legitimacy, redress, and education.”<sup>134</sup> Some gay pornographers argue that pornography can “[teach gay men] how to engage in sexual activities,”<sup>135</sup> as well as educate the public as to “what people of the same sex will do,” noting that “a film that can show you [same-sex sexuality and can dispel myths by showing] people not being hurt by it and enjoying it.”<sup>136</sup> Additionally, many scholars and activists rely on sexually explicit images to advance works of anti-subordination. These “sex-positive” advocates imagine pornography “as fundamentally connected to agentic subjectivity,” finding the “participation in the production of pornography” as “potentially liberating.”<sup>137</sup> While this does not seem to describe the scene in *Blacks On Boys*, one can see the potential disconnect between anti-subordination activists in determining what is

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<sup>131</sup> See *supra* Part III.ii.

<sup>132</sup> ANDREA DWORKIN & CATHARINE A. MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* 49 (1988).

<sup>133</sup> Nash, *supra* note 79, at 53.

<sup>134</sup> Shimizu, *supra* note 74, at 237.

<sup>135</sup> Clay Calvert & Robert D. Richards, *Gay Pornography and the First Amendment: Unique, First-Person Perspectives on Free Expression, Sexual Censorship, and Cultural Images*, 15 AM. U. J. GEN. SOC. POL'Y & L. 687, 706 (2007) (interviewing Stephen P. Modde, Vice-President, Conwest Resources, Inc. Conwest Resources, Inc. operates and runs Falcon studios, one of the world’s biggest gay adult video companies).

<sup>136</sup> *Id.* at 707 (Interview with Louis Sirkin, an attorney who successfully argued *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)).

<sup>137</sup> Nash, *supra* note 79, at 56.

disparaging.

#### iv. Blackzilla

*Blackzilla* is a registered trademark with the PTO. The film *Blackzilla vs. Manacanda*, wherein the trademark is used in the title, is portrayed as a sexual competition between two black pornographic actors with large penises.

With regard to the meaning of *Blackzilla*, the answer appears to lie in the hybrid of the words “black” and *Godzilla*.<sup>138</sup> *Godzilla* was a fictional Japanese sea monster that was awakened and mutated as a result of testing the atomic bomb. He was menacing, killing many on a rampage in his first appearance in the 1954 film *Godzilla*. This fact, combined with the racial designation of black, seems to imply a relationship between the stereotypical black man, who has a large penis, with a menacing, dangerous monster who will use his large penis to ensure the sexual destruction of white women. Furthermore, the caption on the packaging that says “Daddy I’m Goblin’ a Black Turkey Neck”<sup>139</sup> conjures up fears reminiscent of white supremacist propaganda, namely the specter of black men having sex with white women. The question, however, is whether this trademark is disparaging to a substantial composite of the affected population, which in this case would be black men.<sup>140</sup> However, there is likely to be some discontinuity regarding the disparaging nature of *Blackzilla*.

In films bearing the *Blackzilla* trademark, one can see the intersection of race and gender with regard to the propagation of hypersexualized messages regarding black men. The front cover of *Blackzilla vs. Manacanda* shows a picture of the two men involved with their penises draped across the face of the white woman on the cover. *Blackzilla*, and the content it is used in connection with, echoes Frantz Fanon’s sentiments regarding the hypersexualized image of the black man: “[t]he Negro is eclipsed. He is turned into a penis. He *is* a penis.”<sup>141</sup> Deviant sexuality has historically been attributed to

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<sup>138</sup> As *Blackzilla* is not a word in the dictionary, we must look to the particular context surrounding the word so as to decipher its meaning.

<sup>139</sup> Back Cover, *Blackzilla vs. Manacanda*.

<sup>140</sup> There are plausible arguments one could make that this sort of stereotyping is disparaging to all non-black men (as they, relative to this representation, are sexually inferior to black males), white women (as they, relative to this representation, are sexually available to dangerous black males), and black women (as they, relative to this representation, are sexually negligible to black males), as stereotyping is relational. I, however, am choosing to cabin the bulk of my argument, save one sentence about white women and black women, to the disparagement of black men.

<sup>141</sup> FRANTZ FANON, BLACK SKIN WHITE MASKS 120 (1970).

black men through allusions to the size of their penises.<sup>142</sup> Furthermore, one can also see the potential degradation of women as well, as the film's outer cover states "Who Ever Wins, *She* Loses."<sup>143</sup> Finally, this sort of interracial pornography reifies the idea that "what empowers [b]lack men in the objectification of [w]hite women simultaneously disables [b]lack female sexual pleasure."<sup>144</sup> While some may argue that the image of the black man with a large penis is positive, this is the result of a heteronormative constructions which consider penis size an indicator of social stature and power. As such, most anti-pornography advocates, as well as sex-positivists, would likely consider this trademark, and its related content, as disparaging given that the "presumption [for black men] of a large penis" is meant to suggest an "innately uncontrollable" sexuality that poses a danger to white women.<sup>145</sup>

### C. Pornographic Trademarks Conclusion

With regard to the examples provided in Part III, the first prong of the *Harjo* test allows for a thorough understanding of how words, in connection with content, can construct the imagined identities of subordinated groups. The second prong of the *Harjo* test, which requires an inquiry into the opinions of the affected population, highlights not only the diversity of opinions within subordinated groups, but also the difficulties in determining exactly what a consensus among the group in question would look like. In *Not in Whose Name?*, William Wright notes that in the battle over sports team trademarks depicting Native Americans, "[o]ne side sees the practice [of using Native American team names and mascots] as offensive, disparaging, and even racist, while the other sees it as a means to honor and pay tribute to Native Americans."<sup>146</sup> This divide amongst Native American

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<sup>142</sup> COLLINS, *supra* note 69, at 136-37. With reference to the display of Saarjtie Baartman in England, Collins describes what Saarjtie meant for her audience. "At the time European audiences thought that Africans had deviant sexual practices and searched for physiological differences, such as enlarged penises and malformed female genitalia, as indications of this deviant sexuality."

<sup>143</sup> Front cover, *Blackzilla vs. Manaconda* (emphasis added).

<sup>144</sup> Shimizu, *supra* note 74, at 239 (citing Alice Walker's *Porn*, in *YOU CAN'T KEEP A GOOD WOMAN DOWN* 77 (1981)). One could easily contest the idea that mapping the exploitation of white women by black or white men onto black women could be sexually "ablating." However, what I feel Walker is trying to get at is the idea that when white female beauty is privileged, black female beauty is invariably diminished.

<sup>145</sup> SARA L. CRAWLEY, LARA J. FOLEY & CONSTANCE L. SHEHAN, *GENDERING BODIES*, 110-11 (2007).

<sup>146</sup> William N. Wright, *Not in Whose Name?: Evidentiary Issues in Legal Challenges to Native American Team Names and Mascots*, 40 *CONN. L. REV.* 279, 285 (2007). *Compare*

communities resembles divides in the heterogeneous anti-subordination communities. While many, across anti-subordination disciplines, would likely agree that many of the examples in Part III would violate the Section 2(a) prohibition on disparaging trademarks, they may diverge on the potential for pornography and sexually explicit material to serve as a site of reclamation and liberation for subordinated communities.<sup>147</sup>

As such, sex-positivists would likely argue that trademark registration can assist those subordinated groups attempting to re-define themselves by bestowing upon them the substantial rights described in Part I. However, even if one recognizes the power of pornography and sexually explicit content to serve as a site for “articulating counter-hegemonic views of sexuality,”<sup>148</sup> one must be cognizant of what is being produced and how it operates in the world. The divergent understandings of this work will likely create difficulties in determining exactly what a substantial composite of any population thinks. Assuming, however, that a trademark passes *Harjo* scrutiny, a more general obstacle awaits. Section 2(a) has been challenged as an affront to the First Amendment protections of Free Speech. Part VI takes on these arguments.

#### IV. First Amendment Challenges

Some registrants defending against Section 2(a) challenges argue that the prohibitions in the Act violate the First Amendment’s right to free speech.<sup>149</sup> Despite these arguments, courts have generally attempted to skirt the First Amendment challenges to Section 2(a). When the *Mavety* court was asked to comment on the issue, they noted:

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the United States Commission on Civil Rights (“[t]hese references, whether mascots and their performances, logos, or names, are disrespectful and offensive to American Indians and others who are offended by such stereotyping” and “are particularly inappropriate and insensitive in light of the long history of forced assimilation that American Indian people have endured in this country.”) *with* James Billie, Chief of the Seminole Nation (described as the FSU Seminole’s “biggest supporter”). *Id.* at 283, 291.

<sup>147</sup> Shimizu, *supra* note 74, at 275. Shimizu’s notes that if subordinated groups “cannot be imagined outside of sex,” then group identity self-formation “must occur in terms of redefining sex.”

<sup>148</sup> Fung, *supra* note 89, at 248 (arguing that “attack[s] on the National Endowment for the Art and arts funding in the United States supports the racist status quo.”).

<sup>149</sup> U.S. CONST. AMEND. I; *See, e.g., Mavety*, 33 F.3d at 1374; *In re McGinley*, 660 F.2d 481, 484 (1981); *Holiday Inn v. Holiday Inn, Inc.*, 534 F.2d 312, 319 n.6, (1976). For more, *see* Jeffery Lefstin, *Does the First Amendment Bar Cancellation of REDSKINS?*, 52 STAN. L. REV. 665 (2000).

[I]t is clear that the PTO's refusal to register appellant's mark does not affect his right to use it. No conduct is proscribed, and no tangible form of expression is suppressed. Consequently, appellant's First Amendment rights would not be abridged by the refusal to register his mark.<sup>150</sup>

Nonetheless, some scholars have characterized Section 2(a) either as impermissible viewpoint discrimination or as a restriction on protected commercial speech.<sup>151</sup> While the inability to register a particular trademark would actually make the trademark *more* widely available for use than if it were registered, a robust explanation of First Amendment law is not the aim of this comment. I will attempt to explore these arguments in turn and concisely rebut the claims.

### A. Viewpoint Discrimination

In *R.A.V. v. City of St. Paul*,<sup>152</sup> the Supreme Court decided that a St. Paul hate crimes ordinance constituted both impermissible content discrimination – because it only applied to fighting words based on protected categories which, in turn, created disfavored subjects for discussion such as “union membership” and “homosexuality,”<sup>153</sup> but also viewpoint discrimination. The Court noted that:

In its practical operation... [the ordinance amounts] to actual viewpoint discrimination. Displays containing some words – odious racial epithets, for example – would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender – aspersions upon a person's mother, for example – would seemingly be usable *ad libitum* in the placards of those arguing in *favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents.<sup>154</sup>

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<sup>150</sup> *Mavety*, 33 F.3d at 1374 (citing *In re McGinley*, 660 F.2d 481, 484 (1981)). In the context of sexually explicit trademarks that are disparaging to subordinated groups, the court's reasoning would still allow companies to use disparaging marks in connection with their goods and services. While the company can still use the mark, they would not enjoy the protections attributed to registration. For a description of these benefits, *see* Part II.A.

<sup>151</sup> *Davis*, *supra* note 32, at 835.

<sup>152</sup> 505 U.S. 377 (1992).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 391 (Scalia, J.).

The Court concluded that the government can broadly restrict hate speech which rises to the level of fighting words, but may not single out for proscription only those fighting words which specifically invoke *only* race, color, creed, religion and/or gender. Section 2(a), unlike the ordinance at issue in *R.A.V.*, operates in a different fashion.

First, Section 2(a) does not limit its application to images or words that disparage race, color, creed, religion, or gender. Rather, Section 2(a) is applied to any type of trademark that may be disparaging to living persons. Second, the ordinance in *R.A.V.* effectively banned the speech in question by prescribing a punishment for such speech, whereas Section 2(a), as noted by the *Maveety* court, does not *actually* prevent the use of the trademark in the marketplace. As such, prohibitions under Section 2(a) more closely resembles decisions by the National Endowment of the Arts not to fund art projects, rather than an attempt to foreclose the use of the speech altogether.<sup>155</sup> Thusly, Section 2(a) does not implicate the viewpoint discrimination regime under the First Amendment. Some, however, have argued that the viewpoint discrimination analysis is inappropriate for Section 2(a) challenges, preferring to describe Section 2(a) as an impermissible content-based restriction on commercial speech.<sup>156</sup>

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<sup>155</sup> In *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the Supreme Court heard a challenge from artists who were denied individual funding from the NEA for their art projects. National Foundation on the Arts and the Humanities Act, 20 U.S.C. § 954, requires the National Endowment for the Arts to take into consideration general standards of “decency and respect” for the diverse beliefs of the American public when deciding on grant applications. In the context of this requirement, the NEA rejected the petitioners’ request for art grants. The Supreme Court sided with the NEA, concluding that the statute requiring NEA to consider general standards of “decency and respect” for diverse beliefs and values of the American public when ensuring that artistic excellence and artistic merit are criteria by which grant applications are judged, did not inherently interfere with First Amendment. The Court noted that:

And as we held in *Rust*, Congress may selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

*Id.* at 588 (internal citations omitted).

<sup>156</sup> Lilit Voskanyan, *The Trademark Principal Register as a Nonpublic Forum*, 75 U. CHI. L.

## B. Commercial Speech Regulation

The Supreme Court articulated the test for commercial speech protection in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>157</sup> That test protects commercial speech so long as it concerns lawful activities and is not misleading. Regardless, the government may still ban or regulate the commercial speech if the regulation directly advances a substantial governmental interest, and is appropriately tailored to that purpose.<sup>158</sup> Despite the fact that regulations of speech typically take the form of rules against the *use* of the speech, Theodore Davis, Jr. asserts that restrictions on the ability to *register* a trademark with the PTO cannot withstand this constitutional test. Davis argues that because the Court has “held that the government does not have a legitimate interest in suppressing merely ‘tasteless’ commercial speech, even speech that... promotes sexually-related products or services,” then “the fact that [it] may be offensive to some [cannot] justify... affirmative prohibitions on [the] use of a particular mark altogether.”<sup>159</sup>

As was noted in Part II, however, Section 2(a) does not lend itself to the wholesale “suppression”<sup>160</sup> of offensive speech. Additionally, I do not argue for the use of Section 2(a) to prohibit the registration of “tasteless” trademarks. However, the trademarks presented in Part III go beyond “tasteless” and reach the level of disparaging. If we truly believe that there is a qualitative difference between what is tasteless and what is disparaging, then Section 2(a) should be able to avoid Davis’ concerns regarding tasteless trademarks. More importantly, Section 2(a), like the statute at issue in *Finley*,<sup>161</sup> merely prevents the waste of government resources on content it does not wish to support or provide benefits for. Section 2(a) does not, in fact, prevent the *use* of such content.

Others have argued against the restriction of commercial speech by admonishing the government’s role in the regulation of degrading trademarks. One scholar suggests the typical market-based solution to degrading trademarks: “The proper response to offensive speech is not censorship, but

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REV. 1295, 1302-05 (2008).

<sup>157</sup> 447 U.S. 557 (1980).

<sup>158</sup> *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466 (1988) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980)).

<sup>159</sup> Davis, *supra* note 32, at 834-35 (1993) (internal citations omitted).

<sup>160</sup> *Id.*

<sup>161</sup> See Part IV.A., *supra*.

counter-speech.”<sup>162</sup> John Tait has argued that market principles should regulate offensive and degrading trademarks. He posits that:

If the mark is truly offensive to a great number of people, consumers will simply refuse to purchase the product. Also, consumers are free to write letters, “erect signs, carry placards, or publish advertisements” in protest of any offensive trademark.... The marketplace of... commercial products[] will eventually weed out trademarks that people find undesirable and offensive.<sup>163</sup>

This argument, however, assumes that those who are the target audience for pornography (generally, straight, white men) are also those who would be degraded by such material (generally, marginalized groups that do not include straight, white men). The asymmetry of this situation reflects the flaw in a market-based scheme of societal regulation. Furthermore, the standard suggested by Tait is inconsistent with the legal test under *Harjo*, which, understandingly, looks to the opinions of the affected group, rather than society as a whole. Thusly, neither a market based system of regulation, nor a First Amendment challenge to Section 2(a), is appropriate.

### C. First Amendment Challenges Conclusion

Some have argued that Section 2(a) violates the First Amendment’s Right to Free Speech. These claims range from those asserting that Section 2(a) is impermissible viewpoint discrimination to those who claim it crosses the constitutional boundaries vis-à-vis the regulation of commercial speech. Neither of these arguments, however, address the fact that (1) Section 2(a) is not aimed at specific types of trademarks (as defined by content), and (2) that Section 2(a) does not actually prevent the use of a trademark – only its registration with the federal government. Finally, restrictions on registration actually increase the availability of trademarks for use in the marketplace (because owner’s no longer have exclusive use). While I do not purport to support such a system, it is of note given the claims for increased speech rights. While not exhaustive, I hope to have refuted some arguments regarding Section 2(a)’s relationship to the First Amendment.

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<sup>162</sup> John V. Tait, *Trademark Regulations and the Commercial Speech Doctrine: Focusing on the Regulatory Objective to Classify Speech for First Amendment Analysis*, 67 *FORDHAM L. REV.* 897, 937-38 (1998).

<sup>163</sup> *Id.*

## V. Conclusion

When the PTO decides to register a trademark on the Principal Register, it also concludes that the trademark does not consist of disparaging material. Many of the trademarks on the Principal Register are used in connection with sexually explicit and pornographic goods and services. When the PTO registers a pornographic trademark, the government draws a disparaging/non-disparaging line that sends a normative message as to what sorts of racist, sexist, and homophobic representations are unproblematic. As the examples in Part III illustrate, many of these trademarks have explicit titles that, when used in connection with pornographic goods and services, both anti-pornography advocates and sex-positivists would likely consider disparaging to marginalized and subordinated groups.

In considering the question of whether these trademarks are indeed disparaging, courts will have to tangle with potential First Amendment challenges, as well as the evidentiary problems that arise when trying to determine whether a substantial composite of a referenced population finds the trademark disparaging. These evidentiary problems arise from the range of views regarding the utility of pornography in the liberation of marginalized people, as well as from a lack of direction on the part of courts in explaining what exactly constitutes a substantial composite of an affected population. As a practical issue, the wide range of opinions regarding sexually explicit material may make it difficult to bring some cancellation claims. I do not necessarily suspect this, however, of the examples provided in Part III. In my opinion, those were clear-cut cases of Section 2(a) violations.<sup>164</sup> Normatively, however, I agree that pornography and sexually explicit content can serve as a site for the contestation of oppressive constructions of race and sexuality. As such, it is not only appropriate to call for the cancellation of the registered trademarks presented in Part III, but we should also strive to afford trademark protections to those trademarks which deconstruct systems of oppression by promoting positive representations of race, gender, and sexuality. Regardless of what is done in the realm of trademark registration, we must heed Richard Fung's warning that, in protecting sex-positive trademarks and producing sex-positive content, we must ensure that we are "*pulling apart* the tropes... in constructing an alternative erotics,"<sup>165</sup> rather than reifying old, and constructing new, regimes of domination.

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<sup>164</sup> It should be noted, however, that I am only included in one of the four "affected groups," namely black, heterosexual men implicated by *Blackzilla*. Needless to say, however, I am outraged at the rest of the content as well.

<sup>165</sup> Fung, *supra* note 89, at 248 (emphasis added).