

N.I.G.G.A., Slumdog, Heeb, and Dyke: Reconsidering Disparaging Trademarks in a Post-Racial Era

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Currently registration of disparaging trademarks is prohibited under Section 2(a) of the Lanham Act (15 U.S.C. § 1052(a)). I posit that the registration of such marks should be allowed for a variety of reasons. First, one of the goals of the Lanham Act, also commonly known as the Trademark Act, is to protect consumers. For example, it is the mind of the consumer that we are most concerned about when deciding likelihood of confusion cases. If consumers have socially accepted and adopted the use of such terms, then trademark owners should be allowed to adopt these terms to promote its goods or services to those consumers. Second, and along the same lines, the country has recently experienced a shift in the social climate. Due to the 2008 election of Barack Obama, it has been said we now live in a post-racial America. Racism no longer exists; so the story goes.... Therefore, in the spirit of this post-racial era where race is no longer a "hot-button" issue, the registration of that line of marks should be allowed. Finally, I will examine this issue from a First Amendment perspective and show how this section of the Lanham Act incorrectly abridges a trademark owner's right to freely adopt a moniker for its goods or services.

Outline*:

I. History

- a. Distinguish between scandalous, immoral, and disparaging trademarks
- b. Compare standards, or lack thereof (?)
- c. What is the purpose of Section 2(a)
 - i. Why was it enacted
 - ii. Legislative history
 - iii. How does Section 2(a) fit in with general trademark theory

II. Overview of "disparaging" trademark case law

- a. Race: NIGGA (compare with WHITE POWER and BLACK POWER); HEEB; REDSKINS
- b. Sexual Orientation: QUEER, DYKE
- c. Religion:

III. Benefits of prohibiting registration of disparaging marks

- a. Supported by trademark theory?
- b. Keeps marketplace "clean"... is paternalism a good thing sometimes?

IV. Drawbacks of prohibiting registration of disparaging marks

- a. First Amendment Issues
- b. Prevents “Reappropriation”
 - i. What happens/should happen when a member of the concerned class attempts to register the mark? (i.e. “self disparaging marks”)
- c. Current law ignores “post-racial” era

V. Conclusion

* This paper is a work-in-progress. I will have a solid draft in the upcoming months. Also, I have presented on this topic in the past and can submit additional documentation, if needed. Thank you for your consideration.