
TRADEMARKS, RACE AND SLUR- APPROPRIATION: AN INTER- DISCIPLINARY AND EMPIRICAL STUDY*

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The Supreme Court decision in Matal v. Tam¹ sparked global controversy by striking down the proscriptions against registering racist slurs as trademarks. This Article investigates the impact of the case in two ways. First, by using scholarship from the social sciences, this Article examines the limits to the argument that racial slur-appropriation is a vital form of minority self-empowerment. Drawing from this literature, this Article claims that “self” appropriation of a racial slur is critically distinct from the appropriation of a slur by an “other” group, and that removal of the disparagement bar has resulted in negative consequences particularly for Native Americans.

Second, this Article analyzes the U.S. trademark register to examine the empirical impact of the Tam decision. This analysis shows that, out of approximately four million trademark applications submitted from January 1, 2010 to January 1, 2020, the number of racially-oriented applications was low (less than one percent of total applications per year). Nevertheless, a detailed examination of 312 racially-oriented trademark applications found meaningful distinctions between which minorities actively self-appropriate slurs versus which minorities face appropriation by others.

This Article also examines the PTO’s response to racially-oriented trademark applications. From a custom-built lexicon of 537 slurs, only 11

* This Article contains offensive language in a discussion of race and slur-appropriation in trademark law. Due to their offensiveness, we present trademarks in “lower case” instead of conventional block capitals. For the same reason, images are not reproduced. For an accurate depiction of these trademarks, readers can find the trademark via USPTO public databases such as the TRADEMARK ELEC. SEARCH SYS., <https://www.uspto.gov/trademarks-application-process/search-trademark-database> (last visited July 24, 2021) [perma.cc/6YST-MAD7]. We hope this Article encourages meaningful discussions on the impact of this language and the legal implications of its use.

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1. 137 S. Ct. 1744 (2017).

slurs (and their spelling variants) were found to trigger a § 2(a) refusal by the PTO. These slurs were the “n-word,” “mammy,” “squaw,” “cholo,” “redskin,” “slant,” “injun,” “indian giver,” “negro,” “chink,” and “colored;” however, the § 2(a) proscriptions in relation to these slurs were inconsistently applied. Many other applications incorporating these slurs never received a § 2(a) refusal under either the disparagement or scandalous/immoral provisions. This Article argues that despite the inconsistency in its application, the § 2(a) proscriptions set a standard for government-sanctioned civility and were instructive for non-American applicants. In the vacuum left by its absence, this Article finds the PTO resorting to “failure to function” doctrine to resist some racially-oriented applications.

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I. INTRODUCTION

Racist words and images can now be registered as trademarks in the United States of America. This is thanks to two recent Supreme Court cases, *Matal v. Tam*² and (to a lesser extent) *Iancu v. Brunetti*.³ In those cases, the Court struck down the § 2(a) Lanham Act⁴ prohibitions against the registration of “disparaging” and “scandalous/immoral” marks for violating the First Amendment’s protection of freedom of expression. Controversially, the *Tam* decision spoiled the protracted efforts by some Native Americans to de-register NFL-owned disparaging trademarks such as “redskins.”⁵

After *Tam*, the plaintiff rock star Simon Tam proclaimed the ruling to be “a win for all marginalized groups.”⁶ This Article uses social science research and empirical analysis of the trademarks register to dispute this view. This Article claims that this rhetoric is based on a false premise. It assumes equal access to an idealized circle of free speech, slur-appropriation, and self-empowerment. This Article claims that minorities face inequity in an unequal way and that due to that inequity, the loss of § 2(a)’s “disparaging” and “scandalous/immoral” provisions may entrench and legitimize the use of slurs against more vulnerable “marginalized groups.”

In Part II, this Article discusses the background to the *Tam* case. Part III reviews the social science literature on the psycho-social dynamics of racial slur appropriation. Part IV sets out a detailed method to find trademark applications incorporating racial slurs (“racially-oriented trademark applications”). It also sets out a method to define “self-appropriating applications” and “other-appropriating applications” (*i.e.*, applications for a racial slur from a non-affected group). Part V analyzes 312 racially-oriented trademark applications, including the PTO examiner files. It sets out descriptive statistics and discusses whether

2. *See generally id.*

3. 139 S. Ct. 2294 (2019).

4. Prior to *Tam*, the provision read: “[t]rademarks registrable on principal register: No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal 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.” 15 U.S.C. § 1052(a).

5. *See* Mark Conrad, *Matal v. Tam—A Victory for The Slants, A Touchdown for the Redskins, but an Ambiguous Journey for the First Amendment and Trademark Law*, 36 CARDOZO ARTS & ENT. L.J. 83, 89 (2018).

6. Joe Coscarelli, *Why the Slants Took a Fight Over Their Band Name to the Supreme Court*, N.Y. TIMES (June 19, 2017), <https://www.nytimes.com/2017/06/19/arts/music/slants-name-supreme-court-ruling.html> [<https://perma.cc/VST3-2HU6>].

and how § 2(a) refusals were applied by the PTO. The conclusion at Part VI, discusses the normative implications of these results.

II. BACKGROUND

Under the Lanham Act, trademarks can be federally registered subject to the administration of the PTO.⁷ To be eligible, at a minimum the trademark must be distinctive and must be used (or intended to be used) in trade or commerce.⁸ In other words, a registrable trademark must act as a source identifier and distinguish the applicant's goods or services from those of other traders. The PTO can refuse to register a trademark for failing to meet these threshold requirements but typically a PTO refusal will cite to numerous and more specific grounds for refusal.⁹ Historically, these included refusals based on § 2(a) of the Lanham Act (that the trademark is "disparaging" or "immoral/scandalous").¹⁰

These provisions were challenged and struck down by the Supreme Court in two separate cases, *Tam*¹¹ and *Brunetti*¹² for violating the First Amendment's protection of freedom of expression. The first case, *Tam*,¹³ began with lead singer Simon Tam's quest to register the name of his Asian American rock band, "The Slants," in Class 41 for entertainment services *et al.*¹⁴ Simon Tam said he chose the name "The Slants" to reclaim this slur against East Asians and "drain its denigrating force."¹⁵ Tam stated that by self-labeling his band¹⁶ with the racial slur "The Slants," he was "engaging in a process of self-empowerment called re-appropriation, where we own/change the meaning of harmful terms to reduce their sting."¹⁷

The PTO refused the application under the disparagement provision of § 2(a), which prohibited the registration of trademarks "which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them

7. See 15 U.S.C. § 1501(a)(1).

8. See 15 U.S.C. §§ 1051–1052, 1127; see also J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 3:1 (5th ed. 2021); Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977, 1981 (2019) ("To be protectable, a trademark must be not only used in commerce, but used in a trademark way." (internal citations omitted)).

9. As summarized by the Supreme Court in *Iancu v. Brunetti*, "Generally, a trademark is eligible for registration . . . if it is 'used in commerce.' But the Act directs the PTO to 'refuse[] registration' of certain marks. For instance, the PTO cannot register a mark that 'so resembles' another mark as to create a likelihood of confusion. It cannot register a mark that is 'merely descriptive' of the goods on which it is used. It cannot register a mark containing the flag or insignia of any nation or State. There are five or ten more (depending on how you count)." 139 S. Ct. 2294, 2298 (2019) (internal citations omitted).

10. See *supra* note 4.

11. *Matal v. Tam*, 137 S. Ct. 1744, 1744 (2017).

12. *Brunetti*, 139 S. Ct. at 2294.

13. *Tam*, 137 S. Ct. at 1744.

14. U.S. Trademark Application Serial No. 85/472,044 (filed Nov. 14, 2011).

15. *Tam*, 137 S. Ct. at 1751.

16. Consistent with this philosophy, the band has a history of actively co-opting racial slurs with albums titled THE YELLOW ALBUM and SLANTED EYES SLANTED HEARTS. See *Our Story*, SLANTS, <http://www.theslants.com/biography/> (last visited Apr. 9, 2021) [<https://perma.cc/6YRA-JQJ6>].

17. Simon Tam, *First Amendment, Trademarks, and the Slants: Our Journey to the Supreme Court*, 12 BUFF. INTELL. PROP. L.J. 1, 2 (2018).

into contempt, or disrepute.”¹⁸ This law did not distinguish between the self-disparaging use made by Tam from disparaging use of a slur to target another group. Tam’s appeals progressed to the Trademark Trial and Appeal Board (“TTAB”)¹⁹ and then to the federal court.²⁰ Finally, on June 19, 2017,²¹ the Supreme Court unanimously affirmed the *en banc* Federal Circuit’s opinion that the disparagement clause was facially unconstitutional under the First Amendment.²²

About two years later, in *Brunetti*,²³ the Supreme Court considered Erik Brunetti’s appeal in relation to his application for the trademark “fuct” in connection with a clothing line.²⁴ The PTO had refused his application under the adjacent “immoral/scandalous” provision of § 2(a) of the Lanham Act.²⁵ On June 24, 2019, the Supreme Court held that this provision was also in violation of the First Amendment and struck it down.²⁶ Brunetti’s trademark for “fuct” has since proceeded to registration.²⁷

Both the disparagement and the immoral/scandalous provisions were historically used to refuse trademark applications incorporating racist words or images.²⁸ Therefore, there was world-wide interest in the outcomes of *Tam* and *Brunetti* and concern that the PTO would be flooded with applications for racist trademarks.²⁹ Indeed, in the aftermath of *Tam* the media reported on an influx of applications, including trademark applications for the “n-word.”³⁰ Some of these applicants were activists who claimed they sought to capture the “n-word” in the interests of self-appropriation or to prevent hate groups from using racist marks in commerce.³¹

In the immediate term, high-profile efforts by Native Americans to de-register trademarks such as “redskins” collapsed due to the *Tam* decision. In the case

18. 15 U.S.C. § 1052(a).

19. *In re Tam*, 108 U.S.P.Q.2d (BNA) 1305 (T.T.A.B. 2013).

20. *In re Tam*, 785 F.3d 567 (Fed. Cir. 2015); *vacated en banc*, 808 F.3d 1321 (Fed. Cir. 2015).

21. *Matal v. Tam*, 137 S. Ct. 1744 (2017).

22. *Id.*

23. *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

24. See U.S. Trademark Application Serial No. 85/310,960 (filed May 3, 2011) (applying to register the mark “fuct” (International Class 25)).

25. *Brunetti*, 139 S. Ct. at 2296.

26. *Id.* at 2297.

27. “fuct,” Registration No. 88/310,879.

28. See *Matal v. Tam*, 137 S. Ct. 1744, 1753 (2017).

29. Christina S. Loza, *Matal v. Tam: Disparaging Trademarks, Like the Slants, Can Be Registered Trademarks*, ORANGE CNTY. L. 24, 27 (2017) (“There is, of course, a concern that the floodgates have been opened. Will every hateful person file marks and begin filling our Trademark Register with racial slurs? There is certainly a chance.”); cf. Timothy T. Hsieh, *The Hybrid Trademark and Free Speech Right Forged from Matal v. Tam*, 7 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 3 (2018) (“Will the USPTO be flooded by such ‘disparaging’ trademark applications as a result? This paper proposes that such an outcome is unlikely, or that concern is simply blown out of proportion. Sound marketing practices and goodwill advise against or mitigate that outcome.”).

30. Hsieh, *supra* note 29, at 24; Ailsa Chang, *After Supreme Court Decision, People Race to Trademark Racially Offensive Words*, NPR (July 21, 2017, 4:25 PM), <http://www.npr.org/2017/07/21/538608404/after-supreme-court-decision-people-race-to-trademark-racially-offensive-words> [https://perma.cc/H2EA-XUGU].

31. Chang, *supra* note 30; Justin W.M. Moyer, *Trademark for n-word, Swastika Filed After Legal Ruling*, CHI. TRIB. (Aug. 2, 2017, 10:31 AM), <http://www.chicagotribune.com/business/ct-n-word-swastika-trademark-20170802-story.html> [https://perma.cc/9JK2-WM7A].

of the “redskins” marks,³² a group of Native Americans brought cancellation proceedings against the marks’ owners, the National Football League (NFL).³³ The TTAB agreed that the marks disparaged Native Americans and ordered the marks be cancelled.³⁴ The NFL appealed, but the case was put on hold pending the outcome of the Supreme Court decision in *Tam*.³⁵ Twelve days after the *Tam* decision, on June 29, 2017, the petitioners conceded that *Tam* was controlling and withdrew their petition for cancellation.³⁶

These outcomes have provoked passionate debate between free speech advocates (such as Simon Tam) and those that favor greater cultural sensitivity.³⁷ The Court’s opinions generated significant media and legal commentary, including reflections on the First Amendment,³⁸ discussions on methods to subvert unjust outcomes,³⁹ and reviews of PTO practices.⁴⁰ This is the first Article (to the author’s knowledge) to use social science research to examine the limits of Tam’s “slur appropriation as empowerment” claims and the first to empirically evaluate the impact of the *Tam* decision against activity on the trademark register.

32. “the redskins,” Registration No. 836,122; “the redskins,” Registration No. 987,127; “redskins,” Registration No. 1,085,092; “Washington redskins,” Registration No. 978,824; “Washington redskins,” Registration No. 986,668; U.S. Trademark Application Serial No. 738/292,272 (applying for the mark “redskinnettes”).

33. See generally Amanda Blackhorse, et al. v. Pro-Football, Inc., 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014).

34. *Id.*

35. Notice of Appeal, Amanda Blackhorse et al. v. Pro-Football Inc., 111 U.S.P.Q.2d (T.T.A.B. 2014), No. 92/046,185.

36. The petitioners agreed with the NFL’s request that “the Court reverse the judgment of the district court, vacate the district court’s order directing the PTO to schedule cancellation of Pro-Football’s trademark registrations, and remand the case with instructions to grant summary judgment to Pro-Football.” See Letter from Lisa S. Blatt, Couns. for Appellant, Arnold & Porter Kaye Scholer LLP, to Patricia S. Connor, Clerk Ct., U.S. Ct. Appeals for Fourth Cir. (June 22, 2017), <https://www.manatt.com/Manatt/media/Media/PDF/Newsletters/Advertising%20Law/Redskins-letter.pdf> [<https://perma.cc/4D3B-WGL5>]; Letter from Jesse A. Witten, Couns. for Appellees, Drinker Biddle & Reath LLP, to Patricia S. Connor, Clerk Ct., U.S. Ct. Appeals for Fourth Cir. (June 29, 2017), <https://www.manatt.com/Manatt/media/Media/PDF/Newsletters/Advertising%20Law/Pro-Football-Inc-v-Blackhorse.pdf> [<https://perma.cc/7TP7-HQRT>].

37. See, e.g., Simon Tam, *An Open Letter to Asian Americans Advancing Justice, NPR CodeSwitch, and NAPABA*, SLANTS (July 7, 2017), <http://www.theslants.com/an-open-letter-to-asian-americans-advancing-justice-npr-codeswitch-and-napaba/> [<https://perma.cc/C5M7-2U64>].

38. See, e.g., Sonia K. Katyal, *Brands Behaving Badly*, 109 Trademark Rep. 819 (2019); Lisa P. Ramsey, *Free Speech Challenges to Trademark Law After Matal v. Tam*, 56 HOUS. L. REV. 401, 401 (2018); Hsieh, *supra* note 29, at 30; Russ VerSteeg, *Blackhawk Down or Blackhorse Down? The Lanham Act’s Prohibition of Trade- marks That “May Disparage” & the First Amendment*, 68 OKLA. L. REV. 677, 680 (2016); Russ VerSteeg, *Historical Perspectives & Reflections on Matal v. Tam and the Future of Offensive Trademarks*, 25 J. INTELL. PROP. L. 109, 110 (2017).

39. Esther H. Sohn, *Countering the “Thought We Hate” with Reappropriation Use Under Trademark Law*, 94 N.Y.U. L. REV. 1729, 1766 (2019) (proposing a reappropriation use defense); Jake MacKay, *Racist Trademarks and Consumer Activism: How the Market Takes Care of Business*, 42 LAW & PSYCHOL. REV. 131, 144 (2018) (arguing that consumer activism can play a role in regulating use of derogatory terms in the marketplace).

40. Deborah R. Gerhardt, *Beware the Trademark Echo Chamber: Why Federal Courts Should Not Defer to USPTO Decisions*, 33 BERKELEY TECH. L.J. 643, 644 (2018) (arguing the PTO expertise does not lie in considerations of constitutional limits on trademark protection).

III. SOCIAL SCIENCE PERSPECTIVES ON SELF-APPROPRIATION OF RACIAL SLURS

Simon Tam was not the first minority to self-appropriate a slur by way of a registered trademark. For example, in 2003, Jewish publisher Jennifer Bleyer controversially⁴¹ applied for “heeb” in relation to magazines,⁴² and later applied for “heeb” in relation to clothing and entertainment.⁴³ Similarly, in the LGBTQI+ space in 2003, the San Francisco Women’s Motorcycle Contingent applied to register “dykes on bikes.”⁴⁴

Similar to *Tam*, all of these applicants claimed their acts of “semiotic disobedience”⁴⁵ were intended to transform the negative valence of the slur to the benefit of their relevant communities. Despite these intentions, all of these trademarks were highly controversial⁴⁶ and did not receive unanimous support from their respective collectives.⁴⁷ For example, although *Tam* stated that “The Slants refers to our collected perspective as people of color,”⁴⁸ during the case, Asian American groups filed amicus briefs both for and *against* the registration of the trademark.⁴⁹ Contested acts of semiotic disobedience can also be seen outside the trademarks sphere. For example, Oprah Winfrey has openly disagreed with Jay-Z’s frequent use of the n-word in his lyrics and disputes his self-empowerment justifications.⁵⁰

41. See e.g., *Its Hip to be Heeb—Jennifer Bleyer, Founder and Editor of Heeb Magazine*, STAN. EVENT CALENDAR (Nov. 11, 2004), <https://events.stanford.edu/events/42/4212/> [<https://perma.cc/SZ4C-Z66K>].

42. See U.S. Trademark Application Serial No. 78/250,619 (filed May 15, 2003) (applying to register the mark “heeb” in International Class 41).

43. See U.S. Trademark Application Serial No. 78/558,043 (filed Feb. 1, 2005) (applying to register “heeb” for clothing (International Class 25) and entertainment, namely for hosting events (International Class 41)). The application was refused on the grounds of disparagement and its refusal was affirmed by the Trademark Trial and Appeal Board (T.T.A.B.). See *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071 (T.T.A.B. 2008).

44. U.S. Trademark Application Serial No. 78/281,746 (filed July 31, 2003) (applying to register “dykes on bikes” in International Class 41).

45. Katyal, *supra* note 38, at 821. For a discussion of these pre-*Tam* applications, see Todd Anten, Note, *Self-Disparaging Trademarks and Social Change: Factoring the Reappropriation of Slurs into Section 2(a) of the Lanham Act*, 106 COLUM. L. REV. 388 (2006).

46. Angela Giampolo, *The Trademark Battle of Dykes on Bikes*, PHILA. GAY NEWS (Nov. 1, 2017, 8:22 PM), <https://epgn.com/2017/11/01/the-trademark-battle-of-dykes-on-bikes/> [<https://perma.cc/343X-H4RH>]; Joe Garofoli, *Attorneys Find Dykes on Bikes Patently Offensive, Reject Name*, SFGATE, <https://www.sfgate.com/politics/joegarofoli/article/Attorneys-find-Dykes-on-Bikes-patently-offensive-2655626.php> (Jan. 20, 2012, 6:18 PM) [<https://perma.cc/ES9B-YT7Z>]; see also *infra* note 50.

47. For an example of the disputed use of “heeb,” see Aileen Jacobson, *New Jewish Magazine Aims for the Young and Hip*, CHI. TRIB. (Feb. 8, 2002), <https://www.chicagotribune.com/news/ct-xpm-2002-02-08-0202080012-story.html> [<https://perma.cc/8N8P-QKGB>] (quoting Abraham Foxman, national director of the Anti-Defamation League: “It’s good to have a magazine reaching out to youth, but it’s counterproductive to try to get their attention by giving status and credibility to an anti-Semitic epithet.”). For an example of the disputed use of “dyke,” see Bea Mitchell, *Is the Word ‘Dyke’ Offensive?*, PINKNEWS (June 1, 2018), <https://www.pinknews.co.uk/2018/06/01/is-the-word-dyke-offensive/> [<https://perma.cc/9U26-JG8S>] (discussing the view that “dyke” is still considered derogatory in some contexts).

48. Tam, *supra* note 17, at 1.

49. See *Matal v. Tam*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/lee-v-tam/> (last visited July 24, 2021) [<https://perma.cc/BV85-RGD6>].

50. *Oprah Talks to Jay-Z*, OPRAH.COM (Oct. 2009), <http://www.oprah.com/omagazine/oprah-interviews-jay-z-october-2009-issue-of-o-magazine/8> [<https://perma.cc/U5C7-M3AA>]. Jay-Z’s justification was a familiar

The lack of unanimous support for slur appropriation from within communities raises the question of whether, and under what circumstances, slur appropriation can operate as an individual or a collective empowerment tool.⁵¹ Why do some groups engage in slur appropriation but not others? The phenomenon of slur appropriation has recently emerged as a field of interest in psychology, sociology, and linguistics, collectively termed for the purpose of this Article as the “social sciences.”⁵² A summary of every perspective of this wide-ranging scholarship is beyond the scope of this Article, but the next Section presents an overview of the key areas of convergence in relation to slur appropriation.

A. *Slurs and Their Harms*

In the social sciences, slurs are defined as words used by the dominant or majority group to emphasize an attribute that is devalued in a particular social context.⁵³ These slurs often express “contempt and derision”⁵⁴ and thus stigmatize or demarcate the “other” or target group.⁵⁵ The demarcation caused by the sustained use of stigmatizing slurs is thought to be the basis for perpetuating intergroup conflict.⁵⁶ For example, early sociology studies found a positive relationship between the level of hatred towards a group and the number of slurs used to “express and reinforce” that prejudice.⁵⁷ Linguistic scholars, such as Croom, argue that slurs are instrumental in perpetuating discrimination “because

self-appropriation argument. “It’s just become part of the way we communicate. My generation hasn’t had the same experience with that word that generations of people before us had. We weren’t so close to the pain. So in our way, we disarmed the word. We took the fire pin out of the grenade.” *Id.*

51. A difficult but related question is under what conditions can or should an individual speak for a collective. Some literature suggests this may relate to coping styles and/or levels of self-identification with the group. Discussion of this is beyond the scope of this Article. For an overview, see Jennifer Crocker & Brenda Major, *Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma*, 96 *PSYCH. REV.* 608, 613 (1989); Jennifer Crocker & Brenda Major, *The Self-Protective Properties of Stigma: Evolution of a Modern Classic*, 13 *PSYCH. INQUIRY* 232, 235–36 (2003); Irwin Katz, *Gordon Allport’s The Nature of Prejudice*, 12 *POL. PSYCH.* 125, 132 (1991); Samuel Noh & Violet Kaspar, *Perceived Discrimination and Depression: Moderating Effects of Coping, Acculturation, and Ethnic Support*, 93 *AM. J. PUB. HEALTH* 232, 237 (2003).

52. See, e.g., Adam D. Galinsky et al., *The Reappropriation of Stigmatizing Labels: The Reciprocal Relationship Between Power and Self-Labeling*, 24 *PSYCH. SCI.* 2020, 2020 (2013) (“Given the increasing prevalence of self-labeling with stigmatizing descriptors, it is surprising that no empirical research has investigated its effects. The current research begins to fill this empirical void.”); Jennifer Whitson, Eric M. Anicich, Cynthia S. Wang & Adam D. Galinsky, *Navigating Stigma and Group Conflict: Group Identification as a Cause and Consequence of Self-Labeling*, 10 *NEGOTIATION & CONFLICT MGMT. RSCH.* 88, 100 (2017) (describing slur appropriation as “the emerging topic”); see also Adam M. Croom, *Racial Epithets, Characterizations, and Slurs*, 12 *ANALYSIS & METAPHYSICS*, 11, 11 (2013) (“Since at least 2008 linguists and philosophers of language have started paying more serious attention to issues concerning the meaning or use of racial epithets and slurs.”).

53. See, e.g., Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 *ANN. REV. SOCIO.* 363, 369 (2001).

54. Galinsky et al., *supra* note 52, at 2020.

55. Brenda Major & Laurie T. O’Brien, *The Social Psychology of Stigma*, 56 *ANN. REV. PSYCH.* 393, 394 (2005) (offering a comprehensive overview of the early literatures on stigma); Marilyn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 *J. SOC. ISSUES* 429 (1999) (analyzing prejudice from an intergroup perspective).

56. Whitson et al., *supra* note 52, at 89.

57. Erdman B. Palmore, *Ethnophaulisms and Ethnocentrism*, 67 *AM. J. SOCIO.* 442, 442 (1962).

slurring terms offer[] racist speakers a linguistic resource with which to dehumanize their targets”⁵⁸ Croom argues that the use of racist slurs thus disarms inhibitions and enables destructive acts against other human beings.⁵⁹

Research has found that slurs reinforce discrimination in meaningful and measurable ways. For example, the harms accrued by the target community are reflected in both social and economic measures of disadvantage.⁶⁰ Discrimination against a target group has been shown to result in real, negative impacts on psychological well-being⁶¹ and long-term physical health.⁶² A positive correlation has also been found between the number of slurs applied to a group and rates of suicide.⁶³

Psychologists have tried to draft cause-and-effect models to frame these harms. For example, Wang et al. (in reviewing the psychology literature) suggests that stigmatization of a racial minority leads to disadvantage via “two distinct but reinforcing processes: direct discrimination and stigma internalization.”⁶⁴ Direct discrimination has been observed in various contexts, including hiring and payment practices (race and gender discrimination)⁶⁵ and expressions

58. Adam M. Croom, *How to Do Things with Slurs: Studies in the Way of Derogatory Words*, 33 LANGUAGE & COMMUN 177, 189 (2013); see also Christopher Hom, *The Semantics of Racial Epithets*, 105 J. PHIL. 416, 435 (2008) (arguing that some epithets should be excluded from First Amendment protection under a theory called Combinatorial Externalism).

59. Croom, *supra* note 58, at 189. For an overview of the literature on linguistics, see Adam M. Croom, *An Introduction to the Special Issue on Slurs*, 52 LANGUAGE SCI. 1, 1 (2015).

60. See generally Palmore, *supra* note 57, at 445.

61. Melissa L. Greene, Niobe Way & Kerstin Pahl, *Trajectories of Perceived Adult and Peer Discrimination Among Black, Latino, and Asian American Adolescents: Patterns and Psychological Correlates*, 42 DEVELOPMENTAL PSYCH., 218, 230, 234 (2006) (examining Asian American, Dominican, Latino, and Black adolescents’ differential experiences with racism (with Black youths perceiving a steeper growth in racism) and its effects on mental wellbeing over time); Lori S. Hoggard, Christy M. Byrd & Robert M. Sellers, *The Lagged Effects of Racial Discrimination on Depressive Symptomology and Interactions with Racial Identity*, 62 J. COUNSELING PSYCH. 216, 223 (2015) (exploring the impacts of racial discrimination on the mental health of African Americans); Christopher T.H. Liang, Lisa C. Li & Bryan S. K. Kim, *The Asian American Racism-Related Stress Inventory: Development, Factor Analysis, Reliability, and Validity*, 51 J. COUNSELING PSYCH. 103, 104 (2004) (examining non-Black minorities and racism-related stress).

62. Elizabeth Brondolo et al., *Racism and Ambulatory Blood Pressure in a Community Sample*, 70 PSYCHOSOMATIC MED. 49, 49 (2008); Nancy Krieger, *Racial and Gender Discrimination: Risk Factors for High Blood Pressure?*, 30 SOC. SCI. & MED. 1273, 1278–79 (1990) (finding that being Black in the United States carries a risk for high blood pressure); Shelly P. Harrell, *A Multidimensional Conceptualization of Racism-Related Stress: Implications for the Well-Being of People of Color*, 70 AM. J. ORTHOPSYCHIATRY 42, 43, 53 (2000) (presenting a multifactorial model of the expression of racism related stress amongst American minorities).

63. Brian Mullen & Joshua M. Smyth, *Immigrant Suicide Rates as a Function of Ethnophaulisms: Hate Speech Predicts Death*, 66 PSYCHOSOMATIC MED. 343, 346 (2004) (“[T]he suicide rates for ethnic immigrant groups in the United States were significantly predicted by the negativity of the ethnophaulisms used to refer to those ethnic immigrant groups.”).

64. Cynthia S. Wang, Jennifer A. Whitson, Eric M. Anicich, Laura J. Cray & Adam G. Galinsky, *Challenge Your Stigma: How to Reframe and Revalue Negative Stereotypes and Slurs*, 26 CURRENT DIRECTIONS PSYCH. SCI. 75, 75–76 (2017) (proposing that “[B]oth the discriminatory and internalized disadvantages of stigma are reinforced through derogatory group labels, or slurs”); see also GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 142–61 (1954).

65. Claudia Goldin, *A Grand Gender Convergence: Its Last Chapter*, 104 AM. ECON. REV. 1091, 1092, 1116 (2014) (exploring structural impediments in the American labor market that prevent gender convergence in equality measures, such as wages); see also Joseph G. Altonji & Rebecca M. Blank, *Race and Gender in the Labor Market*, in HANDBOOK OF LABOR ECONOMICS 3143, 3143–251 (Orley Ashenfelter & David Card eds., vol.

of discrimination via micro-aggressions,⁶⁶ overt abuse, or abuse via ambiguous signals.⁶⁷

Stigma internalization is a second proposed mechanism of reinforcement where a target behaves in ways that support and re-enforce negative stereotypes.⁶⁸ This maladaptive behavior has been explained by Jost and Banaji as satisfying the target's psychological need for system-justification—that is, the target feels the need to make sense of “the existing states of affairs by assigning attributes to the self and others that are consonant with the roles or positions occupied by individuals and groups.”⁶⁹ This “false consciousness” can occur “even at the expense of personal and group interest.”⁷⁰ Internalization means that the negative connotations of the stereotype or slur can become self-fulfilling.⁷¹

B. *Appropriation of Slurs*

Given the negative implications discussed above, why would a racial or ethnic minority willingly choose to self-appropriate and label themselves with a slur? How can this be empowering? Research psychologists have proposed three mutually enforcing mechanisms to explain why self-appropriation of a slur may lead to increased self-empowerment. First, self-labeling can neutralize the negative valence of the slur; second, self-labeling is an expression of agency which increases the perception that the speaker has power; and third, self-labeling increases the perception that the group has power, and those with more power are

3C 1999) (providing an in-depth overview of the literature analyzing why race and gender differentials persist in U.S. labor markets).

66. Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCH. 271, 278 (2007) (reviewing the psychological literature to develop a taxonomy of interpersonal racial microaggressions impacting minorities in America); Alvin N. Alvarez, Linda Juang & Christopher T. H. Liang, *Asian-Americans and Racism: When Bad Things Happen to “Model Minorities,”* 12 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 477, 487 (2006) (exploring various types of racist aggressions experienced by Asians).

67. Jessica Salvatore & J. Nicole Shelton, *Cognitive Costs of Exposure to Racial Prejudice*, 18 PSYCH. SCI. 810, 810–11 (2007) (exploring the differences between ambiguous versus blatant cues to racial prejudice and the differential impact they have on racial groups); see also Kathy Espino-Pérez, Brenda Major & Brenna Malta, *Was It Race or Merit?: The Cognitive Costs of Observing the Attributionally Ambiguous Hiring of a Racial Minority*, 24 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 272, 275 (2018) (exploring the factors that impact the cognitive costs on interpreting ambiguous racist cues for ethnic minority perceivers); Laura Leets, *Disentangling Perceptions of Subtle Racist Speech: A Cultural Perspective*, 22 J. LANGUAGE & SOC. PSYCH. 145 (2003) (finding that Asian Americans were more sensitive to indirect racist speech in contrast to European, African, and Hispanic groups, who relied more on the actual message. Leets looked at a context-specific variable: cultural patterns of interaction).

68. Wang et al., *supra* note 64, at 76.

69. John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 BRIT. J. SOC. PSYCH. 1, 20 (1994).

70. *Id.* at 2.

71. For example, one study showed that exposing African American students to negative stereotypes about their group's intellectual ability caused a real reduction in their performance on standardized tests. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCH. 797, 808 (1995).

more likely to participate in slur appropriation.⁷² This research scholarship is discussed in the next Section.

1. *Reducing the Stigma of a Slur*

In a series of experiments, psychologists Galinsky et al. found that self-identifying with slur expressions—rather than being identified by others with these expressions—can actually weaken their “stigmatizing force transforming the very words designed to demean into expressions of self-respect.”⁷³ Slurs in particular are considered to be an ideal vehicle for transformation. Whitson et al., in a study extending Galinsky et al., state “[u]nlike less tangible and subtler forms of stigma,” slurs are compact verbal forms which make them particularly vulnerable to the “creative social strategy of re-appropriation.”⁷⁴ That is, through reframing⁷⁵ or self-labeling,⁷⁶ the target group can challenge the negative valence of a slur.

2. *Exercise of Agency*

In their 2013 study, Galinsky et al. found that derogatory terms “were evaluated less negatively after self-labeling, and this attenuation of stigma was mediated by perceived power.”⁷⁷ The research team proposed that self-labeling “is a form of power because it contests who can use the term.”⁷⁸ In their 2017 study, Wang et al. argued that self-appropriation of slurs is “empowering because it limits the dominant out-group’s control of the words and reduces their power to define stigmatized groups.”⁷⁹ Similarly, linguistic scholars have argued that self-labeling is a form of power because it implicitly sets forth limits on who is able to use a certain term.⁸⁰

72. See Adam D. Galinsky, Kurt Hugenberg, Carla Groom & Galen V. Bodenhausen, *The Reappropriation of Stigmatizing Labels: Implications for Social Identity*, 5 RSCH. MANAGING GRPS. & TEAMS 221 (2003); see also Galinsky et al., *supra* note 52, at 2021.

73. Galinsky et al., *supra* note 52, at 2020; see also Adam M. Croom, *Slurs and Stereotypes for Italian Americans: A Context-Sensitive Account of Derogation and Appropriation*, 81 J. PRAGMATICS 36, 45 (2015).

74. Whitson et al., *supra* note 52, at 90 (citations omitted).

75. Another method could be reframing defined as “altering the valence of a group stereotype by transforming a weakness into a strength.” See Wang et al., *supra* note 64, at 77. For example, Wang et al. cite a 2016 study by Wolf, Lee, Sah, and Brooks finding that “expressions of workplace distress (e.g., crying)” could be reframed as an exhibition of passion rather than a derided sign of over-sensitivity or weakness. *Id.* at 76; see also Elizabeth Baily Wolf, Jooa Julia Lee, Sunita Sah & Alison Wood Brooks, *Managing Perceptions of Distress at Work: Reframing Emotion as Passion*, 137 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 10 (2016).

76. Whitson et al., *supra* note 52, at 102.

77. Galinsky et al., *supra* note 52, at 2020.

78. *Id.* at 2021.

79. Wang et al., *supra* note 64, at 78; see also Andrea Carnaghi & Anne Maass, *In-Group and Out-Group Perspectives in the Use of Derogatory Group Labels: Gay Versus Fag*, 26 J. LANGUAGE & SOC. PSYCH. 142, 154 (2007).

80. See Galinsky, *supra* note 52, at 2020; see also Croom, *supra* note 76, at 45 (noting “[t]he key for the transformation of an undermining, racist term is for it to be handled as a tool of empowerment, voided of any previous connotations, and utilized by the offended party.”).

Psychologist J.C. Magee argued that communication via self-labeling is considered an additional expression of agency, and studies have shown those who take action are seen as more empowered (*i.e.*, as having more control and influence) than those who focus on more passive acts of deliberation.⁸¹ Magee found a “causal relationship between action orientation and subsequent inferences of power”⁸² Moreover, a mutually reinforcing cycle was found whereby those experiencing power were more action-oriented and thus perceived as more powerful by others.⁸³ Linguistics research has also found that communicators are generally seen as more powerful than those who are passive receivers of the communication.⁸⁴

3. *Impact on Individual and Collective Power*

Importantly (from a collective perspective), the psychology literature reveals support for self-labeling as a means of empowering both the individual and the collective. For example, in their 2013 study, Galinsky et al. found that in relation to self-appropriation of slurs, self-labelers were seen to have increased power, which in turn, increased the perceived power of the overall stigmatized group.⁸⁵ These researchers demonstrated that “[g]roup, but not individual, power increased participants’ willingness to label themselves with a derogatory term. Self-labelling increased self-labelers’ perceptions of their own power and increased observer’s perceptions of the self-labelers’ and the stigmatized group’s power.”⁸⁶

In experiments linking “self-labeling and group identification with stigma reduction,” Whitson et al. found that group identification is both a “key cause and consequence of reappropriation and is integral to how group conflict is negotiated between members of stigmatized groups and others.”⁸⁷ Whitson et al. concluded that “by taking hold of negative labels[,] these organizational members can develop a sense of group pride, thereby blunting the labels of their ability to harm, and reducing the negative connotations formed about these groups.”⁸⁸ Wang et al. argued that this has a reciprocal benefit upon the group as a whole; that is, as slurs associated with the group lessened in perceived negativity, the group concomitantly was seen as having higher status.⁸⁹ Groups with

81. Joe C. Magee, *Seeing Power in Action: The Roles of Deliberation, Implementation, and Action in Inferences of Power*, 45 J. EXPERIMENTAL SOC. PSYCH. 1, 12 (2009).

82. *Id.*

83. *Id.*

84. Edward L. Fink et al., *The Semantics of Social Influence: Threats vs. Persuasion*, 70 COMMUN. MONOGRAPHS 295, 310 (2003).

85. Galinsky et al., *supra* note 52, at 2022.

86. *Id.* at 2028.

87. Whitson et al., *supra* note 52, at 100.

88. *See id.*

89. Wang et al., *supra* note 64, at 78 (discussing lessening the stigma of the word “slut”); *see* P.J. Henry, Sarah E. Butler & Mark J. Brandt, *The Influence of Target Group Status on the Perception of the Offensiveness of Group-Based Slurs*, 53 J. EXPERIMENTAL SOC. PSYCH. 185, 191 (2014).

“elevated status” were more likely to self-appropriate, which, when done successfully, increased the esteem of the group.⁹⁰ In other words, self-appropriation of a slur, can lead to an increase in self-esteem of the individual and the collective, which in turn increases self-appropriation of more slurs. Ideally this creates a virtuous circle of appropriation and empowerment.

C. Catalysts for Self-Appropriation

One question that emerges is why re-appropriate Asian or other slurs now? Why at this time in history? Under what social or economic conditions does this happen? It is impossible to test these questions via controlled experiments. In a 2003 study, however, Galinsky et al. proposed that the self-confidence of the group was an important precursor.⁹¹ This begs the question as to what factors contribute to strengthening perceived or actual group power. In a 2013 article, Galinsky et al. proposed that “[a]t a structural level, legal or institutional protections for stigmatized groups may facilitate reappropriation attempts.”⁹² In support of this argument, they observed that self-labeling with a derogatory term has historically coincided with increased legal protections towards the target group.⁹³

For example, the authors cite a corollary between the 1964 passage of the U.S. Civil Rights Act and the publication of the Dick Gregory autobiography.⁹⁴ Similarly, within the gay community, the authors argue that the repeal of sodomy laws in the U.S. led to self-appropriation of the label “queer.”⁹⁵ Thus, Galinsky et al. argue that “self-referential use of these derogatory labels following these legislative events was not coincidental—it suggests that the groups felt more powerful, which facilitated self-labeling with the derogatory group terms.”⁹⁶ If we accept this contextual view, Simon Tam’s activities make sense. That is, Simon Tam’s appropriation of racist terms coincides with a recent wave of first- and second-generation Asian Americans (who likely feel more power than their forbears) that are now asserting their civil rights⁹⁷ and openly challenging their status⁹⁸ in American culture.

90. Galinsky et al., *supra* note 72, at 223.

91. *Id.*

92. Wang et al., *supra* note 64, at 78; Galinsky et al., *supra* note 55, at 2022.

93. Galinsky et al., *supra* note 52, at 2022.

94. Note that the title of the autobiography uses the n-word. *Id.*

95. *Id.*; see also Galinsky et al., *supra* note 72, at 233.

96. Galinsky et al., *supra* note 52, at 2022.

97. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 205 (D. Mass. 2019) (finding for Harvard in a suit launched by Asian Americans alleging discrimination in Harvard’s admission process). The suit generated wide media coverage. See, e.g., Jay Caspian Kang, *Where Does Affirmative Action Leave Asian-Americans?*, N.Y. TIMES MAG. (Oct. 1, 2019), <https://www.nytimes.com/2019/08/28/magazine/affirmative-action-asian-american-harvard.html> [perma.cc/2B46-HFCU].

98. See Min Zhou & Carl L. Bankston III, *The Model Minority Stereotype and the National Identity Question: The Challenges Facing Asian Immigrants and Their Children*, 43 ETHNIC & RACIAL STUD. 233 (2020); see also Michele S. Moses, Daryl J. Maeda & Christina H. Paguyo, *Racial Politics, Resentment, and Affirmative Action: Asian Americans as “Model” College Applicants*, 90 J. HIGHER EDUC. 1, 26 (2019).

D. *Self-Appropriation vs Other-Appropriation*

Free speech advocates may incorrectly use the research (on the virtuous circle of appropriation and empowerment) to reason that removal of the disparagement bar is a “win for all marginalized groups.”⁹⁹ Unfortunately, the social science research also points to the limits of self-appropriation as an empowerment tool. For example, Galinsky et al. argue that “[s]elf-labeling may not have positive effects on perceived power or stigma attenuation when the label is soaked in legitimate contempt or when the group has too little power.”¹⁰⁰ In other words, taking a blanket view of the benefits of slur appropriation fails to acknowledge those groups who may have too little perceived or actual power.

1. *The False Parallel*

Seeing the *Tam* decision as a uniform victory assumes neutral power relations between racial groups in America. It incorrectly assumes equal access to legal rights and a uniform cultural disposition towards appropriating a self-disparaging slur as a brand.¹⁰¹ Unfortunately, social scientists have confirmed that many minorities intuitively observe—“[b]ecause groups occupy hierarchal positions within the racial order, neutral power relations cannot be presumed”¹⁰²

Social scientists have conducted various inquiries into the use of slurs assuming *unequal* relationships. For example, it is generally agreed that the use of a slur against a group perceived as having high socioeconomic power, is not as offensive as when the roles are reversed.¹⁰³ Social scientists have investigated the observation that a non-White person calling a White person “cracker” is generally seen as less offensive than a White person calling a Black person the “n-word.”¹⁰⁴

Psychologists Henry et al.,¹⁰⁵ in an experiment investigating perceived offensiveness of slurs, found that if a group was perceived as having a high status (e.g., straight, European-American men), the less the group would be perceived to be offended by a slur.¹⁰⁶ Similarly, sociologists Embrick and Henricks found that racial slurs and stereotypes “applied to Whites by non-Whites do not carry the same meanings or outcomes as they do when these roles are swapped.”¹⁰⁷

99. See Coscarelli, *supra* note 6.

100. Galinsky et al., *supra* note 52, at 2028.

101. See, e.g., Jason Zenor, *Tribal (De)Termination? Commercial Speech, Native American Imagery and Cultural Sovereignty*, 48 SW. L. REV. 81, 103 (2019) (discussing how Native American tribes “often [take] a more collectivist approach to the ownership of property, both real and intellectual” (internal citations omitted)).

102. David G. Embrick & Kasey Henricks, *Discursive Colorlines at Work: How Epithets and Stereotypes are Racially Unequal*, 36 SYMBOLIC INTERACTION 197, 198 (2013).

103. See, e.g., Henry et al., *supra* note 89, at 190; Luvell Anderson & Ernie Lepore, *What Did You Call Me? Slurs as Prohibited Words*, 54 ANALYTIC PHIL. 350, 352 (2013).

104. For examples from linguistics, see Anderson & Lepore, *supra* note 103, at 350; Adam M. Croom, *Slurs, Stereotypes, and In-Equality: A Critical Review of “How Epithets and Stereotypes are Racially Unequal,”* 52 LANGUAGE SCIS. 139, 140 (2014).

105. Henry et al., *supra* note 89, at 186.

106. *Id.* at 185, 187.

107. Embrick & Henricks, *supra* note 102, at 197.

Equating the impact was called a “false parallelbecause it ignores the historical responsibility for racism.”¹⁰⁸

2. *Appropriation and Registered Trademarks*

In summary, the social science research explored above finds that a virtuous circle of slur-appropriation and empowerment exists, but suggests it coincides with structural, legal, or institutional support.¹⁰⁹ The research indicates that self-appropriation can lead to positive outcomes, but that other-appropriation can be harmful particularly where there is a perceived power disparity between the speaker and the target, such as where there is a history of racism.¹¹⁰

This Article argues that trademark law can only serve to amplify these positive and negative dynamics. Access to these amplified benefits may explain why Tam chose to register *The Slants* as a trademark and pursue the case through multiple appeals to the Supreme Court. For example, Tam did not need federal registration to continue to use *The Slants* for the name of his band. He would have been able to use the phrase as a common law trademark, but simply lack access to “certain federal statutory enforcement mechanisms for excluding others”¹¹¹ Nevertheless he chose to invest in a trademark registration and engage with both the trademark registration system and the US court system. Why?

As social scientists suggest, self-appropriation denies the power of others to define the slur in relation to a target group.¹¹² Trademark law underscores this power by commodifying the slur and infusing this exclusionary power with legislative force. Similarly, self-appropriators want to transform the negative valence of the slur. Trademark law provides authority for this new subverted meaning because successful registration gives that new meaning the “‘imprimatur’ of the federal government.”¹¹³ Finally, engagement with the trademark registration system and taking control of the slur, may increase the appropriator’s internal and perceived sense of personal agency. In other words, trademark law amplified the positive aspects of Tam’s engagement with the virtuous circle of slur-appropriation and self-empowerment.

The converse, however, must also apply to the negative implications arising from slur appropriation by an “other” group. The appropriation of a slur such as

108. Embrick and Henricks argue that different power dynamics mean slurs directed to White people are unlikely to affect their life chances in the same way that racial epithets directed toward minorities do. *Id.*

109. Wang et al., *supra* note 64, at 78; Galinsky et al., *supra* note 52, at 2022.

110. *See supra* note 108.

111. “In addition, the refusal of the USPTO to register a trademark is not a denial of an applicant’s right of free speech. The markholder may still generally use the mark as it wishes; without federal registration, it simply lacks access to certain federal statutory enforcement mechanisms for excluding others from confusingly similar uses of the mark. Mr. Tam may use his trademark as he likes, whether it be encouraging discussion on or taking ownership of racial slurs, or identifying goods and services with his band.” *In re Tam*, 808 F.3d 1321, 1374–1375 (Fed. Cir. 2015) (Lourie, J., dissenting).

112. *See, e.g.*, Wang, et al., *supra* note 64, at 78; *see also* Carnaghi & Maass, *supra* note 79, at 154.

113. “Finally, it has been questioned whether federal registration imparts the ‘imprimatur’ of the federal government on a mark, such that registration could be permissibly restricted as government speech. I believe that such action is justified.” *In re Tam*, 808 F.3d at 1374 (Lourie, J., dissenting).

“redskins” by an “other” could further entrench the stigmatization of that minority group.¹¹⁴ This is because other-appropriation denies the target group the agency attributed to self-appropriating a racist slur for themselves and legally prevents them from using that slur (as a trademark). Trademark law serves as a legal barrier to the target group’s access to the virtuous self-labeling/group empowerment circle in relation to that slur.¹¹⁵ The perception of the target group’s agency could also diminish if they are seen as merely passive receivers of the communication.¹¹⁶ Registration of the slur by that “other” as a trademark could amplify these harms due to trademark’s legal and institutional authority.

Viewed in this way, the stakes of the *Tam* decision were high but most of the surrounding legal and other rhetoric implied that the benefits of self-appropriation outweighed the costs.¹¹⁷ The next Section seeks to explore this calculus by identifying and analyzing racially-oriented trademark applications both before and after *Tam* between January 1, 2010 and January 1, 2020.

IV. METHODOLOGY

A. Previous Empirical Studies

The PTO’s public-facing databases are not constructed for users to search for trademark applications according to grounds for refusal (*e.g.*, “disparagement” or “§ 2(a)”).¹¹⁸ Therefore, identifying disparaging, racially-oriented trademark applications is a difficult exercise. In developing a method, three earlier empirical studies of immoral/scandalous marks were particularly useful. First, in 2011, LaLonde & Gilson¹¹⁹ examined trademark applications incorporating “milf” and found that the PTO applied the “immoral/scandalous” provision inconsistently. The authors found that twenty applications received a § 2(a) refusal while another twenty did not, which led them to conclude that the PTO applied the immoral/scandalous provision inconsistently.¹²⁰

In 2015, Carpenter & Garner¹²¹ sought to identify other potentially immoral/scandalous marks beyond “milf.” To do this, the authors created a lexicon

114. See generally Galinsky et al., *supra* note 52; MacKay, *supra* note 39, at 131.

115. MacKay, *supra* note 39, at 142–43.

116. Edward L. Fink et al., *The Semantics of Social Influence: Threats vs. Persuasion*, 70 COMM’N MONOGRAPHS 295, 310 (2003).

117. See *In re Tam*, 808 F.3d at 1364; see also Coscarelli, *supra* note 6.

118. Public-facing databases include: TRADEMARK ELECTRONIC SEARCH SYSTEM, <https://www.uspto.gov/trademarks-application-process/search-trademark-database> (last visited July 24, 2021) [perma.cc/6YST-MAD7]; *Trademark Status & Document Retrieval*, USPTO, [hereinafter TSDR database] <https://tsdr.uspto.gov/> (last visited Apr. 9, 2021) [perma.cc/8L7I-AE8A] *USPTO Datasets OPEN DATA PORTAL*, <https://developer.uspto.gov/product/trademark-annual-xml-applications> (last visited Apr. 9, 2021) [perma.cc/9GJR-56NB].

119. Anne Gilson LaLonde & Jerome Gilson, *Trademarks Laid Bare: Marks That May Be Scandalous or Immoral*, 101 TRADEMARK REP. 1476, 1478 (2011).

120. *Id.* at 1478 (presenting case study on “milf”).

121. Megan M. Carpenter & Mary Garner, *NSFW: An Empirical Study of Scandalous Trademarks*, 33 CARDOZO ARTS & ENT. L.J. 321, 321 (2015).

of terms relating to profanity, sex, violence, disability, ethnicity, religion, politics, and scatology.¹²² Using these terms as a probe, the authors identified 232 trademark records between 2001 and 2011 where the applied-for mark was refused for being scandalous and immoral under § 2(a).¹²³ The authors focused on five terms for further analysis and found that the § 2(a) provision was inconsistently applied by the PTO.¹²⁴

In 2019, Feliu¹²⁵ similarly used a lexicon of seven vulgar words and their variants to identify potentially immoral/scandalous trademark applications.¹²⁶ Feliu's goal was to benchmark the volume of vulgar marks applied for after the Federal Circuit's 2017 decision in *In re Brunetti*¹²⁷ but before the Supreme Court's final opinion in 2019 (affirming the decision).¹²⁸ In examining the aftermath of the case, Feliu stated "there doesn't seem to have been much of a flood behind the anticipated floodgates."¹²⁹

This Article describes these studies as "bottom-up" approaches, where a single word or lexicon is used to extract trademark applications which incorporate words of interest. An alternative "top-down" approach is found in a study by Beebe and Fromer,¹³⁰ who focused on 3.6 million trademark (word) applications from 2003–2015. Beebe and Fromer created a bespoke dataset by combining two sources of PTO trademark data.¹³¹ They "then used keywords and key phrases to autocode the office actions for whether the PTO refused registration on the basis that the applied-for mark was immoral or scandalous under [§] 2(a)"¹³² Rather than a lexicon of potentially disparaging or scandalous words, the authors extracted subsets of applications by grounds of refusal from their purpose-built dataset.¹³³ The study found that 1,901 word mark applications were refused under § 2(a)'s immoral or scandalous provision and 675 applications were refused

122. *Id.* at 332 ("[W]e identified salient terms for particular refusals, we searched for a sample of additional marks containing those terms, and extrapolated to additional related marks across the broad spectrum of categories for refusal outlined by Gilson and LaLonde: profanity; sex; violence; disability; ethnicity; religion; politics; and scatology.").

123. *Id.*

124. *Id.* at 333 (conducting "a 'deep-dive' into a few specific terms for which marks were rejected by examiners. These terms include: 'bitch,' 'pothead,' 'shit,' 'slut,' and 'whore.'").

125. Vicenc Feliu, *The F Word—An Early Empirical Study of Trademark Registration of Scandalous and Immoral Marks in the Aftermath of the In re Brunetti Decision*, 18 J. MARSHALL REV. INTELL. PROP. L. 404, 418 (2019).

126. *Id.* at 412. ("The Seven Words are: shit (word 1), piss (word 2), fuck (word 3), cunt (word 4), cocksucker (word 5), motherfucker (word 6) and tits (word 7).").

127. *In re Brunetti*, 877 F.3d 1330, 1339 (2017) (holding the § 2(a) "immoral/scandalous" provision unconstitutional).

128. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019).

129. Feliu, *supra* note 125, at 418.

130. Barton Beebe & Jeanne C. Fromer, *Immoral or Scandalous Marks: An Empirical Analysis*, 8 NYU J. INTELL. PROP. & ENT. L. 169, 171.

131. *See id.* at 177–78 for information on datasets.

132. *Id.* at 177.

133. *See id.*

under the disparagement provision.¹³⁴ Looking at comparable marks and the imposition of other grounds of refusal (such as § 2(d)), they concluded that § 2(a) was being applied in a “systematically inconsistent and arbitrary” manner.¹³⁵

This Article is the first (to the author’s knowledge) to apply empirical methods to identify word and image trademark applications specifically related to racial slurs or images. To do so, a bottom-up approach has been adopted. That is, a bespoke racial slur lexicon was created, and the lexicon was used to identify trademark applications which incorporated a slur in a word mark or an image mark. A bottom-up approach was preferred in this study because this Article seeks to examine the attitudes of a multitude of applicants towards self-appropriation and not just the attitudes of PTO examiners when applying a § 2(a) grounds of refusal (which would be reflected in a top-down approach). A top-down approach would not give an accurate snapshot of disparaging, racially-oriented applications common in the applicant community. Prior studies indicate that the PTO standards for § 2(a) refusals are inconsistent and arbitrary and thus an unreliable indicator of the number of racially-oriented trademark applications.¹³⁶ A bottom-up approach will include all types of applications including “withdrawn,” “reviewed,” “pending,” and “lapsed (without examination),” irrespective of whether a § 2(a) refusal was issued or whether the trademark was ultimately rejected or withdrawn.

Similar to the bottom-up studies relating to vulgar terms, this study starts with defining a racial slur lexicon in order to identify trademark applications that incorporate such terms. Given race/ethnicity/religion are sensitive, complex, and contested issues, a detailed description of the method and its limitations are outlined below.

B. *The Datasets*

1. *Constructing a Lexicon of Racially-Oriented Slurs*

As discussed above, this study needed to identify a base population of all racially-oriented¹³⁷ word and image trademark applications filed with the PTO from January 1, 2010 to January 1, 2020,¹³⁸ irrespective of final PTO outcome. Rather than “cherry pick” certain racial slurs, the goal of the study was to identify

134. *See id.* at 178.

135. *Id.* at 203.

136. *See id.*

137. It is important to note that the empirical analysis only focused on disparaging trademarks that had a racial component. Thus, trademarks that could receive a § 2(a) disparagement refusal based on gender or other (*e.g.*, “dykes on bikes”) were excluded from the study, largely because it was extremely difficult to determine the scope of the reappropriation of sexually oriented slurs (as the sexual orientation of a registrant is difficult to determine from publicly available information). This also means that the number of racially-oriented trademark applications in the sample (from 2010 to 2020) will not necessarily overlap with the 675 trademark applications (including racial and sexual slurs) attracting a § 2(a) disparagement refusal identified by Beebe and Fromer. *See generally id.* (looking at data between the time frame of 2003 to 2014).

138. A ten-year period (January 1, 2010–January 1, 2020) was selected because (from a pragmatic perspective) identifying the race of the applicants from digital records would be more difficult before 2010. Also, it was thought that the negative valence and the meaning of a slur would likely remain constant over a ten-year period.

as many slurs as possible and therefore as many racially-oriented applications as possible. This led to the difficult question of what counts as a racial slur in modern America. Even if the entire population was surveyed on this question, there would be substantial disagreement. The next best option was to find an objective, publicly accessible dictionary of racial slurs developed and edited by a large group. That is, a democratic dictionary of racial slurs. The closest analog to this was Wikipedia's list of 476 ethnic slurs¹³⁹ and the 1,438 slurs from the "Racial Slurs Database" ("RSDB")—both open-source databases of racial slurs.¹⁴⁰ These two lists were combined. After eliminating duplicates and foreign character slurs, the list of slurs was further refined to remove any slurs that might produce a "false positive" when used as a search term against U.S. trademark applications. A "false positive" was defined as a slur capable of a good-faith non-racial meaning.¹⁴¹ Also excluded were slurs unlikely to be considered offensive to the average American.¹⁴² These terms were removed from the lexicon.

To refine the lexicon to target groups of interest and to enable the demographic analysis, the working list of slurs was referenced against the Federal Bureau of Investigation's list of Hate Crime Victim Groups¹⁴³ and the U.S. Census Bureau's codification and definitions of race and ethnicity. The final list of target groups in this study were (with slightly modified labels): "White,"¹⁴⁴ "African American," "Native American," "Native Hawaiian," "Asian," and "Latinx."¹⁴⁵

139. *List of Ethnic Slurs*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_ethnic_slurs (last visited July 24, 2021) [<https://perma.cc/T7CG-F3BD>].

140. RACIAL SLUR DATABASE, <http://www.rsdb.org> (last visited July 24, 2021) [<https://perma.cc/B2A3-YNB5>].

141. For example, on Wikipedia, "Brownie" is listed as a slur against "someone of Hispanic, Indian, and Arab" descent, but is also a legitimate description of a chocolate snack and might be used in a trademark application without any derogatory intent. This approach therefore mirrors the test set out by the PTO where the examiner surveys the mark for its dictionary meaning and then examines its meaning in context. "If the examiner finds that a 'substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark . . . to be disparaging in the context of contemporary attitudes,' a prima facie case of disparagement is made out, and the burden shifts to the applicant to prove that the trademark is not disparaging." See *Matal v. Tam*, 137 S.Ct. 1744, 1754 (2017) (discussing the procedure as it was then in the USPTO, U.S. DEP'T OF COM., TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1203.03(b)(i) 1200–150 (Apr. 2017)).

142. For example, "Xiao Riben" was excluded even though it is listed as a Chinese language slur against "the Japanese people or a person of Japanese descent." See *List of Ethnic Slurs*, *supra* note 139.

143. *Hate Crime Statistics*, FED. BUREAU INVESTIGATIONS, <https://www.fbi.gov/services/cjis/ucr/hate-crime> (last visited July 24, 2021) [<https://perma.cc/JAF4-WAPB>]. The FBI gathers data on biases against the following groups which they name as: American Indian or Alaska Native, Arab, Asian, Black or African American, Hispanic or Latino, Multiple Races (including Native Hawaiian or Other Pacific Islander), and White. See *id.* It also gathers data on biases against the following religions: Buddhism, Catholicism, Eastern Orthodox (Russian, Greek, Other), Hinduism, Muslim, Jehovah's Witness, Judaism, Mormonism, Christianity, Protestant, and Atheism. See *id.*

144. Slurs which targeted groups not considered racial "minorities" in modern-day America were excluded—for example, "mick" for someone of Irish descent. For a discussion of the Irish in America, see NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (2009).

145. The U.S. Census uses established federal guidelines to collect and present data on race and Hispanic origin. There are five mutually exclusive categories of race which they name as—White, Black, Native American or Alaska Native, Asian, Native Hawaiian and Other Pacific Islander, or Other. The Census also categorizes for Hispanic (which is considered an ethnicity and not a race). "White" is defined by the U.S. Census as Irish, German, Italian, Lebanese, Near Easterner, Arab or Polish. See Elizabeth M. Grieco & Rachel C. Cassidy, U.S.

“Jewish” was also included as a minority of interest, given there have been applicants for trademarks such as “heeb,”¹⁴⁶ and Jewish applicants have been included in previous studies of race and intellectual property law.¹⁴⁷ These seven metagroups were used to reduce the list further to 523 slurs.

Additional *ex post* slurs were added onto the list once the first round of investigation of the trademark register was undertaken. For example, it became clear that only eleven slurs had received a § 2(a) refusal. The list of eleven slurs included one term, “indian giver,” not found in the two online dictionaries. Given the PTO objected to the phrase as disparaging,¹⁴⁸ the term (both singular and plural) was added to the lexicon. It should be noted that the source database (discussed below) had difficulty returning non-exact or “fuzzy” matches. Once the eleven disparaging slurs (as denoted by the PTO) were identified, the plural forms of these eleven slurs, and their variants, were added to the lexicon.¹⁴⁹ Adding these slurs led to a total of 537 slurs in the working lexicon.

2. “Eskimo” and “Indian”

Special mention is needed in relation to “eskimo” and “indian.” Eskimo is not included in the lexicon. Although some may consider it a slur, according to Wikipedia and the RSDB, it is not listed as a slur in the U.S. (*cf.* Canada),¹⁵⁰ nor did applications incorporating “eskimo” attract a § 2(a) refusal.¹⁵¹ Thus, to apply the tenets of the methodology consistently, “eskimo” was not included in the lexicon.

Conversely, “indian” has been included in the lexicon, as it is considered a slur by these dictionaries.¹⁵² However, it is acknowledged that some Native Americans may not consider the term “indian” to be a racial slur¹⁵³ and the word

CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN 2000: CENSUS 2000 BRIEF (2001), <https://www.census.gov/prod/2001pubs/c2kbr01-1.pdf> [<https://perma.cc/5PBD-CSD4>].

146. There are other strong reasons to include “Jewish” as a minority category. “Anti-Jewish” appears on the FBI Hate Crime Victim Group list, and there are reliable dictionaries of Jewish surnames to identify Jewish applicants, as Brauneis and Oliar have noted. See Robert Brauneis & Dotan Oliar, *An Empirical Study of the Race, Ethnicity, Gender, and Age of Copyright Registrants*, 86 GEO. WASH. L. REV. 46, 64 (2018).

147. *Id.* at 63–67. Although self-identification as Jewish is not categorized by the U.S. Census as a race or ethnicity, the authors included identification as Jewish as a category of interest. This was because Jewish names were prominent in the copyright data they were examining and identifying Jewish names was well supported by reliable dictionaries of popular Jewish names.

148. See U.S. Trademark Application Serial No. 86/602495 (filed Apr. 20, 2015) (applying to register the mark “indian giver” in connection with e-cigarette liquids (International Class 34)).

149. The additional 14 slurs added were: “chinks,” “cholos,” “coloreds,” “indian giver,” “indian givers,” “injuns,” “mammys,” “mammy’s,” “negros,” “n-words,” “n-wordz,” “redskins,” “slants,” and “squaws.”

150. See *List of Ethnic Slurs*, *supra* note 139; RACIAL SLURS DATABASE, *supra* note 140.

151. See, e.g., “eskimo hut frozen daiquiris to-go,” Registration No. 6001,224; “paper eskimo,” Registration No. 3,956,818; “eskimo blanket co., ltd.,” Registration No. 2,391,776.

152. See *List of Ethnic Slurs*, *supra* note 139; RACIAL SLURS DATABASE, *supra* note 140.

153. See e.g., Kathy English, *Is “Indian” a Derogatory Word?*, TORONTO STAR (Jan. 24, 2009), https://www.thestar.com/opinion/2009/01/24/is_indian_a_derogatory_word.html [<https://perma.cc/43SY-YFHH>]; CLYDE TUCKER, BRIAN KOJETIN, & RODERICK HARRISON, BUREAU OF LABOR STATISTICS, BUREAU OF THE CENSUS, A STATISTICAL ANALYSIS OF THE CPS SUPPLEMENT ON RACE AND ETHNIC ORIGIN (May 1995), <https://www.census.gov/prod/2/gen/96arc/ivatuck.pdf> [<https://perma.cc/6SGU-MSNC>] (“Persons identifying as American Indians were asked which of the following terms they preferred to describe themselves: American

“Indian” has been incorporated by Native American groups in self-appropriating trademark applications.

Nevertheless, it is generally accepted that the use of Native Americans as mascots is seen by many as disparaging¹⁵⁴ and potentially harmful.¹⁵⁵ To retrieve these types of applications it was necessary to retain “indian” as a search term and investigate the use of the term in both word and image trademark applications. This is because the PTO categorizes trademarks using Native American human imagery with the code “American Indians.”¹⁵⁶ Leaving “indian” in the lexicon as a search term, retrieved trademark applications incorporating Native American human imagery and racially-oriented uses of the word “indian.”

C. The Datasets

1. Constructing a Working List of Racially-Oriented Trademark Applications

After compiling a working dataset of 537 slurs, each slur was used as a search term against all 3,782,981 trademark applications (word and/or image) on the U.S. Trademark Register for the period of January 1, 2010 to January 1, 2020.¹⁵⁷ The source database was the World Intellectual Property Office Global Brands Database (WIPO Database), which accesses data from the U.S. Trademark Register.¹⁵⁸ The search revealed an initial output of 4,391 trademark applications which should be considered conservative because the WIPO Database does not appear to pick up “fuzzy” or “wildcard” matches in response to a search

Indian, Alaska Native, Native American, Some other term, or No preference. Over fifty percent chose the term American Indian or Alaska Native as the one they preferred, but a sizable number preferred Native American.”). See generally *Native American Name Controversy*, WIKIPEDIA, https://en.wikipedia.org/wiki/Native_American_name_controversy#Indian/Injun (last visited July 24, 2021) [<https://perma.cc/W8N3-UJX7>].

154. See Victoria Phillips, *Beyond Trademark: The Washington Redskins Case and the Search for Dignity*, 92 CHI.-KENT L. REV. 1061, 1061 (2017).

155. Laurel R. Davis-Delano, Joseph P. Gone & Stephanie A. Fryberg, *The Psychosocial Effects of Native American Mascots: A Comprehensive Review of Empirical Research Findings*, 23 RACE, ETHNICITY & EDUC. 1, 5 (2020); see also *Summary of the APA Resolution Recommending Retirement of American Indian Mascots*, AM. PSYCH. ASS’N <https://www.apa.org/pi/oema/resources/indian-mascots> (last visited July 24, 2021) [<https://perma.cc/HL4M-AUUA>].

156. See *Category 02: Human Beings*, USPTO: U.S. TRADEMARK DESIGN SEARCH CODE MANUAL, https://tess2.uspto.gov/tmdb/dscm/dsc_02.htm#02 (last visited July 24, 2021) [<https://perma.cc/MUD3-MFCV>].

157. Each term was wrapped with inverted commas to match the trademark text in the WIPO database.

158. See *Global Brands Database*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/branddb> (last visited July 24, 2021) [<https://perma.cc/37LF-8ND7>]. This database provides simultaneous searches of both word and image trademark applications; it does not require downloading large volumes of data and permits searching by date range. Previous “big data” trademark studies by Beebe and Fromer have sourced PTO data by downloading files from the PTO’s bulk data system, which segregates applications for word marks from image marks and provides extensive information on the application. See Beebe & Fromer, *supra* note 130, at 177; Barton Beebe & Jeanne C. Fromer, *Are We Running out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 970 (2018). The nature of the inquiries in those studies meant the authors could disregard image marks and thus avoid downloading the very large image files. In contrast, because racially-oriented trademarks may be popular as image marks, the WIPO Global Brands Database was an easier database to search. Although less information relating to the application is returned than with the PTO bulk data, it was sufficient for the purposes of the study. Other studies conducted by Feliu and, jointly, Carpenter & Garner were smaller in scale and used the PTO’s Trademark Electronic Search System (“TESS”) which permits one search term at a time. See Feliu, *supra* note 125; Carpenter & Garner, *supra* note 121.

term.¹⁵⁹ Nevertheless, the database has numerous advantages over public facing PTO trademark databases. First, it permits multiple search terms to be inputted at once. Second, it parses each search term through both word and image marks and third, the results can be easily exported.¹⁶⁰

The initial output revealed that a significant percentage of the 4,391 applications did not involve slurs against racial minorities. Indeed, 1,068 (24.3%) of the 4,391 trademark applications involved slurs against White people.¹⁶¹ Examples include marks incorporating “hillbilly” and “white trash.” These were applied for 112 times and 22 times respectively over the ten-year period.¹⁶² Given the frequency and uncontentious acceptance of such marks by the PTO, it can be said that many slurs against White Americans have not been rejected by the PTO despite the pre-*Tam* prohibition against disparaging marks. Since the goal of the study was to examine self-appropriated trademarks by racial minorities, White slur applications were excluded from the working list of applications.¹⁶³ Of the remaining applications, numbering over 3,000, the author manually examined each one for context in order to further remove false positives from the working list.¹⁶⁴ After all such applications were removed, a working list of 409 trademark applications remained with an unambiguous, racially-oriented meaning.

2. *Inferring Self-Appropriation and Other-Appropriation*

As argued earlier, self-appropriation is critically distinct from the appropriation of a slur by a nonaffected group. In order to distinguish between self- and other-appropriated marks, it was necessary to infer the race/ethnicity/religion/intention (for simplicity, “race”) of each applicant. For example, an Asian applicant such as Simon Tam, applying to register “slant” (a slur against Asians) would be coded as a self-appropriating applicant. The PTO, however, does not

159. See discussion *supra* Section IV.B.1.

160. See *Global Brand Database–Help*, WORLD INTELL. PROP. ORG., https://www3.wipo.int/branddb/en/branddb-help.jsp#status_filter (last visited July 24, 2021) [<https://perma.cc/PFN3-XKJH>].

161. Note that the WIPO Global Brands Database uses the following definitions of status: “Active is any record that is currently in force[;] Pending is any record that is not yet in force, but is pending examination[;] Inactive is any record that has been removed from Active status through expiration, withdrawal or other means.” See *id.*

162. See *WIPO Global Brands Database*, WIPO IP PORTAL, <http://www.wipo.int/branddb> (last visited Apr. 9, 2021) [<https://perma.cc/W2AR-Y6DZ>] (search “hillbilly” or “white trash” under Names tab; then, under the Dates tab, input 2010-01-01 TO 2020-01-01 into the Application box; then, search again).

163. Slurs offensive to Italian Americans were excluded because this ethnic group is categorized as White by the Census Bureau. For example, “wop” appeared in many trademark applications in contexts such as doo wop; “guido” appeared in six trademark applications. All were removed from the database.

164. The USPTO TSDR database was particularly useful when assessing word trademarks by revealing applicants’ specimens of use and correspondence regarding intention to use. For example, the trademark application for the word “chief” appears prima facie to be a racially-oriented trademark application, though an examination of the specimen in the file notes reveals a photograph of a binder where “chief” is used as an acronym for “Curriculum Handbook for Instruction of Executive Functions.” U.S. Trademark Application Serial No. 87/535,502 (filed July 20, 2017). In contrast, when reviewing the trademark application for the word mark “chief originals,” the specimen of use shows the word mark used in conjunction with a stylized Native American head-dress. U.S. Trademark Application Serial No. 88/169,467 (filed Oct. 25, 2018). I thus coded the latter, but not the former, as a racially-oriented trademark application.

require applicants to disclose their race, religion, or ethnicity,¹⁶⁵ and are required to adopt a neutral stance to the applicant's identity.¹⁶⁶ Consequently, to perform an empirical investigation of self- or other-appropriating applications, the racial backgrounds of applicants had to be inferred from publicly available information.¹⁶⁷

It is acknowledged that racial and other assignments are often contested categorizations. Therefore, inferring the probability of the race of an applicant was difficult and is deserving of many disclaimers. Nevertheless, even with these disclaimers in mind, the study was able to determine the probability of race for ninety-two percent of the applications in the working list, using direct evidence or tools of inference that have been relied upon by previous intellectual property scholars in comparable studies.

Of the 409 applications, 348 had a race attributed to the applicant via direct evidence, such as applicant statements or a combination of statements and the visual appearance of the applicants. This high proportion is due to the fact that, unsurprisingly, the type of applicant that applies for a slur as a trademark is often forthright in public statements about their intention, race, or ethnicity.¹⁶⁸ For example, the applicant¹⁶⁹ may make statements to the media,¹⁷⁰ post about the application on their website or social media,¹⁷¹ or give their reasons in the trademark application itself.¹⁷²

Where race or ethnicity could not be directly identified, an indirect method of inferring race was used. Inferences were drawn based on the applicant's surname, a method that has been previously relied upon in comparable literature in intellectual property.¹⁷³ This method uses U.S. Census Bureau tables ("Census

165. *Trademark Initial Application Form*, USPTO, <https://www.uspto.gov/trademarks/apply/initial-application-forms> (last visited July 24, 2021) [<https://perma.cc/NRA3-FYMQ>].

166. Anten, *supra* note 45, at 390.

167. All coding was done by the author keeping records of source information for each application. The coding for each application was then double checked by an American research assistant who made minor amendments and added further notes.

168. For example, the applicant for U.S. Trademark Application No. 87/602,520 for "kike" runs an advisory blog titled "Ask a Jewish Lawyer." See, e.g., *Confirmed: Amazon Brand Registry Now Accepts Pending Trademark Applications in Most Markets*, JPG LEGAL: ASK A JEWISH LAWYER (Jan. 13, 2021), <https://jpglegal.com/ask-a-jewish-lawyer/> [<https://perma.cc/4GD2-H5VR>].

169. Where the applicant was a company name, the founder (or the most senior person listed at that company) served as a proxy for the applicant.

170. See *Man Wants to Trademark a Variation of the n-word*, WTSP (July 27, 2017 10:11 PM), <https://www.wtsp.com/article/news/nation-world/man-wants-to-trademark-a-variation-of-the-n-word/460094186> [<https://perma.cc/F4TQ-N447>].

171. The website of the applicant for U.S. Trademark Application No. 88/367,375 ("big chief" in relation to coffee) stated that proceeds would be donated to Native American cultural preservation. See *"Big Chief" Has Touched Down!*, FRENCH TRUCK COFFEE, <https://frenchtruckcoffee.com/journal/2019/2/15/big-chief-has-touched-down> (last visited July 24, 2021) [<https://perma.cc/EHL4-2U3E>].

172. For example, when "baked by a negro" was denied based on a § 2(a) scandalous objection, the applicant wrote that "the trademark pays homage to the historical aspects of African American life and entrepreneurship" and followed with a lengthy statement of intent. U.S. Trademark Application Serial No. 85/708,593 (filed Aug. 21, 2012).

173. This method draws upon the same methodology used by Robert Brauneis & Dotan Oliar. The authors inferred the race, ethnicity, gender, and age of almost 15 million copyright registrants for the years 1978 to 2012.

method”), to provide the probability of someone’s race or ethnicity according to their surname.¹⁷⁴ This approach, like the others, can be problematic.¹⁷⁵ Therefore, where the study had to rely on the Census method, it only included those applications where the probability of race to surname was greater than eighty percent.¹⁷⁶ Due to this high threshold, the Census method was only used for twenty-seven trademark applications out of the 409 applications studied. There were thirty-four trademark applications where the probability of race of the applicant could not be ascertained or where their race could not be inferred via the Census method. These thirty-four applications were excluded.

This left a total of 375 trademark applications in the working list. This represented 218 different applicants who, on average, applied for 1.7 marks each. However, one applicant—Indian Motorcycle International, LLC (coded as White)—represented sixty-three trademark applications.¹⁷⁷ This applicant significantly skewed the data and was therefore excluded from the dataset.

Therefore, the final list of racially-oriented marks for analysis comprised of 312 trademark applications representing 217 different applicants averaging 1.4 applications each. In sum, for 285 (91.3% of 312) trademark applications, the “race” (race/ethnicity/religion/intention) of the applicant was coded using direct evidence and/or visual appearance. For twenty-seven applications (8.7% of 312), identity was coded by cross-checking the applicant’s surname with U.S. Census data for probabilities of race (where the probability of a surname to race was greater than 80%).

3. *Coding Self- vs Other-Appropriated Trademarks*

Where an applicant applied for a trademark that involved a racially-oriented slur against the same race as the applicant, this was coded as a self-appropriating

Brauneis & Oliar, *supra* note 148, at 46. See generally Miriam Marcowitz-Bitton, Deborah R. Gerhardt & Mike Schuster, *An Empirical Study of Gender and Race in Trademark Prosecution*, 94 S. CAL. L. REV. (forthcoming).

174. See *Frequently Occurring Surnames from the Census 2000*, U.S. CENSUS BUREAU, http://www.census.gov/topics/population/genealogy/data/2000_surnames.html (last visited July 24, 2021) [<https://perma.cc/CAC4-YGGM>].

175. See Ioan Voicu, *Using First Name Information to Improve Race and Ethnicity Classification*, 5 STATISTICS & PUB. POL’Y 1, 1–2 (2018) (discussing that surname-based methods can struggle to distinguish non-Hispanic Blacks from non-Hispanic Whites); see also Mark N. Elliot, et al., *Using the Census Bureau’s Surname List to Improve Estimates of Race/Ethnicity and Associated Disparities*, 9 HEALTH SERVS. & OUTCOMES RES. METHODOLOGY 252, 252 (discussing the problems with “imputing Native American and multiracial identities from surname and residence”).

176. Jewish names are not distinguished by the U.S. Census data. There was only one (out of eight) applications that included a Jewish slur where the applicant’s ethnicity could not be directly identified. For this application, U.S. Trademark Application Serial No. 87/420,347 for “yid-lid,” given the nature of the business, I thought the applicant could be Jewish and cross-checked the surname of the applicant with a Jewish database of common surnames. See U.S. Trademark Application Serial No. 87/420,347 (filed Apr. 21, 2017). This is consistent with the approach of Brauneis and Oliar. Brauneis & Oliar, *supra* note 145, at 57. Similarly, I referred to the Beit Hatfutsot Databases. BEIT HATFUTSOT DATABASES, <https://dbs.bh.org.il/search?q=sorkin&collection=persons> (last visited July 24, 2021) [<https://perma.cc/65YT-R9UP>] (using “Sorkin” as an example).

177. See, e.g., U.S. Trademark Application Serial No. 87/560,491 (filed Nov. 28, 2017) (applying to register “indian motorcycle 1901 (with image)” in International Class 14).

application. Using that rule, the study classified 151 (48.4%) of the 312 applications as self-appropriating trademark applications, and 161 (51.6%) as other-appropriating trademark applications. It should be noted that for those coded as other-appropriating applications, there were no public declarations of a racially prejudicial intent or otherwise on behalf of the applicant. It may be that the applicants wanted to appropriate something shocking to seek consumers' attention or because they were ignorant of the racist legacy of some words in American culture (which may be the case with foreign applicants).¹⁷⁸ Or, it could be that the applicants were aware of the racist legacy of some words (e.g., "redskins") but were indifferent to change.¹⁷⁹ In the absence of direct evidence, no intention is imputed to those other-appropriating applicants.

4. *Limitations*

Despite best efforts to rely on objective, public, or democratic data, when it comes to issues of slurs, race, ethnicity, or religion, invariably there will be disagreements and mischaracterizations. No matter what method is used, disagreements will be inevitable. To try to ameliorate variances in opinion, all the coding work is the result of one author/coder. Therefore, if there are any errors or areas of disagreement, those errors will at least be applied consistently. In addition to the limitations noted in each of the subsections above, it is acknowledged that the method required the exercise of the author's subjective judgment, particularly in filtering out applications that appeared to have a good faith meaning and inferring race of the applicant. Therefore, the lexicon, the list of "racially-oriented" trademark applications, and the coding of self- or other- appropriation should be considered as one non-American author's best efforts—where those efforts are informed by publicly available dictionaries, U.S. government data, and internet-based searches. Despite these limitations, this study provides an approach that is sufficiently robust so that cautious observations can be made. It also serves to provide some benchmark data so that the longer-term impact of *Tam* can be evaluated.

V. RESULTS

As noted earlier, throughout the history of *Tam*, some commentators and judges were concerned that racially offensive trademarks would flood the public register in the absence of a statutory bar.¹⁸⁰ This concern is reflected in Justice Dyk's *en banc* dissent in the Federal Court, that "the purpose of the statute is to

178. See, e.g., U.S. Trademark Application Serial No. 88/222,321 (filed Dec. 9, 2018) (applying to register "mammy pancake (with image)" in International Class 43).

179. For example, the NFL, the owner of the "redskins" trademarks, appealed the Trademark Trial and Appeal Board's decision to cancel the trademarks. The appeal was put on hold pending the outcome of the Supreme Court decision in *Tam*. *Pro-Football, Inc. v. Blackhorse*, 112 F.Supp.3d 439 (E.D. Va. 2015).

180. See Loza, *supra* note 29, at 27; see also *In re Tam*, 808 F.3d 1321, 1364 (Fed. Cir. 2015) (Dyk, J., concurring in part). "The government need not support the inevitable consequence of this decision—the wider registration of marks that offend vulnerable communities." *Id.* at 1357–58.

protect underrepresented groups in our society from being bombarded with de-meaning messages in commercial advertising.”¹⁸¹ The next Section empirically examines whether the PTO has been “bombarded”¹⁸² with racially-oriented trademark applications and provides descriptive statistics in relation to those applications.

A. Are Racially-Oriented Trademarks Growing in Number?

The results show that the evidence is mixed. While there may have been a slight increase in racially-oriented applications immediately after *Tam* (Qtr 2, 2017),¹⁸³ it would not be accurate to describe this as a flood. Figure 1 plots the 312 racially-oriented trademark applications across the 10-year period of January 1, 2010 to January 1, 2020.

181. *In re Tam*, 808 F.3d at 1364.

182. *Id.* (Dyk, J., concurring in part).

183. *See infra* Figure 1 and accompanying text.

FIGURE 1: RACIALLY-ORIENTED APPLICATIONS BY FILING YEAR,
JANUARY 2010–JANUARY 2020 (N=312)

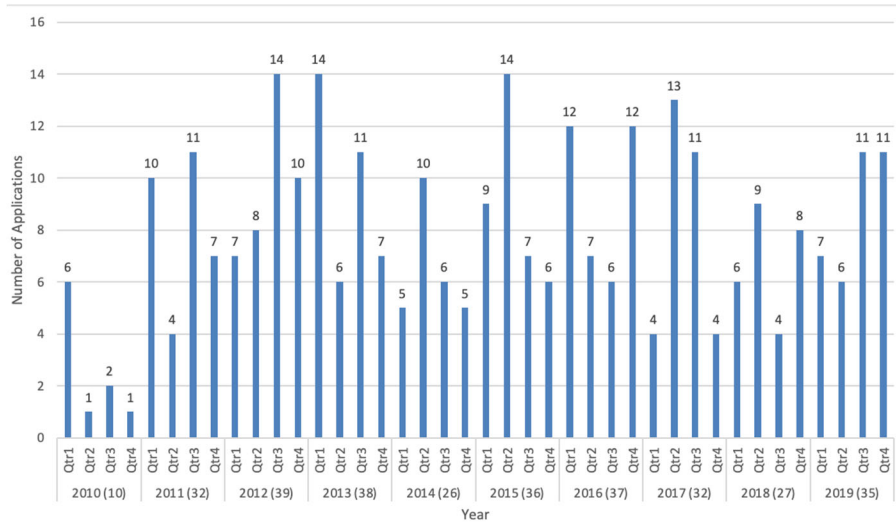


Figure 1 shows the number of racially-oriented applications per year and per quarter on the horizontal axis. The total number of racially-oriented applications averaged 31.2 per year. Given the small sample size, declaring a trend over time is not prudent. Looking at the data split into quarters, however, what can be seen post-*Tam* from June 19, 2017, is a spike in the absolute number of racially-oriented trademark applications (up from four applications in the first quarter of 2017 to thirteen and eleven in the second and third quarters respectively). There were, however, other spikes in applications such as the fourteen applications in 2012 Qtr. 3, 2013 Qtr. 1, and 2015 Qtr. 2. This implies that the post-*Tam* spike is modest to unremarkable.

The small sample size deters making pronouncements as to trends, but *prima facie*, the number of racially-oriented trademark applications does not appear to be growing over time. This lack of growth becomes starker when compared with the exponential growth of trademark applications generally. Table 1 shows the number of racially-oriented applications as a proportion of total number of applications at the PTO per year.

TABLE 1: PROPORTION OF RACIALLY-ORIENTED APPLICATIONS TO TOTAL PTO APPLICATIONS (WORD AND IMAGE) BY FILING YEAR, JANUARY 2010–JANUARY 2020

Year	No. of Racially-Oriented Applications Per Year	Total No. of Applications at PTO per Year	Proportions
2010	10	288,790	0.0035%
2011	32	313,595	0.0102%
2012	39	322,275	0.0121%
2013	38	334,355	0.0114%
2014	26	353,605	0.0074%
2015	36	387,790	0.0093%
2016	37	409,336	0.0090%
2017	32	460,547	0.0069%
2018	27	479,875	0.0056%
2019	35	504,820	0.0069%

Table 1 shows that racially-oriented applications are just a fraction of one percent of the total number of trademark applications received by the PTO each year. And, while the number of racially-oriented applications has remained steady since 2011, by contrast, the annual number of all trademark applications has almost doubled in growth.¹⁸⁴ Table 1 reveals consistent annual increases in all trademark applications from 288,790 applications in 2010 to 504,820 in 2019.¹⁸⁵ Overall, racially-oriented applications have not matched this trend in growth.

Therefore, while there is some support for the anecdote that there was a flurry of applications immediately after *Tam*,¹⁸⁶ it cannot be said that the floodgates opened to a rush of racially-oriented applications. These findings are consistent with Feliu’s assessment of the aftermath of the federal circuit in *Brunetti*¹⁸⁷—finding no surge in applications for vulgar trademarks.¹⁸⁸ Of course, *Tam* may have led to an increased use of slurs as common law trademarks or in general speech. Indeed, the free speech rhetoric flowing from the § 2(a) cases may have disinhibited civility and increased the volume of “demeaning messages in commercial advertising.”¹⁸⁹ Yet it cannot be said that this is reflected in the trademark register, at least in the period of study.

184. See *supra* Table 1.

185. See *supra* Table 1.

186. See *supra* Figure 1 and accompanying text.

187. *In re Brunetti*, 877 F.3d 1330, 1339 (Fed. Cir. 2017).

188. Feliu, *supra* note 125, at 418 (“[T]his study indicates that for the time being there doesn’t seem to have been much of a flood behind the anticipated floodgates.”).

189. *In re Tam*, 808 F.3d 1321, 1364 (Fed. Cir. 2015).

B. *Self-Appropriated vs Other-Appropriated*

A key part of *Tam*'s rhetoric was that self-appropriating a slur was an active strategy to fuel an individual and collective sense of empowerment.¹⁹⁰ This Section empirically examines whether other minorities were similarly encouraged to apply for trademarks disparaging towards their own race. That is, of all the racially-oriented trademark applications, did the number of *self*-appropriating applications increase after the *Tam* decision?

The data shows that self-appropriating applications after *Tam* did increase in absolute and relative terms over other-appropriating applications. As discussed earlier, for the ten-year period, this study classified 151 (48.4%) of the 312 applications as self-appropriating trademark applications and 161 (51.6%) as other-appropriated trademark applications.¹⁹¹ Figure 2 plots the number of self-appropriated versus other-appropriated trademark applications applied for over time.

FIGURE 2: SELF-APPROPRIATED VS OTHER-APPROPRIATED RACIALLY-ORIENTED TM APPLICATIONS PER YEAR, JANUARY 2010–JANUARY 2020, N=312

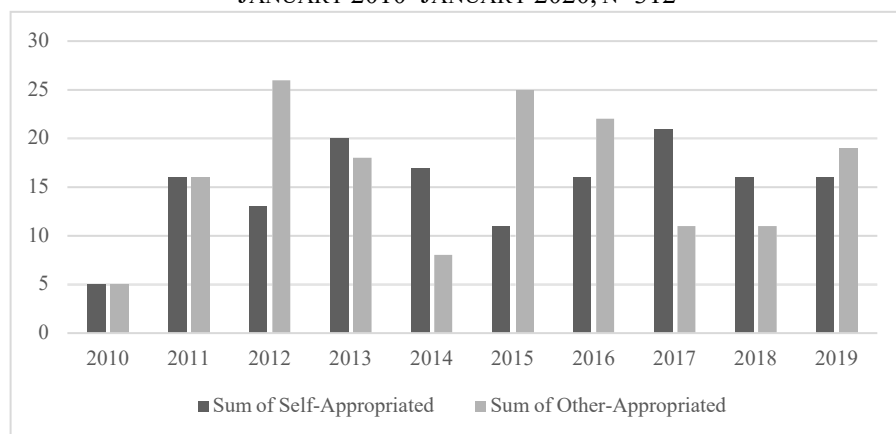


Figure 2 shows that prior to *Tam*, the majority of racially-oriented applications were other-appropriating (123 other-appropriating *cf.* 102 self-appropriating).¹⁹² After *Tam*, this ratio reversed, with the majority of applications being coded as self-appropriating (forty-nine self-appropriated applications *cf.* thirty-eight other-appropriated).¹⁹³ In other words, self-appropriating applications increased in absolute and relative terms after the *Tam* opinion.

190. *Matal v. Tam*, 137 S.Ct. 1744, 1754 (2017).

191. *See supra* Section IV.C.3.

192. In other words, 54.7% of the 225 pre-*Tam* applications were other-appropriated while 45.3% were self-appropriated.

193. In other words, 43.7% of the 87 post-*Tam* applications were other-appropriated while 56.3% were self-appropriated.

This increase in self-appropriating activity may have been inspired by the wide publicity generated by the case in the popular press,¹⁹⁴ and many applicants in the post-*Tam* period were strident in their declarations of semiotic disobedience.¹⁹⁵ For example, African American activist Curtis Bordenave applied for two “n-word”¹⁹⁶ marks, stating that he wanted to dictate “the future of how we define this word.”¹⁹⁷ Some applicants appear to have self-appropriated a slur as a defense mechanism. For example, Marlon Andrews applied for “‘n-word’ please”¹⁹⁸ because he “didn’t want this phrase to be available to be used for exploitative reasons.”¹⁹⁹ Steve Maynard of Snowflake Enterprises LLC applied for two “n-word” word marks,²⁰⁰ stating that “he is not racist but believes that saturating the market with such epithets can rob them of their racist connotations.”²⁰¹

For other post-*Tam* applicants, their websites similarly reveal self-appropriating intent, including a desire to reclaim racial epithets, as well as to sequester the mark from other populations.²⁰² For example, the retailers behind applications for “slanteye”²⁰³ and “cholo loco clothing”²⁰⁴ openly expressed their desire to reclaim and re-interpret the slurs once used to hurt them.²⁰⁵ The word “yid” appears to have been self-appropriated by businesses serving the Jewish commu-

194. See, e.g., Adam Liptak, *Justices Strike Down Law Banning Disparaging Trademarks*, N.Y. TIMES (June 19, 2017), <https://www.nytimes.com/2017/06/19/us/politics/supreme-court-trademarks-redskins.html> [<https://perma.cc/MM7J-73BU>].

195. See *supra* notes 193, 194 and accompanying text; see also *infra* notes 196–206.

196. See U.S. Trademark Application Serial No. 87/495,358 (filed June 19, 2017) (applying to register “n-word” in International Class 25); U.S. Trademark Application Serial No. 87/496,567 (filed June 19, 2017) (applying to register “n-word” in International Class 41).

197. See *Man Wants to Trademark a Variation of the n-word*, *supra* note 170.

198. See U.S. Trademark Application Serial No. 87/495,357 (filed June 19, 2017) (applying to register “n-word please” in International Class 25).

199. Tim Lince, *Numerous ‘Offensive’ Trademark Applications Filed Following Tam Ruling; Applicants Reveal Commercial Hopes and Exploitation Fears*, WORLD TRADEMARK REV. (June 26, 2017) <https://www.worldtrademarkreview.com/portfolio-management/numerous-offensive-trademark-applications-filed-following-tam-ruling> [<https://perma.cc/8WK8-U9JM>].

200. See U.S. Trademark Application Serial No. 87/507,414 (filed June 27, 2017) (applying to register “n-word” in International Class 32); U.S. Trademark Application Serial No. 87/507,483 (filed June 27, 2017) (applying to register “n-word” in International Class 33).

201. Andrew Chung, *Supreme Court Ruling Leads to Offensive Trademark Requests*, REUTERS (July 24, 2017, 12:07 AM), <https://www.reuters.com/article/us-usa-court-slur-idUSKBN1A80L6> [<https://perma.cc/EU9Y-UAVH>].

202. See *infra* notes 205–11 and accompanying text.

203. See U.S. Trademark Application Serial No. 88/180,567 (filed Nov. 3, 2018) (applying to register “slanteye” (with image) in International Class 35).

204. See U.S. Trademark Application Serial No. 88/186,300 (filed Aug. 11, 2018) (applying to register “cholo loco clothing” in International Class 25).

205. The Slanteye Boutique owner states that the slur was reclaimed so that “what was meant to make me ashamed of my uniqueness, is now a source of empowerment.” *Slanteye Boutique*, slanteyeboutique.com (last visited July 24, 2021) [<https://perma.cc/VAX2-W7DT>]. The applicant for Chola Loca Clothing stated that, “[a]s a Latina, many folks stereotyped and judged [her] by the color of [her] skin, [her] tattoos [leading her] to turn that resentment into [her] drive.” *About the Founder*, Chola Loca Clothing, <https://cholalocaclothing.com/about-us> (last visited July 24, 2021) [<https://perma.cc/CAK7-SRWV>].

nity, where it appears to be comfortably used in the marketing of these businesses.²⁰⁶ Only one of the recent self-appropriating applications—for the word mark “chink”²⁰⁷—appears to have been applied for by a well-known trademark “troll”²⁰⁸ (albeit, an Asian one).²⁰⁹

C. *Racially-Oriented Trademarks by Group*

The social science research suggests that self-appropriation of slurs can be empowering and may be facilitated when there are “legal or institutional protections for stigmatized groups.”²¹⁰ Conversely the research suggests that other-appropriation of racial slurs can be harmful particularly where there are power disparities that stem from issues such as historic racism. Therefore, slur-appropriation activity (as measured by trademark applications) may provide an interesting (though, blunt) barometer of self-perceived group power or at least reflect a level of self-confidence that leads to acts of semiotic disobedience. Therefore, the next question is: which minorities have engaged in more self-appropriation activity relative to other-appropriation activity over the last ten years?

1. *Ten-Year Period (January 1, 2010–January 1, 2020)*

To answer this question empirically, the 312 racially-oriented trademark applications were divided into those coded as self-appropriating versus those coded as other-appropriating. Then, the applications were sorted according to the target group of the slur—“African American,” “Native American,” “Native Hawaiian,” “Asian,” “Latinx,” and “Jewish.”

206. See U.S. Trademark Application Serial No. 87/656,486 (filed Oct. 23, 2017) (applying to register “yidjob (with image)” in International Class 35); U.S. Trademark Application Serial No. 87/883,301 (filed Apr. 18, 2018) (applying to register “yidride” in International Class 39).

207. See U.S. Trademark Application Serial No. 87/499,767 (filed June 21, 2017) (applying to register “chink” in International Class 35).

208. “In the trademark world, a troll is generally understood as one who attempts to register a mark and then demands payment and threatens litigation against unsuspecting companies that have adopted the same or similar marks.” See Peter Mendelson, *Trademark Trolls: Here to Stay?*, 70 INTA BULLETIN (Dec. 1, 2015); see also Michael S. Mireles, *Trademark Trolls: A Problem in the United States*, 18 CHAPMAN L. REV. 815, 819, 823 (2015).

209. Chung, *supra* note 201; see also Tim Lince, “I’m the Banksy of Trademarks”—Millionaire Applicant of NASTY WOMAN Regards Cease and Desist from Beyoncé as “Great Marketing,” WORLD TRADEMARK REV. (Nov. 3, 2016), <https://www.worldtrademarkreview.com/brand-management/im-banksy-trademarks-millionaire-applicant-nasty-woman-regards-cease-and> [<https://perma.cc/6699-CKTK>].

210. Wang et al., *supra* note 64, at 78; Galinsky, *supra* note 52, at 2022.

FIGURE 3: SELF-APPROPRIATED VS OTHER-APPROPRIATED RACIALLY-ORIENTED TM APPLICATIONS BY GROUP
JANUARY 1, 2010–JANUARY 1, 2020, N=312

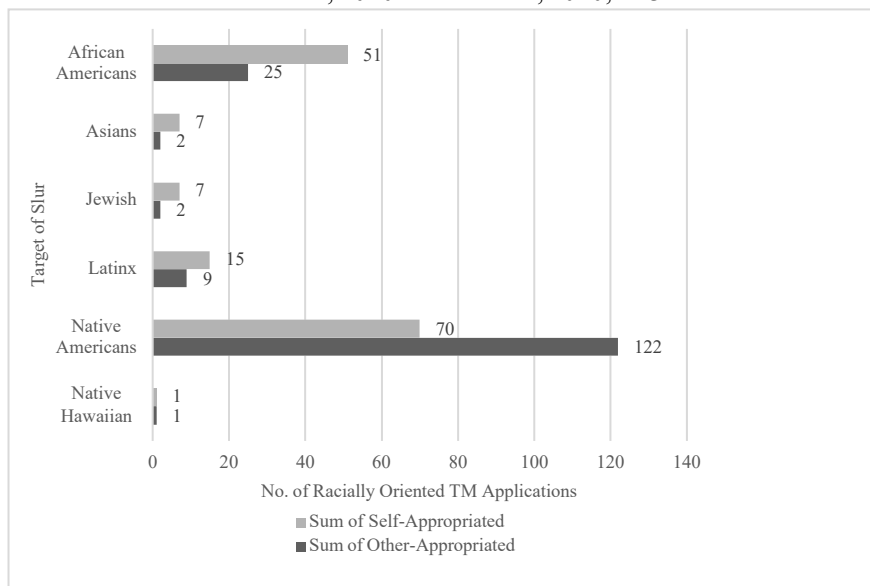


Figure 3 shows that there were many trademark applications incorporating slurs against African Americans. Applications involving African American slurs represented 24.4% or 76 out of 312 applications; followed by Latinx slurs (7.7% or 24 out of 312 applications); and Asian and Jewish slurs (2.9% respectively or 9 out of 312 application). For these groups, the number of self-appropriating applications outnumbered other-appropriating applications over the ten-year period of inquiry (January 1, 2010–January 1, 2020). This may indicate that these minority applicants felt sufficient legal, cultural, or institutional support to engage in reclamation trademark activity.

Figure 3 shows that trademark applications incorporating Native American slurs made up 61.5% of the total dataset, or 192 out of 312 applications. These include both self- and other- appropriating applications. For example, in 2014 there were twelve self-appropriating Native American trademark applications using “indian”²¹¹ or “chief.”²¹² In contrast however, to the other minorities, Native American self-appropriating applications (70) were outnumbered by appropriation of Native American slurs by “others” (122 other-appropriating applications).

211. There were eleven applications incorporating “indian,” three of which were from the Oneida Indian Nation of New York. U.S. Trademark Application Serial No. 86/246,173 (filed Apr. 8, 2014) (applying to register “indian country business today” in International Classes 9 and 35); U.S. Trademark Application Serial No. 86/279,900 (filed May 13, 2014) (applying to register “indian country destinations today” in International Classes 9 and 39).

212. There was one application incorporating “chief” from Grand River Enterprises Six Nations Ltd. U.S. Trademark Application Serial No. 86/242,341 (filed April. 4, 2014) (applying to register “old chief” in International Class 34).

For example, in 2012, all of the twenty-six other-appropriated applications in that year involved slurs against Native Americans. This included eleven applications from one applicant for “big chief” (with image) marks²¹³ and “big chief” word marks²¹⁴ in relation to paper and notebook products.

2. Post-Tam (June 19, 2017–January 1, 2020)

As discussed at Figure 1, the *Tam* case spurred a moderate spike in self-appropriating trademark applications. The question is, which groups took part in this immediate activity? Was it other Asians? Other minorities? Or was there an increase in other-appropriating activity? This analysis takes a subset of the ten-year data above to look only at the post-*Tam* activity.

FIGURE 4: AFTER TAM, JUNE 2017–JANUARY 2020 SELF-APPROPRIATED VS OTHER-APPROPRIATED RACIALLY-ORIENTED TM APPLICATIONS BY TARGET GROUP N=87]

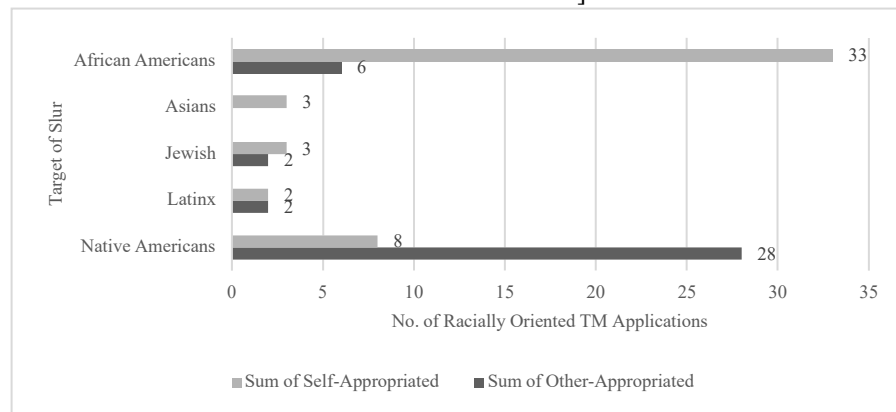


Figure 4 shows that there were eighty-seven racially-oriented applications in the post-*Tam* period. It is very clear that self-appropriating activity of African American slurs were predominant. There were thirty-three self-appropriating applications for African American slurs, making up 67.3% of the total number of self-appropriating applications in this period (forty-nine). These included applications incorporating “the n-word”²¹⁵ or “negro.”²¹⁶ Of the six other-appropriating applications relating to African American slurs, three were from Chinese

213. See, e.g., U.S. Trademark Application Serial No. 85/633,641 (filed May 23, 2012) (applying to register “big chief (with image)” in International Class 16).

214. See, e.g., U.S. Trademark Application Serial No. 85/718,903 (filed Sept. 1, 2012) (applying to register “big chief” in International Class 16).

215. See *Man Wants to Trademark a Variation of the n-word*, *supra* note 170.

216. See, e.g., U.S. Trademark Application Serial No. 87/314,309 (filed Jan. 26, 2017) (applying to register “uppity negro movement” in International Class 25).

companies,²¹⁷ one was from serial troll Mike Lin,²¹⁸ and one was from the owner of a soap company.²¹⁹

In the post-*Tam* period, other-appropriations of Native American slurs continued to outnumber self-appropriating applications. Several applications used Native American imagery in relation to gambling, tobacco, and alcohol.²²⁰ Given the significance and sensitivity of these findings, a separate article is being developed discussing these trademark applications.

D. Outcomes at the PTO

1. Which Slurs Attracted a Section 2(a) Refusal?

Although this Article identified 312 racially-oriented trademark applications, it is a separate inquiry to determine if the PTO found the marks to be disparaging. To examine this question, the file histories for each of the 312 applications were accessed via the PTO Trademark Status & Document Retrieval (TSDR) database.²²¹ Of the 312 applications identified, forty-four (14.1% out of 312) received a § 2(a) objection based on the fact that the mark was disparaging, scandalous or immoral.²²²

For these forty-four applications, the § 2(a) refusals were based only on eleven different racial slurs and their variants. These slurs were: the “n-word,” “mammy,” “squaw,” “cholo,” “redskin,” “slant,” “injun,” “indian giver,” “negro,” “chink,” and “colored”²²³ (the “disparaging slurs”).

Figure 5 below presents the frequency of applications which received a § 2(a) refusal against one of these eleven slurs and also presents the outcome of those applications. Note that some applications were still pending as of May 1, 2021.

217. See, e.g., *supra* note 175; U.S. Trademark Application Serial No. 88/732,876 (filed Dec. 19, 2019) (applying to register “mammy pancake (with image)” in International Class 41); U.S. Trademark Application Serial No. 79/271,187 (filed Sept. 17, 2019) (applying to register “jambo” in International Classes 9, 10, and 44).

218. U.S. Trademark Application Serial No. 87/499,736 (filed June 21, 2017) (applying to register “n-word” in International Class 35).

219. U.S. Trademark Application Serial No. 87/855,385 (filed Mar. 29, 2019) (applying to register “mammy’s soap co. (with image)” in International Class 3).

220. See, e.g., TABLE MOUNTAIN CASINO, <https://www.tmcasino.com/> (last visited July 24, 2021) [<https://perma.cc/YQ8L-QRWJ>] (gambling); NAT. AM. SPIRIT, <https://www.americanspirit.com/> (last visited Apr. 9, 2021) [<https://perma.cc/F8YN-S2P3>] (tobacco); *Native Amber*, COOP ALE WORKS, <https://coopale-works.com/beers/native-amber/> (last visited Apr. 9, 2021) [<https://perma.cc/WW67-QPQR>] (alcohol).

221. TSDR Database, *supra* note 118.

222. Note that there were an additional three applications that received a § 2(a) objection on the grounds that the mark implied a false connection. These three applications are excluded from this analysis.

223. There was one application that received a disparagement objection due to its incorporation of two separate slurs, “negro” and “colored.” See U.S. Trademark Application Serial No. 86/250,760 (filed Apr. 13, 2014) (applying to register “American negro doll (colored doll)” in International Class 28).

FIGURE 5: RACIALLY-ORIENTED TM APPLICATIONS RECEIVING A § 2(A) DISPARAGEMENT, IMMORAL OR SCANDALOUS REFUSAL BY SLUR AND OUTCOME AS OF MAY 1, 2021. JANUARY 2010–JANUARY 2020, N=44

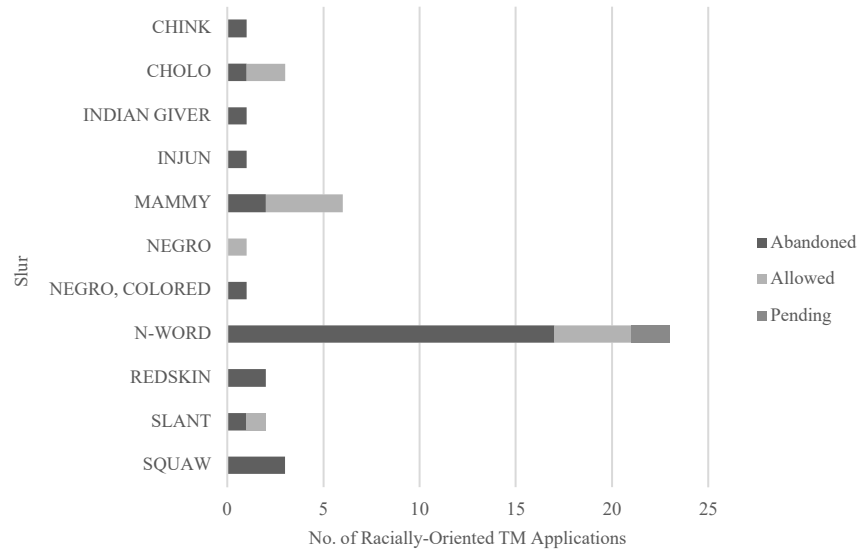


Figure 5 shows that 30 out of 44 applications (or 68.2% of 44) were abandoned after receiving a refusal from the PTO. The file histories show that 12 out of 44 applications (or 27.3% of 44) were allowed despite the initial § 2(a) refusal. For example, in 2015, there were disparagement refusals against five applications incorporating “mammy.”²²⁴ All of these “mammy” applicants challenged the § 2(a) refusal.²²⁵ Each application received a suspension letter from the PTO pending the resolution of the *Tam* case, and after the decision, the applications were allowed to proceed to registration.²²⁶

224. See U.S. Trademark Application Serial No. 86/567,392 (filed Mar. 18, 2015) (applying to register “rena mammy” in connection with non-medicated skin care (International Class 3)); U.S. Trademark Application Serial No. 86/568,432 (filed Mar. 18, 2015) (applying to register “rena mammy” in connection with medicated skin care (International Class 5)); U.S. Trademark Application Serial No. 86/568,436 (filed Mar. 18, 2015) (applying to register “rena mammy” in connection with mineral water (International Class 32)); U.S. Trademark Application Serial No. 86/568,439 (filed Mar. 18, 2015) (applying to register “rena mammy” in connection with educational services (International Class 41)); U.S. Trademark Application Serial No. 76/718,771 (filed Dec. 20, 2015) (applying to register “mammy’s kitchen” in connection with restaurant services (International Class 43)).

225. The applicant for the four “rena mammy” marks argued that § 2(a) was a disputed legal ground. The applicant for “mammy’s kitchen” argued that there were already other “mammy” marks on the register.

226. Letter from Tara J. Pate, Off. Deputy Comm’r Trademark Examination Pol’y, USPTO, to Konrad Gatien, Stubbs Alderton & Markiles LLP (May 3, 2016), <https://tsdr.uspto.gov/documentviewer?caseId=sn86568439&docId=SUL20160503141635#docIndex=3&page=1> [<https://perma.cc/8C8K-F7TG>].

2. *Inconsistent Application of the Disparagement Bar Pre-Tam*

The PTO's application of the § 2(a) bar as against the eleven disparaging slurs appears to be very inconsistent. In other words, there were many other applications incorporating one of these eleven slurs that never received a § 2(a) refusal under either the disparagement provision or the immoral/scandalous provision. Four examples are discussed below.

From January 2010 to January 2020, there were four applications incorporating "slant." Three were filed prior to the *Tam* decision on June 19, 2017. Of these four applications, two were self-appropriating applications from Simon Tam.²²⁷ Both were refused as incorporating a word disparaging to Asians.²²⁸ In 2011, however, the PTO issued a notice of allowance for the mark "slants" for baby bibs (Class 25) (coded by this study as "other appropriated").²²⁹

Over the ten-year period, there were seventeen applications incorporating "mammy." All of these were coded as "other-appropriated." Prior to the *Tam* decision in 2017, there were fourteen "mammy" applications, six of which attracted a § 2(a) refusal²³⁰ but eight of which did not.²³¹ Similarly, there were twenty applications incorporating "cholo" (nine coded as "other-appropriated," eleven as "self-appropriated") over the ten-year period. Of the nineteen pre-*Tam* applications, three applications (all coded as "self-appropriated") received a § 2(a) refusal²³² while sixteen (a mixture of self- and other-appropriated) did not.²³³ Over the ten-year period, there were sixteen applications incorporating

227. For applications for "the slants" in relation to entertainment, namely live performances (Class 41), see U.S. Trademark Application Serial No. 77/952,263 (filed Mar. 5, 2010); U.S. Trademark Application Serial No. 85/472,044 (filed Nov. 14, 2011).

228. *In re Tam*, 785 F.3d 567, 568 (Fed. Cir. 2015).

229. See U.S. Trademark Application Serial No. 85/269,787 (filed Mar. 17, 2011). The USPTO issued a notice of allowance on September 27, 2011. *Id.*

230. See, e.g., U.S. Trademark Application Serial No. 85/056,916 (filed June 8, 2010) (applying to register the mark "mammy" in connection with mops (International Class 21)).

231. See, e.g., U.S. Trademark Application Serial No. 86/182,086 (filed Feb. 2, 2014) (applying to register the mark "mammy's house" in connection with personal cleaning products (International Classes 3, 30)); U.S. Trademark Application Serial No. 87/384,072 (filed Mar. 24 2017) (applying to register the mark "mammygol" in connection with various goods, including toys and body building apparatuses (International Class 25)).

232. U.S. Trademark Application Serial No. 86/818,790 (filed Nov. 12, 2015) (applying to register the mark "cholo's try" in connection with online content (International Class 41)).

233. U.S. Trademark Application Serial No. 85/556,047 (filed Feb. 29, 2012) (applying to register the mark "cholo rider customers" in connection with hats, hoodies, and like-items (International Class 25)); U.S. Trademark Application Serial No. 86/090,272 (filed Oct. 13, 2013) (applying to register the mark "cholo polo" in connection with a Chicano culture magazine (International Class 16)); U.S. Trademark Application Serial No. 86/412,657 (filed Oct. 2, 2014) (applying to register the mark "that's so cholo" in connection with bumper stickers (International Class 16) and hats, hoodies, and like-items (International Class 25)); U.S. Trademark Application Serial No. 86/802,058 (filed Oct. 28, 2015) (applying to register the mark "cholos on acid" in connection with live entertainment and musical services (International Class 41)); U.S. Trademark Application Serial No. 86/862,313 (filed Dec. 30, 2015) (applying to register the mark "#ficholo" connection with clothing (International Class 25)); U.S. Trademark Application Serial No. 87/249,740 (filed Nov. 28, 2016) (applying to register the mark "cholo" in connection with e-cigarettes (International Class 34)).

“negro” (all coded as “self-appropriating”). Prior to *Tam*, there were seven applications incorporating “negro,” of which only one²³⁴ received a section 2(a) refusal but six did not.²³⁵

These examples demonstrate that the PTO was unable to consistently apply the § 2(a) provisions in relation to racially-oriented trademarks. This finding is similar to other empirical studies of § 2(a), which found the application of the “immoral or scandalous” provision to be “arbitrary” and “inconsistent.”²³⁶

3. *Continued Resistance to the “n-word”*

The data reveals that “n-word” applications are applied for relatively frequently and are particularly vexing for the PTO. Both pre- and post- *Tam*, the PTO appears to struggle with reconciling the laws of the day with an apparent resistance to registering “n-word” trademarks. For example, pre-*Tam*, there were nine applications (two coded as “other-appropriated”) that incorporated the “n-word” as part of a compound phrase or image.²³⁷ All nine applications received a § 2(a) refusal on various grounds that the trademark was “disparaging,”²³⁸ both “disparaging” and “immoral/scandalous,”²³⁹ or just “immoral/scandalous.”²⁴⁰ The “n-word” appears to be the only disparaging slur to have attracted both provisions of the § 2(a) clause.²⁴¹

Note that these grounds of refusal are evaluated differently. Disparaging marks are assessed by whether they offend an identifiable group, whereas scan-

234. U.S. Trademark Application Serial No. 85/708,593 (filed Aug. 21, 2012) (applying to register the mark “baked by a negro” in connection with baked goods (International Class 30)).

235. See, e.g., U.S. Trademark Application Serial No. 85/495,483 (filed Dec. 12, 2011) (applying to register the mark “contemporary negro” in connection with shirts (International Class 25)); U.S. Trademark Application Serial No. 85/875,491 (filed Mar. 13, 2013) (applying to register the mark “negro synthesis” in connection with dance apparel (International Class 25)).

236. Beebe & Fromer, *supra* note 130, at 193 (using an empirical examination of § 2(a) objections, finding that “[F]or applications filed from 2003 through 2015, the PTO declined to issue an immoral-or-scandalous refusal to and approved for publication a significant number of applications that sought to register a word mark that, based on the PTO’s own § 2(a) refusal practices, was immoral or scandalous regardless of context.”); see also Carpenter & Garner, *supra* note 121, at 356 (looking at profane words and finding that “there are many marks containing the same terms that have been both registered and refused”).

237. See, e.g., U.S. Trademark Application Serial No. 77/956,075 (filed Mar. 10, 2010) (applying to register “fly n-word company” for digital marketing (International Class 9)).

238. See, e.g., Letter from Vivian Micznik First, Trademark Att’y, USPTO, to Patrick Shoyemi Coker (June 14, 2010), <https://tsdr.uspto.gov/documentviewer?caseId=sn77956075&docId=OOA20100614185902#docIndex=2&page=1> [<https://perma.cc/22X6-YUY3>]; U.S. Trademark Application Serial No. 77/956,075 (filed Mar. 10, 2010) (applying to register “fly ‘n-word’ company” for digital marketing (International Class 9)).

239. See, e.g., U.S. Trademark Application Serial No. 87/083,034 (filed June 24, 2016) (applying to register “him ‘n-word’ shit” for hats, shirts, and other garments (International Class 25)).

240. See Letter from Myriah Habeeb, Trademark Att’y, USPTO, to Geraldine Hughes (Feb. 13, 2017), <https://tsdr.uspto.gov/documentviewer?caseId=sn87083034&docId=SUSLT20170213151013#docIndex=7&page=1> [<https://perma.cc/9VWG-NL66>]; see, e.g., U.S. Trademark Application Serial No. 87/483,653 (filed June 24, 2016) (applying to register “rottons-rich off thoughts that other ‘n-words’ said” for silk screen printing (International Class 40)).

241. Compare *supra* note 238, with *supra* note 239, and *supra* note 240.

dalous marks are assessed as to whether they are shocking to the general public.²⁴² Therefore, refusals for disparagement would discuss dictionary definitions of the “n-word” and conclude that “the likely meaning of” the “n-word” to be an “(ethnic slur) extremely offensive name for a Black person.”²⁴³ A refusal based on the immoral/scandalous provision would discuss dictionary definitions and other publications, stating that the “n-word” was vulgar and akin to profanity so that “a substantial composite of the general public (although not necessarily a majority) would consider the mark to be scandalous in the context of contemporary attitudes and the relevant marketplace”²⁴⁴

In the two-year window after *Tam* struck down disparagement, but before *Brunetti* struck down the immoral/scandalous provision, the PTO received fourteen applications incorporating the “n-word.”²⁴⁵ Six of these fourteen applications were for the “n-word” as a standalone word mark.²⁴⁶ In this period, the PTO could no longer rely on the disparagement provision, so it started issuing § 2(a) refusals based on the immoral/scandalous provision.²⁴⁷ These applications were then suspended until *Brunetti* was resolved.²⁴⁸ For five of these applications, the PTO also added a “failure to function” refusal.²⁴⁹ This is significant because the failure to function refusal is its own statutory basis for refusal²⁵⁰ and can be difficult to overcome.²⁵¹

242. For a discussion of the provisions prior to *Tam* and *Brunetti*, see Anten, *supra* note 45, at 409.

243. See Letter from Vivian Micznik First, *supra* note 238.

244. See Letter from Myriah Habeeb, Senior Att’y, USPTO, to Curtis Bordenave (Feb. 28, 2019) <https://tsdr.uspto.gov/documentviewer?caselId=sn87495358&docId=NFIN20180228140650#docIndex=7&page=1> [<https://perma.cc/ZDD3-F8D6>] (denying an application to register “n-words” for clothing (International Class 25) and for retail store services (International Class 41) after concluding it was immoral/scandalous).

245. Only one of these fourteen applications was coded as “other-appropriated.” See U.S. Trademark Application Serial No. 87/499,736 (filed June 21, 2017) (applying to register “n-word” for online retail store services (International Class 35)).

246. See Letter from Myriah Habeeb, Senior Att’y, USPTO, to Mike Lin (Feb. 28, 2018), <https://tsdr.uspto.gov/documentviewer?caselId=sn87499736&docId=SUSLT20180228173047#docIndex=6&page=1> [<https://perma.cc/EG92-AK7C>].

247. *Id.*

248. See *id.*; see also *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019).

249. In addition to these five, there was one application in the pre-*Tam* period where a failure to function refusal was also issued. Letter from Colleen Kearney, Trademark Att’y, USPTO, to Slimarous World Music LLC (Sept. 20, 2012), <https://tsdr.uspto.gov/documentviewer?caselId=sn85952753&docId=OOA20130920203029#docIndex=2&page=1> [<https://perma.cc/J6SA-ELX3>]; see also U.S. Trademark Application Serial No. 85/952,753 (filed June 6, 2013) (applying to register “pussy ‘n-word’ be cool (P. N. B. C.)” for entertainment marketing services (International Class 35)).

250. USPTO, MANUAL OF PATENT EXAMINING PROCEDURE § 1202.02(a)(i) (8th ed., rev. 7, 2008) (“Before October 30, 1998, there was no specific statutory reference to functionality as a ground for refusal, and functionality refusals were thus issued as failure-to-function refusals”). On October 30, 1998, the Lanham Act was changed to “to expressly prohibit registration on either the Principal or Supplemental Register of functional matter.” *Id.* For example, § 2(e)(5) of the Trademark Act, 15 U.S.C. § 1052(e)(5), prohibits registration on the Principal Register of “matter that, as a whole, is functional.” *Id.*

251. For example, the PTO has stated that “an applicant cannot overcome a failure-to-function refusal . . . by attempting to amend the application to seek registration on the Supplemental Register or pursuant to Section 2(f).” *Id.* § 1202.04(d) (citing *In re Eagle Crest, Inc.*, 96 U.S.P.Q.2d 1227, 1229 (T.T.A.B. 2010)).

A refusal based on failure to function stems from the statutory definition of a trademark whereby a trademark must be used as an indicator of source.²⁵² That is, it must identify and distinguish the applicant's goods or services. As Roberts explains, "[w]hen a mark does not actually indicate source or distinguish goods or services because of the way in which it is used, the USPTO refuses to register it based on its 'failure to function.'"²⁵³

In other words, the trademark must function as a badge of origin or a brand, as opposed to a mark being seen as decorative, ornamental or merely conveying descriptive information.²⁵⁴ For example, a trademark used as a slogan on a t-shirt may attract a consumer due to the information conveyed by the slogan and not because it is being seen as a brand. Applications refused based on this "failure to function" rule are discussed below.

4. *Inconsistent Application of Failure to Function*

Of the eleven disparaging slurs previously objected to under § 2(a) grounds, the "n-word" appears to be the only disparaging slur the PTO continues to refuse, now under the guise of a failure to function.²⁵⁵ Again, as with its application of § 2(a), the failure to function refusal appears to be inconsistently applied. An example of this inconsistency can be seen in relation to an application filed on June 19, 2017, by Snowflake Enterprises,²⁵⁶ which tried to trademark the "n-word" for athletic apparel (Class 25).²⁵⁷ In denying the application, the PTO argued that the "n-word":

252. The doctrine of failure to function is conceptually distinct from the "doctrine of functionality" and also different to the concept of distinctiveness. See Lisa P. Ramsey, *Using Failure to Function Doctrine to Protect Free Speech and Competition in Trademark Law*, 104 IOWA L. REV. 70, 80–81 (2020) ("Functionality doctrine focuses on whether trademark protection of this product feature would provide an unfair competitive advantage for utilitarian or aesthetic reasons, while failure to function doctrine focuses on whether the matter actually functions as a trademark that identifies and distinguishes a product's source.") Roberts has argued failure to function is not given as much attention as the distinctiveness inquiry by courts, and the failure to function requirements is applied "somewhat inconsistently." See Roberts, *supra* note 8, at 1981.

253. Roberts, *supra* note 8, at 1982 (footnote omitted).

254. A typical failure to function refusal in this context would argue that "the applied-for mark is a commonplace term widely used by a variety of sources that merely conveys an ordinary, familiar, well-recognized concept or sentiment. Because consumers are accustomed to seeing this term commonly used in everyday speech by many different sources, they would not perceive it as a mark identifying the source of applicant's goods but rather as only conveying an informational message." See U.S. Trademark Application Serial No. 87/496,454 (filed June 19, 2017) (applying for the mark "n-word" for athletic apparel (International Class 25)).

255. See, e.g., U.S. Trademark Application Serial No. 87/499,736 (filed June 21, 2017) (applying to register the mark "n-word" for online retail store services (International Class 35)).

256. The application was suspended until the outcome of the *Brunetti* case. See, e.g., Letter from Myriah Habeeb, Senior Att'y, USPTO, to Snowflake Enterprises, (Dec. 6, 2018), <https://tsdr.uspto.gov/documentviewer?caseId=sn87496454&docId=SUSLT20181206140115#docIndex=8&page=1> [<https://perma.cc/DY4M-G49L>]. However, after the *Brunetti* decision, on October 9, 2019, the USPTO raised a new issue—that the mark failed to function as a trademark. Letter from Kevin G. Crennan, Trademark Examining Att'y, USPTO, to Snowflake Enterprises, LLC, (Oct. 9, 2019), <https://tsdr.uspto.gov/documentviewer?caseId=sn87496454&docId=OOA20191009201441#docIndex=5&page=1> [<https://perma.cc/467Q-AVUU>].

257. U.S. Trademark Application Serial No. 87/496,454 (filed June 19, 2017) (applying to register the mark "n-word" in connection with athletic apparel (International Class 35)).

[may] convey[] to the average American consumer a message ‘mean[ing] dude, homie or friend, primarily by people of African American descent . . . [it is] a brand but rather because of the aforementioned messages they wish to convey to others by wearing the goods.’²⁵⁸

These refusals are conspicuous because there were two contemporaneous applications for the “n-word,” filed by Curtis Bordenave, which did not receive failure to function refusals.²⁵⁹ This is despite the fact that one of Bordenave’s applications was also in Class 25 for clothing,²⁶⁰ where a similar failure to function argument could have applied.

The “n-word” phrase applications which received a failure to function refusal, included a 2013 application for “figgas over ‘n-words,’”²⁶¹ and an application filed on the day of the *Tam* judgment for use of the phrase “‘n-word’ please” on clothing.²⁶² In relation to the latter, the PTO argued that the mark failed to function due to incorporation of “common informational wording.”²⁶³ Specifically, that “the phrase [“n-word” please] is a common idiom in the African American community and is generally understood to mean ‘give me a break,’”²⁶⁴ Again, this refusal (based on the mark being used as a common idiom) seems inconsistently applied when applications for marks such as “real ‘n-words,’”²⁶⁵ or “call me when that ‘n-word’ not home”²⁶⁶ did not attract a failure to function refusal.²⁶⁷

There is something post-ironic in the application of the failure to function refusal in the context of this study. In a sense, the PTO are telling African American applicants that they cannot self-appropriate the “n-word” as a trademark because it has already been appropriated into the vernacular by the African American community. If that is the case, however, then contemporaneous applications for the “n-word” (such as from African American Curtis Bordenave) should have also received a failure to function refusal.

258. Letter from Kevin G. Crennan, Trademark Examining Att’y, & Myriah Habeeb, Managing Att’y, USPTO, to Snowflake Enterprises, LLC, (Mar. 17, 2020), <https://tsdr.uspto.gov/documentviewer?caseId=sn87496454&docId=SUSLT20180228154447#docIndex=0&page=1> [<https://perma.cc/ZB4E-9Q29>].

259. See U.S. Trademark Application Serial No. 87/495,358 (filed June 19, 2017) (applying to register “n-word” in International Class 25); U.S. Trademark Application Serial No. 87/496,567 (filed June 19, 2017) (applying to register “n-word” in International Class 41).

260. U.S. Trademark Application Serial No. 87/495,358 (filed June 19, 2017) (applying to register “n-word” in International Class 25).

261. U.S. Trademark Application Serial No. 86/093,498 (filed Oct. 16, 2013) (applying to register “figgas over ‘n-words’” for dance apparel (International Class 25)).

262. U.S. Trademark Application Serial No. 87/495,357 (filed June 19, 2017) (applying to register “‘n-word’ please” in International Class 25).

263. Letter from Myriah Habeeb, Senior Att’y, USPTO, to Marlon Andrews, (Mar. 1, 2018), <https://tsdr.uspto.gov/documentviewer?caseId=sn87495357&docId=NFIN20180301120113#docIndex=3&page=1> [<https://perma.cc/X5PN-2H6J>].

264. *Id.*

265. U.S. Trademark Application Serial No. 88/540,893 (filed July 26, 2019) (applying to register “real ‘n-words’” International Class 25).

266. U.S. Trademark Application Serial No. 88/295,298 (filed Feb. 9, 2019) (applying to register “call me when that ‘n-word’ not home” in International Class 25).

267. *Id.*

5. *Applications from Foreign Applicants*

Another way racially-oriented applications can be categorized is by whether the applicant is foreign or domestic. The distinction is important because foreign applicants may be ‘innocent’ slur-appropriators. That is, they may be applying for a slur in ignorance of the racist connotations of a particular word or image. The advantage of a statutory bar against disparaging marks is its ability to signal to foreign applicants that some words are taboo or offensive in the domestic culture.

Unfortunately, it is difficult to make generalized statements about non-American applicants because the majority (222 out of 312 applications) did not have a “holder country” recorded in the relevant field.²⁶⁸ Nevertheless, some interesting observations can be made about some slurs. For example, there have been many non-American applications for trademarks incorporating “mammy.”²⁶⁹ Ten of the sixteen applicants for “mammy” list their holder’s country as either China,²⁷⁰ Taiwan,²⁷¹ Hong Kong,²⁷² Great Britain,²⁷³ or Germany.²⁷⁴ It is likely that “mammy” is a common phonetic equivalent to mummy or mother in those countries. Seven of these ten applicants received a § 2(a) refusal.²⁷⁵

VI. CONCLUSION

The social science literature lends qualified support to the idea that if a target group is sufficiently empowered in a collective sense (which could be enhanced through legal or other structural support), individuals may seek to self-label with a derogatory slur. In doing so, self-appropriation can invert the meaning of the slur and can increase the perceived power of the overall group. This Article contends that trademark law can amplify the costs and benefits of this process but finds that applications for racially-oriented trademarks are relatively uncommon.

Nevertheless, the results reveal that while the number of applications were low, there was a real difference in the nature of the racially-oriented trademark applications after *Tam*. Bearing in mind the limitations in the methodology, the empirical results show that after the *Tam* decision, there was an absolute and

268. *Cf. infra* notes 270–74.

269. *See infra* notes 270–74.

270. *See, e.g.*, U.S. Trademark Application Serial No. 86/567,392 (filed Mar. 18, 2015) (applying to register “rena mammy” in non-medicated skin care preparations (International Class 3)).

271. *See* U.S. Trademark Application Serial No. 85/056,916 (filed June 8, 2010) (applying to register “mammy” for mops (International Class 5)).

272. *See* U.S. Trademark Application Serial No. 88/222,321 (filed Dec. 9, 2018) (applying to register “mammy pancake” for cafeteria services (International Class 43)).

273. *See* U.S. Trademark Application Serial No. 85/746,228 (filed Oct. 4, 2012) (applying to register “mammy jamia’s” for jellies and jams (International Class 29)).

274. *See* U.S. Trademark Application Serial No. 79/179,999 (filed Nov. 10, 2015) (applying to register “be mammy” for accessories for nursing mothers (International Classes 10, 24, 25)).

275. *See e.g., supra* Figure 5 and note 230.

relative increase in self-appropriating applications (forty-nine) over other-appropriated applications (thirty-eight). Of the minority groups studied, a relatively high proportion of self-appropriation activity was evident from African American, Asian, Jewish, and Latinx groups. For Native Americans, however, the opposite was found. That is, other-appropriating applications continued to outnumber self-appropriating applications.

The disproportionate number of other-appropriated Native American marks may indicate that between Native Americans and “others,” there may be a power disparity or an access disparity. Native Americans could also have a different cultural attitude to branding with a self-disparaging slur or image. The relationship between Native American groups and trademark law is a sensitive issue and has been discussed by scholars such as Riley and Carpenter²⁷⁶ and others.²⁷⁷ The issue deserves deeper investigation and further research is being conducted to compare and contrast the treatment of indigenous cultural property as trademarks with the frameworks used in Australia²⁷⁸ and New Zealand.²⁷⁹

Although the number of racially-oriented applications has been historically low, the result of *Tam* is that future applications are much more likely to become registered trademarks. While some traders may have success with slurs as an attention seeking strategy, ultimately the consumer will decide whether branding with a slur pays dividends. In *Tam*, the Court said, the “proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”²⁸⁰ Personal feelings come second to the “uninhibited marketplace of

276. See Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 869 (2016) (“In this way, we argue that U.S. law and policy has long facilitated the process of non-Indians ‘owning Red’—by which we mean the widespread practice by which non-Indians claim and use Indian resources for themselves, often without attribution, compensation, or permission, causing harm and loss to Indian people.”).

277. See Zenor, *supra* note 101, at 91 (arguing that the “images, names and symbols tribes would want to protect are most often part of a collective” that is “antithetical” to the parameters of commercial intellectual property law); Alexandria Chu, *The Washington Redskins and the Current Standard for Disparaging Trademarks: The Impact of Disparaging Trademarks in the Modern World*, 25 S. CAL. REV. L. & SOC. JUST. 39, 39 (2015) (discussing the social impact of disparaging marks); Ingrid Messbauer, *Beyond “Redskins”: A Source-Based Framework for Analyzing Disparaging Trademarks and Native American Sports Logos*, 25 FED. CIR. B.J. 241, 243 (2016) (discussing the history of Native American imagery in American sports and proposing a model distinguishing between self and other propagation).

278. In 2021, IP Australia launched an indigenous knowledge project. The terms of reference include reviewing the protocols and processes relevant to trademarks that use indigenous signs, symbols or knowledge. See IP Australia, *Enhance and Enable-Indigenous Knowledge Consultations 2021*, INTELL. PROP. AUSTR., <https://consultation.ipaustralia.gov.au/policy/ik2021/> [<https://perma.cc/VU6X-3DGS>] (last visited July 24, 2021) [<https://perma.cc/VU6X-3DGS>]; see also Fady JG Aoun, *Whitewashing Australia’s History of Stigmatising Trade Marks and Commercial Imagery*, 42 MELBOURNE U. L. REV. 671, 671 (2019); see also Vicki Huang, *Comparative Analysis of US and Australian Trade Mark Applications for the Slants*, 40 EUR. INTELL. PROP. REV. 429, 430 (2018).

279. See Māori Advisory Committee and Māori Trade Marks, N.Z. INTELL. PROP. OFF., <https://www.iponz.govt.nz/about-ip/trade-marks/practice-guidelines/current/maori-advisory-committee-and-maori-trade-marks/> [<https://perma.cc/GK3U-HKLH>] (Jan. 1, 2018) (describing the history of the impetus for these changes); see also Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J.L. & JURIS. 249, 249 (1993).

280. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

ideas [and] the ability to incite debate.”²⁸¹ In this sense, free speech advocates preserve a hope that the consumer or the market will eventually “shout down” those that promote the use of racist or offensive slurs as trademarks.²⁸² Or, that sufficient debate creates consensus as to whether certain words should be considered offensive slurs. Under this view, society should permit the use of derogatory trademarks because in a free market, the consumer is the best arbiter of “disparaging” or “scandalous/immoral” marketing.²⁸³

While this view is attractive, in a free market, typically those with power have the loudest voices and those in power tend to preserve the status quo. It is usually more difficult for marginalized groups to make themselves heard by the wider community unless there is some kind of catalyst or wider collective action. It is therefore interesting that since *Tam* and *Brunetti*, many events such as the Black Lives Matter movement have triggered a greater awareness and responsiveness to the role of race in America.²⁸⁴ Anecdotally, these events have led to increased consumer pressure for more socially “woke” marketing and this has led to many companies removing or revising their racially-oriented branding.²⁸⁵ High profile reversals include trademarks for “redskins,”²⁸⁶ “Aunt Jemima,”²⁸⁷ and the “Land O’ Lakes Girl.”²⁸⁸

Nevertheless, it is difficult to say that consumer activism is an optimal model of regulation. Although the PTO struggled with the application of § 2(a) and continues to resist applications for the “n-word” under other doctrines, the alternative—the free market—can be equally unpredictable. It is also difficult to imagine high-profile companies de-registering their marks had it not been for the tragic events surrounding the Black Lives Matter movement, COVID-19, and subsequent social consciousness raising. It would be a bleak hope to think that only tragedy could provoke corporate social responsibility. Even in the absence of these tragedies, the free market may be an unreliable or risky arbiter of social

281. *In re Tam*, 808 F.3d 1321, 1364 (Fed. Cir. 2015), *aff’d sub nom, Tam*, 137 S. Ct. 1744.

282. See Mike Florio, *Packers CEO Says Redskins Name is “Very Derogatory to a Lot of People,”* NBC SPORTS (Aug. 7, 2013, 9:32 AM), <https://profootballtalk.nbcsports.com/2013/08/07/packers-ceo-says-redskins-name-is-very-derogatory-to-a-lot-of-people/> [<https://perma.cc/C9PL-N3K4>].

283. MacKay, *supra* note 39, at 145.

284. See, e.g., Justin Worland, *America’s Long Overdue Awakening to Systemic Racism*, TIME MAG. (June 11, 2020, 6:41 AM), <https://time.com/5851855/systemic-racism-america/> [<https://perma.cc/GX7B-L4TD>].

285. See *infra* notes 286–88 and accompanying text.

286. For example, on July 13, 2020, the Washington Football Team announced they were retiring the name and logo “redskins.” *Statement of the Washington Football Team*, WASH. FOOTBALL TEAM (July 13, 2020, 9:00 AM), <https://www.washingtonfootball.com/news/washington-redskins-retiring-name-logo-following-review> [<https://perma.cc/P6AB-CV5A>].

287. On June 17, 2020, it was reported that Quaker Oats was retiring the Aunt Jemima name and logo. Mary Ellen Podmolik, *Quaker Oats Getting Rid of Aunt Jemima, Citing ‘Racial Stereotype.’ Uncle Ben’s and Mrs. Butterworth’s May Be Next*, CHI. TRIB. (June 17, 2020, 4:39 PM), <https://www.chicagotribune.com/business/ct-biz-aunt-jemima-brand-quaker-oats-20200617-qgpyv5hslfzzejk5hx7ak4hcm-story.html> [<https://perma.cc/2EUT-2R4F>].

288. On February 6, 2020, Land O’ Lakes, Inc. reported that it was removing Mia, the indigenous woman featured on all their packaging. Katherine J. Wu, *Land O’ Lakes Drops the Iconic Logo of an Indigenous Woman from its Branding*, SMITHSONIAN MAG. (Apr. 28, 2020), <https://www.smithsonianmag.com/smart-news/mia-land-olakes-iconic-indigenous-woman-departs-packaging-mixed-reactions-180974760/> [<https://perma.cc/LT4W-ZFAV>].

norms, particularly in light of the polarity in public discourse during the Trump era. Therefore, for vulnerable or voiceless communities, for those who feel bombarded by less recognized slurs, or for those who have grown weary from “the fight,” the loss of the disparagement bar is something to be truly lamented.