
COMMENT

DISCRIMINATORY DISCRETION: PTO PROCEDURES
AND VIEWPOINT DISCRIMINATION UNDER
SECTION 2(A) OF THE LANHAM ACT

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INTRODUCTION

The current standards for denying and cancelling trademarks under section 2(a) of the Lanham Act are insufficiently clear to prevent trademark examiners and administrative judges from employing viewpoint-based discrimination against owners of marks that are perceived to be immoral, scandalous, or disparaging. Since trademark protection is a grant of speech rights to mark owners, the U.S. Patent and Trademark Office's (PTO) discretionary decisions to deny or cancel the registration of marks that represent particular viewpoints under section 2(a) are at odds with the First Amendment protections afforded to both commercial and expressive speech. This Comment proposes that to protect the First Amendment rights of mark owners, the PTO should employ a policy that all allegedly immoral, scandalous, or disparaging marks are presumptively valid and can be denied registration or cancelled only upon a showing that the proposed marks are within the

specific categories of speech deemed to be outside the realm of First Amendment protection. Stricter standards for denying and cancelling trademarks under section 2(a) will allow the commercial marketplace and the marketplace of ideas to determine the fate of these so-called “undesirable” trademarks.

Part I introduces Lanham Act section 2(a), the statute authorizing the denial of registration for trademarks that are immoral, scandalous, or disparaging. I discuss the PTO’s procedures for granting and denying trademarks, and compare the PTO’s purported procedures with how the office actually makes decisions. I then argue that this process is infused with discretionary decisionmaking that allows examiners to incorporate their own opinions on the propriety of marks into the section 2(a) analysis. In Part II, I analyze the PTO’s rates of granting and denying registration to allegedly scandalous and disparaging trademarks under section 2(a) and the evidence used to support such decisions. In Part III, I assess the effects of trademark denial and cancellation on mark owners. In Part IV, I discuss the First Amendment doctrine of viewpoint discrimination, its interaction with the doctrines of commercial speech and administrative discretion, and how it applies to trademark registration and the PTO. I conclude that section 2(a) is a restriction on viewpoint in violation of the First Amendment. In Part V, I analyze how the discretionary procedures in the PTO lead to viewpoint discrimination. Finally, in Part VI, I propose changes to the section 2(a) regime to limit discrimination on the basis of viewpoint. I argue that the PTO should adopt the presumption that potentially scandalous and disparaging trademarks are valid absent section 2(a) challenges from third parties in opposition or cancellation proceedings. I also propose that section 2(a) denials should be limited to traditionally unprotected categories of speech, allowing the marketplaces of commerce and ideas to limit the propagation of trademarks that are seen as scandalous or disparaging.

I. LANHAM ACT SECTION 2(A) AND RELATED PTO PROCEDURES FOR SCANDALOUS AND DISPARAGING TRADEMARKS

This Comment focuses on the PTO’s application of Lanham Act section 2(a) to deny or cancel trademark registrations at both the initial examination stage and in proceedings before the Trademark Trial and Appeals Board (TTAB). Section 2(a) proscribes registration of trademarks that “[c]onsist[] of or comprise[] immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or

disrepute”¹ The PTO has tended to group denials under section 2(a) into two broad categories: marks that are immoral or scandalous, and marks that are disparaging to persons or groups.² However, determining which marks fall into these categories is largely subjective because of a lack of defined legislative intent and the PTO’s failure to specifically articulate standards for applying these bars to registration in administrative and judicial proceedings. The vagueness of the statutory language leads the PTO to use subjective standards and creates First Amendment problems. In effect, the TTAB can selectively deny registration to marks under section 2(a) on the basis of the viewpoints the marks express.

A. *The History of Section 2(a)*

Congress enacted the Lanham Act in 1946 “with the dual objectives of protecting the consuming public from deception and protecting the mark holder from misappropriation.”³ The Act’s legislative history also indicates an intent to reduce arbitrariness and simplify the procedures for granting trademarks at the federal level.⁴ The opening language of section 2 reflects these goals: “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”⁵ By presuming that all trademarks are registerable *unless* they fall under one of the bars to registration listed in section 2, the Lanham Act simplifies the application and registration process and protects the rights of the mark owner by allowing him to register his mark as quickly as possible in order to reap the benefits of federal trademark registration and enforce the mark against potential infringers.

Section 2(a) does not accomplish the objectives described above. Prohibiting trademarks on the basis of their scandalous or disparaging content does not prevent consumer deception so long as the marks identify their source, and does not prevent misappropriation because the mark owner gets no protection if the content of the mark is barred under section 2(a).

¹ Lanham Act § 2(a), 15 U.S.C. § 1052(a) (2012).

² See TMEP §§ 1203.01, 1203.03 (8th ed. July 2015) (describing separate PTO procedures for assessing scandalous and disparaging marks).

³ Lynda J. Oswald, *Challenging the Registration of Scandalous and Disparaging Marks Under the Lanham Act: Who Has Standing to Sue?*, 41 AM. BUS. L.J. 251, 257 (2004).

⁴ See FRITZ G. LANHAM, PROVIDING FOR THE REGISTRATION OF TRADE-MARKS USED IN COMMERCE, TO CARRY OUT THE PROVISIONS OF CERTAIN INTERNATIONAL CONVENTIONS, AND FOR OTHER PURPOSES, H.R. REP. NO. 76-944, at 2 (1939) (“The purpose of this bill is to simplify and make registration more liberal, to dispense with mere technical prohibitions and arbitrary provisions, to make procedure simple and inexpensive, and relief against infringement prompt and effective.”).

⁵ Lanham Act § 2, 15 U.S.C. § 1052 (2012).

Furthermore, section 2(a) inquiries are inherently arbitrary because they rely on examiners to parse public sentiment towards allegedly disparaging and scandalous words, a wholly subjective inquiry.⁶

So what, then, justifies a statutory prohibition on the registration of scandalous and disparaging marks? The legislative history provides no clues as to Congress's intent.⁷ Based on the statutory text and court decisions, however, scholars generally agree on four justifications for the section 2(a) bars to registration:

The federal government (1) "should not create the appearance that it favors or approves the use of scandalous, immoral and disparaging trademarks"; (2) "should not squander its precious time and resources" on such marks; (3) "should promote the public health, welfare, and morals by discouraging the[ir] use" . . . ; and (4) "should protect the sensitivities of those in public who might be offended" by [such marks].⁸

These justifications are purportedly served through the trademark examination process under section 2(a); however, they also open the door to justifying discrimination against marks on the basis of viewpoint.

B. *The Trademark Examination Process*

The PTO controls the process for federal registration of trademarks.⁹ Under the Lanham Act, a mark owner must complete a five-stage PTO application process to register a mark: "(1) application, (2) examination, (3) publication in the PTO's Official Gazette, (4) opposition, and (5) registration."¹⁰ The application must include the name and address of the applicant, a representation of the mark (either words or an image), a listing of the goods or services for which the mark will be used, and the appropriate filing fee.¹¹

⁶ See generally *infra* Section I.C and Part II (discussing how and when marks are deemed scandalous or disparaging).

⁷ See Oswald, *supra* note 3, at 265 ("The legislative history of Section 2(a) is frustratingly silent as to why the Lanham Act denies registration to scandalous or disparaging matter.").

⁸ Megan M. Carpenter & Kathryn T. Murphy, *Calling Bulls**t on the Lanham Act: The 2(a) Bar for Immoral, Scandalous, and Disparaging Marks*, 49 U. LOUISVILLE L. REV. 465, 468 (2011) (citing Stephen R. Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 TRADEMARK REP. 661, 788 (1993)).

⁹ BARTON BEEBE ET AL., TRADEMARKS, UNFAIR COMPETITION, AND BUSINESS TORTS 125 (2011).

¹⁰ *Id.*

¹¹ 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:46 (4th ed. 2015).

After the mark owner submits an application, it is initially reviewed by a PTO examining attorney.¹² “If the examining attorney identifies a substantive problem with the application, she will typically issue an ‘Office Action’ rejecting the application and explaining the basis for the rejection. The applicant is given six months to respond.”¹³ If the applicant does not respond, the mark is deemed “abandoned” and will not proceed to publication.¹⁴ However, if the applicant responds to the Office Action, the examining attorney will reexamine the application in light of any evidence or arguments provided by the applicant.¹⁵ After reexamination, the examining attorney will issue a final rejection if she determines that the mark does not satisfy the requirements of the Lanham Act.¹⁶ The applicant can appeal that rejection within six months to the TTAB, an administrative body within the PTO, and finally to the United States Court of Appeals for the Federal Circuit.¹⁷

If the mark is approved by the examining attorney, it is published in the PTO Official Gazette.¹⁸ Within thirty days of publication, “[a]ny person who believes that he would be damaged by the registration of [the] mark” may file an opposition with the PTO.¹⁹ If registration is not successfully opposed, the mark is registered on the Principal Register and receives the statutory protections of registration.²⁰ However, after registration, anyone who believes that he has been or will be damaged by the mark may file a petition to cancel it.²¹ This petition can be filed within five years of registration, or at any time if “[the mark’s] registration was obtained fraudulently or contrary to the provisions of [Lanham Act section 4] or of [Lanham Act sections 2(a), (b), or (c)].”²² Cancellation proceedings are adjudicated by the TTAB and “progress[] as in any inter partes proceeding before” the Board.²³

¹² BEEBE ET AL., *supra* note 9, at 129.

¹³ *Id.*

¹⁴ Lanham Act § 12(b), 15 U.S.C. § 1062(b) (2012).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ BEEBE ET AL., *supra* note 9, at 129; *see also* Lanham Act § 20, 15 U.S.C. § 1070 (2012) (“An appeal may be taken to the Trademark Trial and Appeal Board from any final decision of the examiner in charge of the registration of marks upon the payment of the prescribed fee.”); *id.* § 21(a)(1), § 1071(a)(1) (“An applicant for registration of a mark . . . who is dissatisfied with the decision of the Director or Trademark Trial and Appeal Board, may appeal to the United States Court of Appeals for the Federal Circuit . . .”).

¹⁸ Lanham Act § 12(a), 15 U.S.C. § 1062(a) (2012).

¹⁹ *Id.* § 13(a), § 1063(a).

²⁰ *Id.* § 13(b)(1), § 1063(b)(1); *see also infra* Section III.A (describing the statutory benefits of registration).

²¹ Lanham Act § 14, 15 U.S.C. § 1064 (2012).

²² *Id.* § 14(3), § 1064(3). This Comment focuses on cancellations of registered trademarks in violation of section 2(a), which can be filed at any time.

²³ 3 MCCARTHY, *supra* note 11, § 20:43.

Section 2 of the Lanham Act provides the substantive bases for rejecting a trademark application or cancelling a registered mark. These bars to registration include marks that are immoral, scandalous, or disparaging; marks that are likely to cause confusion, mistake, or deception through their resemblance to other marks; and marks that are merely descriptive of the goods to which they are affixed.²⁴

In assessing a trademark application, the examining attorney follows the guidelines set forth in the Trademark Manual of Examining Procedure (TMEP). According to the TMEP, “Trademark Examining Attorneys will be governed by the applicable statutes, the Trademark Rules of Practice, decisions, and Orders and Notices issued by the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, Commissioners, or Deputy Commissioners.”²⁵ An examining attorney’s initial examination must be “complete” and “must also clearly explain all refusals and requirements.”²⁶

C. PTO Procedures Under Section 2(a): Determining Whether Marks Are Scandalous or Disparaging

1. Purported Examination Procedures of the PTO

According to the TTAB and the courts, the PTO is supposed to resolve any doubts as to the disparaging or scandalous nature of a mark in favor of the applicant and then allow for opposition proceedings to assess any section 2(a) issues before the mark is registered on the Principal Register. In *In re In Over Our Heads, Inc.*, the TTAB stated that

[b]ecause the guidelines [for determining whether a mark is disparaging] are somewhat vague and because the determination is so highly subjective, we are inclined to resolve doubts on the issue of whether a mark is scandalous or disparaging in favor of [the] applicant and pass the mark for publication with the knowledge that if a group does find the mark to be scandalous or disparaging, an opposition proceeding can be brought and a more complete record can be established.²⁷

²⁴ Lanham Act § 2, 15 U.S.C. § 1052 (2012). Other lesser-invoked bars to registration include marks that include the name, image, or signature of a living person without his consent, or the name, image, or signature of a deceased U.S. president “during the life of his widow.” *Id.* § 2(c), § 1052(c).

²⁵ Catherine P. Cain, *Foreword to TMEP, supra note 2.*

²⁶ TMEP, *supra note 2*, § 704.01.

²⁷ 16 U.S.P.Q.2d (BNA) 1653, 1654-55 (T.T.A.B. 1990).

The Federal Circuit reinforced this position in *Ritchie v. Simpson*, a case in which a member of the public challenged the registration of marks associated with O.J. Simpson under section 2(a).²⁸ The court “commended” the PTO examiners’ deference towards publication and the policy of foregoing section 2(a) decisions until the opposition phase because these policies strike a balance between preserving the rights of mark owners and considering the public’s interest in preventing the registration, and thus the use, of scandalous or disparaging trademarks.²⁹ The court stated that by having this policy of deference, “the PTO avoids the risk of pre-judging public attitudes toward a proposed registration based on ad hoc responses by government officials, while at the same time affording the affected public an opportunity to effectively participate in the question of whether the registration is proper.”³⁰

2. Actual Examination Procedures of the PTO

Under the policies described above, examiners should be precluded from exercising their own judgment when the disparaging or scandalous nature of a mark is questionable or unclear. In light of changing attitudes towards language—both within the general public with regard to scandalous words and within individual groups with regard to terms that may disparage—examining attorneys should exercise deference at the initial examination stage for section 2(a) determinations and allow opposition proceedings to capture the actual attitudes of the potentially scandalized public or disparaged group.³¹ However, analysis of the actual procedures undertaken by examiners reveals that deference is employed in name only, with examiners substituting their own discretionary judgment of scandalousness or disparagement for that of the public or disparaged group.³²

²⁸ 170 F.3d 1092 (Fed. Cir. 1999).

²⁹ *Id.* at 1094.

³⁰ *Id.* (emphasis omitted).

³¹ 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, 405-06 (2006) (“Recognizing that a mark, once published, may then be challenged by a third party in an inter partes proceeding, both the TTAB and courts have repeatedly warned examining attorneys not to substitute their own personal judgments for those of potential challengers. Even if an examiner comes across some evidence that a mark may disparage, the intrinsically subjective and speculative nature of disparagement analysis instructs the examiner to publish the mark, so long as the examiner has doubts.” (citations omitted)).

³² See *id.* at 419-20 (“Despite this mandate [to resolve doubts regarding the disparaging nature of the mark in favor of the applicant], many examining attorneys refuse to register marks containing former slurs in the face of strong doubts.”); Lilit Voskanyan, Comment, *The Trademark Principal Register as a Nonpublic Forum* [sic], 75 U. CHI. L. REV. 1295, 1318 (2008) (“[A]lthough the registration system may be inclined towards inclusion, that stance itself does not eliminate the

a. *Evidence Relied upon by Examiners*

Examiners have discretion as to what and how much evidence they rely upon when making a section 2(a) decision. Some merely use case law and TTAB precedent to support their arguments, while others cite multiple dictionary definitions, Internet sources, and prior applications.³³ Furthermore, some examiners consider the mark in a vacuum without regard to the context in which it is used, while others take that context into account.³⁴ These decisions are arbitrary because the PTO has provided no overarching policy regulating how applications are assessed under section 2(a).

In addition, PTO examiners are permitted to rely on lower-quality, less-reliable information when determining whether a mark is scandalous or disparaging, such as dictionary definitions, Internet search evidence, and the mere context of the goods to which the marks are affixed. “No specific degree or amount of such evidence is required so long as the examining attorney is persuaded to publish the mark for opposition.”³⁵ In the examination context, the PTO lacks the resources to assemble high-quality evidence, such as surveys, personal affidavits, petitions, and expert linguistic analysis, to assess the actual perception of the public (in a scandalousness assessment) or the perception of the allegedly disparaged group (in a disparagement assessment).³⁶ Therefore, “the PTO tolerates such deficiencies and offers examiners conducting ex parte evaluations of disparagement wide discretion in selecting the materials that will guide their decisions,” while third-party challengers are expected to bring forth the high-quality information that the PTO claims it cannot obtain on its own to prove that a mark is scandalous or disparaging under section 2(a).³⁷

selective nature of the registration mechanism, much less transform the Register into one available for ‘general access.’”).

³³ See *infra* Part II for further analysis of the types of evidence relied upon by PTO examiners.

³⁴ See Carpenter & Murphy, *supra* note 8, at 479 (“Some examining attorneys have taken it upon themselves to do a more advanced investigation as to goods and services other than the ones included in the application. Other examining attorneys only consider the specimens in the application as an indication of goods and services; through different processes, different results arise.”).

³⁵ Jessica M. Kiser, *How Dykes on Bikes Got It Right: Procedural Inequities Inherent in the Trademark Office’s Review of Disparaging Trademarks*, 46 U.S.F. L. REV. 1, 20 (2011).

³⁶ See *In re Budge Mfg.*, 857 F.2d 773, 775 (Fed. Cir. 1988) (“[T]he PTO has limited facilities for acquiring evidence—it cannot, for example, be expected to conduct a survey of the marketplace or obtain consumer affidavits . . .”).

³⁷ Anten, *supra* note 31, at 407 (“[C]ourts hold third parties who challenge the registrability of marks to a higher standard . . .”).

b. *Reliance upon Precedent*

Examiners are also not bound by previous decisions, even when an applicant seeks to register a mark similar to marks he or others have already registered. According to the TMEP, "Previous decisions by examining attorneys in approving other marks are without evidentiary value and are not binding on the agency or the Board."³⁸ Therefore, an examiner can exercise his discretion to deem a mark barred by section 2(a) even if marks containing the same or similar content were granted by other examiners. For example, in *In re Watkins*, the TTAB reviewed an examiner's determination that the mark TWATTY GIRL was scandalous. Despite the fact that the PTO registered the applicant's previous applications for the marks TWATTY and TWATTYTRAX without any section 2(a) objections, the TTAB noted that it was not bound by the applicant's prior registrations.³⁹ The analysis in Part II below also demonstrates examiners' lack of regard for precedent; in many instances, the PTO selectively denies registrations for the same purportedly scandalous or disparaging word without regard for identical prior registrations.⁴⁰

c. *Evidentiary Standards*

The section 2(a) evidentiary standards for both scandalousness and disparagement invite examiners to infuse their analyses with individual discretion. Each standard will be considered in turn.

i. *Scandalousness*

The Federal Circuit articulated the evidentiary standard for scandalousness that has been adopted by the PTO in *In re Mavety Media Group Ltd.*⁴¹ To find a mark scandalous, (1) the mark must be shocking to the sense of truth, decency, or propriety, or call out for condemnation; (2) the mark must be considered in the context of the marketplace as applied to only the goods or services in the application for registration; and (3) the mark must be scandalous to a substantial composite of the general public, as measured from the context of contemporary attitudes.⁴² The TMEP instructs examiners to provide evidence that supports a denial for scandalousness under this standard.⁴³ An examiner may cite dictionaries, newspapers, and magazines as evidence, but he has the choice of what and how much evidence he supplies

³⁸ TMEP, *supra* note 2, § 1207.01(d)(vi).

³⁹ No. 76138675, 2005 WL 548042, at *1 (T.T.A.B. Feb. 8, 2005).

⁴⁰ *See infra* Part II.

⁴¹ 33 F.3d 1367 (Fed. Cir. 1994).

⁴² *Id.* at 1371.

⁴³ TMEP, *supra* note 2, § 1203.01.

in support of a section 2(a) scandalousness denial; the only restriction appears to be that he cannot rely solely on previous refusals.⁴⁴ Case law and precedential TTAB decisions also do not clearly dictate the quantity or quality of evidence required to make a section 2(a) denial for scandalousness.⁴⁵ Some precedent holds that dictionary evidence is sufficient to meet the burden of proving scandalousness, essentially rendering a mark scandalous per se based on its definition alone. For example, the Federal Circuit stated in *In re Boulevard Entertainment, Inc.* that when “the evidence shows that the mark has only one pertinent meaning, dictionary evidence alone can be sufficient to satisfy the PTO’s burden” of proving scandalousness.⁴⁶ Other cases state, however, that definitional evidence, even when combined with evidence demonstrating that the public perceives the mark as scandalous or disparaging, is insufficient to support such a determination. For example, in *In re Old Glory Condom Corp.*, the TTAB determined that the examiner’s reliance on news stories discussing citizens’ negative reactions to so-called inappropriate uses of the American flag was insufficient to justify her opinion that a pictorial mark depicting a condom-shaped American flag was scandalous to a substantial portion of the general public.⁴⁷ In that case, more evidence would be required to support a scandalousness determination, but it is unclear from the opinion how much more and what type of evidence would have been sufficient.

However, one category of marks that the PTO has essentially deemed scandalous per se is marks that contain profanity. Although the TTAB has acknowledged that profane words can attain secondary, nonprofane meanings, it has also claimed that such words cannot lose their profane meanings entirely.⁴⁸ These marks are dismissed as scandalous purely based

⁴⁴ *Id.*

⁴⁵ See Baird, *supra* note 8, at 774 (“The cases interpreting Section 2(a) are inconsistent with respect to what evidence is required as evidence before an examining attorney may reject a trademark registration application on the basis that the trademark consists of or comprises scandalous or immoral matter.”).

⁴⁶ 334 F.3d 1336, 1340-41 (Fed. Cir. 2003).

⁴⁷ 26 U.S.P.Q.2d (BNA) 1216, 1220 (T.T.A.B. 1993) (“Precisely *why* this combination of images is scandalous the examining attorney fails to articulate. . . . We are not willing, based solely on the examining attorney’s opinion, the evidence of the reaction to the Madonna video, and the unsuccessful effort to amend the U.S. Constitution to prohibit the *burning* of the flag, to presume that the flag imagery of applicant’s mark would give offense in a manner that must be deemed ‘scandalous’ under Section 2(a).”).

⁴⁸ See *In re Tinseltown, Inc.*, 212 U.S.P.Q. (BNA) 863, 866 (T.T.A.B. 1981) (“[T]he fact that profane words may be uttered more freely does not render them any the less profane. Nor does this fact amend the statute by which we are required to determine the registrability of such matter as marks.”); Baird, *supra* note 8, at 718 (“Although the Board acknowledged that profane words may

on their profane dictionary definition without regard for contemporary evolution of meaning. In these instances, the examiners essentially act as arbiters of what they consider to be good taste by preventing allegedly profane words from obtaining the legitimacy and rights afforded to registered trademarks.⁴⁹ However, determining what qualifies as “profane” is necessarily a subjective task because the scandalousness of the marks is supposed to be considered in light of contemporary attitudes as well as the marks’ contexts.⁵⁰ Examiners thus act within their own discretion to decide whether a word that has a definition that is on the border between profane and nonprofane is scandalous and therefore unregistrable.

Examiners also receive little guidance as to what and how much evidence is necessary to demonstrate that a mark is scandalous to a “substantial composite of the general public.”⁵¹ Examiners can rely on the types of evidence articulated in the TMEP when making this assessment, but the sufficiency of evidence necessary to make a scandalousness claim is unclear from the examination materials. For example, “While there is established caselaw on courts’ consideration of marketing efforts or opinion surveys when evaluating other Lanham Act claims, such as false advertising or likelihood of confusion, nothing suggests that the TTAB looks to these cases for guidance.”⁵² Without clear standards for assessing and supporting a scandalousness determination, discretion is likely to enter the decisionmaking process, and with it the potential for examiners’ personal biases to cloud their supposed objectivity.

ii. Disparagement

The standards for disparagement under section 2(a) are even more uncertain. The TTAB’s decision in *Harjo v. Pro-Football, Inc. (Harjo I)* set forth the basic two-step inquiry for assessing disparagement: (1) determining the likely meaning of the matter in question, and (2) determining whether that meaning may be considered disparaging to a substantial composite of the

acquire secondary, non-profane meanings over the course of time, it resisted the notion that a profane word could ever lose its profane meaning entirely.”).

⁴⁹ See Baird, *supra* note 8, at 718 (arguing that the PTO treats profane words as scandalous *per se* to avoid “encourag[ing] their use and accelerat[ing] their transformation into becoming acceptable jargon in the market place”).

⁵⁰ See *id.* at 717 (“[W]hile it may be easy to state that ‘profane’ words cannot ever be registered as trademarks, it is not as easy at the fringe to identify exactly which words and images are to be considered ‘profane.’ Indeed, . . . profanity is relative; it depends upon the viewpoints, values, and beliefs of the listener.”).

⁵¹ *In re Mavety Media Grp.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994).

⁵² Regan Smith, Note, *Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks*, 42 HARV. C.R.-C.L. L. REV. 451, 462 (2007).

relevant group.⁵³ The TMEP has articulated this basic test to examiners as follows: “the examining attorney must make a prima facie showing that a substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark, as used on or in connection with the relevant goods or services, to be disparaging in the context of contemporary attitudes.”⁵⁴ With no specific evidentiary standard set forth in the Manual, the TTAB has analogized the standards for determining disparagement with those for determining scandalousness, even though the affected group is defined differently.⁵⁵ In addition, no guidance is provided as to what types of evidence examiners should assess to determine disparagement, so examiners can only draw from the scandalousness context. This is problematic because dictionaries and news articles, for example, may not encompass what a “substantial composite” of the relevant group believes about the allegedly disparaging word or phrase, and do not take into account the context in which the word or phrase is used within the trademark. These “hazy” guidelines mean that “without the benefit of an actual member of the disparaged group coming forward to challenge the mark, an examiner’s assessment is akin to a prediction of how a particular group of people might conceivably react to the mark.”⁵⁶ Such predictions are riddled with discretionary decisions that fail to defer to applicants before reaching the opposition phase, when members of the allegedly disparaged groups can come forward and voice their actual disapproval of the marks.

II. AN ANALYSIS OF SECTION 2(A) DENIALS: WHAT IS ACTUALLY DEEMED SCANDALOUS OR DISPARAGING?

A. Methodology

To assess grants and denials of scandalous and disparaging trademarks under section 2(a), I selected words in each category that are traditionally included in these categories (e.g., profanity), have been the subject of public debate, or were the subject of previous section 2(a) cases that have reached the TTAB or the Federal Circuit. I searched for each word in the PTO’s

⁵³ 50 U.S.P.Q.2d (BNA) 1705, 1740-41 (T.T.A.B. 1999), *rev’d on other grounds*, 284 F. Supp. 2d 96 (D.D.C. 2003).

⁵⁴ TMEP, *supra* note 2, § 1203.03(b)(i).

⁵⁵ See *Harjo I*, 50 U.S.P.Q.2d (BNA) at 1738 (“In seeking guidance for determining . . . whether matter may be perceived as disparaging, we look to the limited precedent of the courts and the [TTAB] on the issue of disparagement, as well as to the previously enunciated precedent on the related issue of scandalousness.”).

⁵⁶ Anten, *supra* note 31, at 406.

Trademark Electronic Search System (TESS)⁵⁷ through the basic word mark search function. From the resulting list, I viewed each application's prosecution history and documents on the Trademark Status and Document Retrieval (TSDR) database.⁵⁸ TSDR documents relevant to my analysis included (1) the applicant's initial application, which contains the identification of goods for which the mark is used as well as any visual representations of the mark; (2) Office Actions sent from the examining attorney to the applicant that request further information from the applicant and provide reasoning and supporting evidence for initial or final denials of registration; and (3) internal notations to the applicant's files that indicate the examiner's actions regarding the application, such as communications with the applicant or the examiner's managing attorney.

Applications that did not have the relevant documents uploaded to TSDR (generally, applications prior to the year 2000) were disregarded, as were applications for marks that did not contain the relevant word but nevertheless were included in the TESS search results for that word.

From the TSDR documents, I assessed whether the mark was denied or approved for publication by the examining attorney.⁵⁹ If the mark was approved, I determined whether the examiner raised a section 2(a) objection at any point during the examination process. If the mark was denied, I determined whether the denial was under section 2(a) or whether it was on other statutory or technical grounds. For any applications in which a section 2(a) objection was raised—regardless of whether the application was ultimately granted or denied by the examiner—I assessed whether the examiner relied on any evidence for his section 2(a) analysis, and if so, what types of evidence were presented. I also noted any anomalies based on the goods for which the mark was used, unusual uses of evidence, and any exchanges between the applicant and the examiner regarding a potential section 2(a) denial.

B. *Data and Analysis*

1. Marks Denied Under Section 2(a)

In the scandalousness context, the most “vulgar” words were denied registration most frequently and most consistently, whereas less blatantly

⁵⁷ TESS, U.S. PAT. & TRADEMARK OFF., <http://tmsearch.uspto.gov> [<http://perma.cc/6ASD-TJC9>] (last visited Oct. 31, 2015).

⁵⁸ TSDR, U.S. PAT. & TRADEMARK OFF., <http://tsdr.uspto.gov> [<http://perma.cc/U62U-HY8Q>] (last visited Oct. 31, 2015).

⁵⁹ Marks approved for publication do not always become registered on the Principal Register. My analysis only focuses on whether the mark was approved at the examination stage, regardless of whether it was ultimately registered.

offensive words (such as acronyms) were registered more often.⁶⁰ “Fuck” and “asshole” received no registrations whatsoever, and 100% of the denials for “asshole” were made under section 2(a). Very few marks using “shit” were granted (2.83%), and 95.88% of “shit” denials were made under section 2(a). The “less offensive” words (“tits,” “slut,” and “piss”) were assessed more inconsistently, with 31.91% of “tits” applications (none of which faced a section 2(a) objection), 65.42% of “slut” applications, and 73.53% of “piss” applications successfully registered.

Representing a vulgar word in an acronym did not insulate it from scandalousness denial, but this “rule” is inconsistently applied depending on the acronym in question. For example, compare “WTF” and “MILF,” which both include a letter that stands for the heavily denied word “fuck.” “WTF” received only one section 2(a) objection throughout all of the relevant applications (and the mark was ultimately registered). For “MILF,” on the other hand, two-thirds of all denials were made under section 2(a).

Disparagement determinations were even more inconsistent, even for words with the same apparent meaning.⁶¹ For example, the words “heeb” and “hebe” are alternative spellings for a derogatory term directed towards Jewish people. All denials of “heeb” were made under section 2(a), while no denials of “hebe” were made for that reason.⁶² “Fag” and “faggot” were also treated inconsistently even though both words have the same disparaging meaning towards gay and lesbian individuals. All “faggot” applications were denied under section 2(a), whereas 62.96% of “fag” applications were registered (with only 18% over a section 2(a) objection). In addition, marks containing “queer,” another traditionally disparaging term for gay and lesbian individuals, received no section 2(a) denials or objections, though perhaps this is because “queer” has become a more accepted word by the gay community in light of touchstones in popular culture such as *Queer Eye for the Straight Guy*.⁶³

Although the term “redskin” has been the topic of controversy amid the current litigation surrounding the Washington Redskins trademarks,⁶⁴ marks containing the term have not been consistently deemed disparaging. When considering “redskin” marks more generally, slightly more than 44% of those marks were successfully registered, and only 40% of denials were made under

⁶⁰ For a full list of the researched scandalous words and their rates of registration and denial with respect to section 2(a), see *infra* Appendix, Table 1.

⁶¹ For a full list of the researched disparaging words and their rates of registration and denial with respect to section 2(a), see *infra* Appendix, Table 2.

⁶² One “hebe” registration was made over a section 2(a) objection, making up 20% of all registrations for the word.

⁶³ (Bravo Original Production & Scout Productions 2003–07).

⁶⁴ See *infra* subsection V.D.1 (discussing the *Redskins* case in greater detail).

section 2(a)—despite the TTAB’s argument in the current cancellation proceedings that the word is disparaging per se, even where it has acquired secondary meaning (i.e., as the identifier of the professional football team).⁶⁵ Another derogatory term for Native Americans, “squaw,” has been registered significantly more often; 82.14% of applications were registered, and only 13% of those were over a section 2(a) objection. When assessing the mark, the examiners likely applied the geographic meaning of “squaw” rather than the disparaging meaning.⁶⁶ However, this high success rate makes the “redskin” denials even more puzzling, as “redskin” has likely acquired a secondary meaning of identifying the professional football team that eclipses the word’s use as an ethnic slur. The selective application of secondary meaning in the context of disparaging marks indicates the PTO’s failure to implement clear standards for analyzing such marks under section 2(a), ultimately leading to arbitrary decisionmaking.

2. Evidence Relied upon in Scandalousness and Disparagement Determinations

In both the scandalousness and disparagement contexts, nearly all examiners rely on some kind of evidence. For scandalousness, most examiners rely on dictionary definitions that deem the word to be offensive, vulgar, profane, or scandalous to support a section 2(a) determination.⁶⁷ In fact, for marks including the term “asshole” or “WTF,” all section 2(a) analyses were supported by dictionary definitions.⁶⁸ Analyses that relied less heavily on dictionary definitions culled evidence from the Internet to support the scandalous definition of the mark in context. For example, only 45.45% of section 2(a) analyses for marks including “MILF” used dictionaries, but 100% used Internet sources.⁶⁹ Common Internet sources included Wikipedia articles, Urban Dictionary and other crowd-sourced online slang dictionaries, and lists of Google search results showing the scandalous context of the terms. A few bold examiners also included screenshots of pornographic websites using the terms in question to support their denials. The use of Internet

⁶⁵ See *Blackhorse v. Pro-Football, Inc. (Blackhorse I)*, 111 U.S.P.Q.2d (BNA) 1080, 1110 (T.T.A.B. 2014), *aff’d*, No. 1:14-cv-01043-GBL-IDD, 2015 WL 4096277 (E.D. Va. July 8, 2015), *appeal filed*, No. 15-1874 (4th Cir. Aug. 6, 2015) (“[Pro-Football’s] argument regarding ‘secondary meaning’ in the sense that it has ‘a secondary or alternate meaning’ denoting a football team, is not persuasive in that the ‘secondary meaning’ has not stripped the word ‘redskins’ of its ‘ethnic’ meaning.”).

⁶⁶ But see Richard Pérez-Peña, *Tribes See Name on Oregon Maps as Being Out of Bounds*, N.Y. TIMES, Mar. 29, 2015, at A16 (describing efforts by Native Americans in Oregon to remove the name “squaw” from official place names due to the term’s offensiveness).

⁶⁷ See *infra* Appendix, Table 3.

⁶⁸ See *infra* Appendix, Table 3.

⁶⁹ See *infra* Appendix, Table 3.

sources in section 2(a) analyses appeared more prevalent for newer, less commonly used terms. These sources were also more commonly used to show that the mark is scandalous in context, whereas dictionary definitions were used to show that a word is scandalous by definition regardless of context. In addition, scandalousness determinations were unlikely to use other denials as evidence, reflecting the TMEP's mandate requiring individual consideration of each application. However, a few examiners disregarded this rule and used other denial evidence to support their adverse determinations (9.57% of "shit"; 13.33% of "asshole"; 4.50% of "fuck"; and 4.35% of "tits").⁷⁰

Similarly, disparagement determinations primarily relied on dictionary evidence. For seven out of the thirteen terms analyzed, 100% of section 2(a) denials relied on dictionary evidence.⁷¹ This is problematic, however, because disparagement must be determined by the perceptions of a substantial composite of the allegedly disparaged group. By relying on general purpose dictionaries, these examiners account for the attitudes of the public as a whole but not the relevant group specifically. This problem is exacerbated by the fact that the allegedly disparaged groups tend to be minorities whose opinions may not be reflected by those of the general public. Significantly fewer decisions were supported by evidence showing the opinions of actual group members, such as surveys or statements by representative organizations. Although 100% of "redskin" denials under section 2(a) supplied this type of evidence (likely because it was on file from the original cancellation case), only denials concerning the terms "slant" (50%), "dyke" (16.67%), and "squaw" (83.33%) included this type of evidence at all.⁷² The majority of these decisions, therefore, are not supported by evidence that a substantial composite of the relevant group finds the word disparaging. Rather, these denials appear to be supported by general assumptions of disparagement by the public or merely by the lone examiner who makes the decision.

3. Anomalies

Certain grants and denials of trademark registration stand out as anomalous given their inconsistency with the general treatment of the word at issue, indicating arbitrariness within the review process. For example, the word "shit" as used in a trademark has been denied in nearly 98% of cases, almost 96% of which were for scandalousness under section 2(a).⁷³ One mark was granted over an initial section 2(a) objection, however. The mark

⁷⁰ See *infra* Appendix, Table 3.

⁷¹ See *infra* Appendix, Table 4.

⁷² See *infra* Appendix, Table 4.

⁷³ See *infra* Appendix, Table 1.

DEMSHITZ has been a registered mark on the Principal Register since April 2012. Its prosecution history indicates that a section 2(a) objection was raised on July 27, 2009, but was withdrawn on July 29, 2009.⁷⁴ The remainder of the mark's prosecution history rests on the misclassification of goods and services for which the mark was registered. Once the applicants reclassified their goods, however, the registration was granted without objection. The only evidence of the examiner's reason for reconsideration is a checklist document, titled *Note to the File*, indicating that the examiner "discussed 2(a) with [his] senior."⁷⁵ This sudden change is especially perplexing given that the TTAB has essentially held that the word "bullshit" is scandalous per se.⁷⁶

The considerations of other scandalous words also illustrate inconsistent decisionmaking. For example, the trademark TIT MOUSE, as applied to a computer mouse shaped like a woman's breast, was approved for publication without section 2(a) objection.⁷⁷ Conversely, the mark TITMOUSE was denied as scandalous under section 2(a) as applied to a nearly identical product.⁷⁸ Further, an examiner denied a mark as scandalous for containing the term "Sugar Tit," even though the mark owner argued that the term was referring to the real town of Sugar Tit, South Carolina—a legitimate argument, as "South Carolina Moonshine" and "Sweetest Shine In the South" were also included as part of the applied-for mark.⁷⁹

⁷⁴ See DEMSHITZ, U.S. Trademark Application Serial No. 77/721,974 (filed Apr. 24, 2009), Office Action Outgoing, July 27, 2009, <http://tsdr.uspto.gov/documentviewer?caseId=sn77721974&docId=OOA20090727151445#docIndex=26&page=1> [<http://perma.cc/2N99-MQJA>] (denying registration "because the applied-for mark [consisted] of or [comprised] immoral or scandalous matter"); DEMSHITZ, U.S. Trademark Application Serial No. 77/721,974 (filed Apr. 24, 2009), Office Action Outgoing, July 29, 2009, <http://tsdr.uspto.gov/documentviewer?caseId=sn77721974&docId=OOA20090729203800#docIndex=23&page=1> [<http://perma.cc/R8MM-35JA>] (withdrawing the section 2(a) denial upon subsequent review and instructing the applicant to correctly classify the goods and services).

⁷⁵ DEMSHITZ, U.S. Trademark Application Serial No. 77/721,974 (filed Apr. 24, 2009), Note to the File, July 29, 2009, <http://tsdr.uspto.gov/documentviewer?caseId=sn77721974&docId=NTS20090729203313#docIndex=24&page=1> [<http://perma.cc/WQ7E-V4CQ>].

⁷⁶ See *In re Tinseltown, Inc.*, 212 U.S.P.Q. (BNA) 863, 866 (T.T.A.B. 1981) (denying registration to the trademark BULLSHIT as applied to a line of handbags despite having "acquired a secondary, non-profane meaning" and society's more frequent use of profanities).

⁷⁷ TIT MOUSE, U.S. Trademark Application Serial No. 78/006,367 (filed May 1, 2000), Notice of Publication Under 12(a), Jan. 22, 2003, <http://tsdr.uspto.gov/documentviewer?caseId=sn78006367&docId=NOP20030122160236#docIndex=2&page=1> [<http://perma.cc/GPY4-TDXY>].

⁷⁸ See TITMOUSE, U.S. Trademark Application Serial No. 78/954,967 (filed Aug. 18, 2006), Office Action Outgoing, Jan. 20, 2007, <http://tsdr.uspto.gov/documentviewer?caseId=sn78954967&docId=OOA20070120082345#docIndex=1&page=1> [<http://perma.cc/Y4YE-7NKP>] (denying registration in part because "tit" is "vulgar slang" for a woman's breast).

⁷⁹ See SWEETEST SHINE IN THE SOUTH SUGAR TIT MOONSHINE, U.S. Trademark Application Serial No. 86/335,465 (filed July 12, 2014), Office Action Outgoing, Dec. 13, 2014, <http://tsdr.uspto.gov/documentviewer?caseId=sn86335465&docId=OOA20141213103708#doc>

The TSDR records also provide insufficient information to support decisions to drop section 2(a) objections originally made by the examining attorneys. As in the DEMSHITZ registration, two refusals of marks containing “MILF” were later reversed after initial section 2(a) denials. The only evidence supporting those reversals are notations to each application’s file that state “[s]ubsequent consultation with Managing Attorney; 2(a) refusal withdrawn.”⁸⁰ Two applications containing “slut” that were ultimately registered without official section 2(a) objections contain similarly cryptic notes, stating that 2(a) was discussed with the examiner’s managing attorney but no action was ultimately taken.⁸¹

The disparagement context presents similarly anomalous decisions. For example, two “redskin” marks were granted as applied to food products, whereas one that was also applied to food products was denied as disparaging.⁸² Another mark for WASHINGTON REDSKIN POTATOES (as applied to clothing products, perhaps parodying the football team) was denied under section 2(a) even though the mark itself refers to potatoes with red skins rather than Native Americans (as in the aforementioned granted marks for food products).⁸³

Reappropriation of marks by group members is also treated inconsistently. Marks for MARRIAGE IS FOR FAGS, an apparent reappropriation in support of gay marriage, and POCKETFAG.COM, an explicit reappropriation, according to a response by the mark owner, were both denied registration

Index=2&page=1 [http://perma.cc/3QAG-BX7D] (denying registration due to the scandalous term in the mark and requiring a new drawing and amended disclaimer).

⁸⁰ DIARY OF A MILF, U.S. Trademark Application Serial No. 78/885,837 (filed May 17, 2006), Note to the File, Feb. 12, 2008, <http://tsdr.uspto.gov/documentviewer?caseId=sn78885837&docId=NTS20080212173433#docIndex=7&page=1> [http://perma.cc/C3RM-8MUP].

⁸¹ See, e.g., TOKYO STREET SLUTS, U.S. Trademark Application Serial No. 78/506,930 (filed Oct. 27, 2004), Note to the File, June 11, 2005, <http://tsdr.uspto.gov/documentviewer?caseId=sn78506930&docId=NTS20050613054610#page=1> [http://perma.cc/EX94-JWFZ].

⁸² Compare REDSKIN, Registration No. 2,183,639 (registering on Aug. 25, 1998 a mark for “REDSKIN” as applied to “canned beans”), and ALL NATURAL MY DADZ NUTZ CARMELIZED JUMBO REDSKINS, Registration No. 3,792,438 (registering on May 25, 2010 the mark as applied to “nut-based snack foods”), with REDSKIN HOG RINDS, U.S. Trademark Application Serial No. 86/052,159 (filed Aug. 30, 2013), Office Action Outgoing, Dec. 29, 2013, <http://tsdr.uspto.gov/documentviewer?caseId=sn86052159&docId=OOA20131229163025#docIndex=1&page=1> [http://perma.cc/T6MH-2ZUD] (denying a mark for REDSKIN HOG RINDS as applied to pork rinds).

⁸³ See WASHINGTON REDSKIN POTATOES, U.S. Trademark Application Serial No. 86/092,137 (filed Oct. 15, 2013), Office Action Outgoing, Mar. 17, 2014, <http://tsdr.uspto.gov/documentviewer?caseId=sn86092137&docId=OOA20140317163638#docIndex=4&page=1> [http://perma.cc/4VKE-GJ4H] (“Although the use of ‘redskin’ with potatoes may often have a different connotation, in the context of applicant’s mark that includes ‘WASHINGTON’ and is used in connection with football-related goods and services, the connotation is disparaging.”).

notwithstanding a demonstration by group members that the mark was not disparaging because it was being reclaimed by the disparaged group.⁸⁴ However, a mark for F.A.G. FABULOUS AND GAY, another apparent reappropriation of the term “fag” made to positively apply to gay individuals, was registered without any section 2(a) objection.⁸⁵ This disparate treatment of terms deemed disparaging in certain contexts demonstrates a lack of clear standards for dealing with terms that have been reappropriated or have alternative meanings, potentially leading to discrimination by examining attorneys who can deny marks without having to take these considerations into account.

III. EFFECTS OF TRADEMARK DENIAL OR CANCELLATION

Building on the reasons (or lack thereof) for denying trademark registration under section 2(a), this Part addresses the effects of such denials on the rights and expression of mark owners. The PTO and the courts have flatly dismissed the proposition that section 2(a) violates the First Amendment, because denying registration does not actually deny use. In *In re McGinley*, the Court of Customs and Patent Appeals (the predecessor to the Federal Circuit) succinctly held that

[w]ith respect to appellant’s First Amendment rights, it is clear that the PTO’s refusal to register appellant’s mark does not affect his right to use it. No conduct is proscribed, and no tangible form of expression is suppressed. Consequently, appellant’s First Amendment rights would not be abridged by the refusal to register his mark.⁸⁶

Since *In re McGinley*, opinions from the TTAB and the Federal Circuit dealing with section 2(a) merely cite to this general proposition without questioning or further analysis.⁸⁷ A trademark that is not registered on the

⁸⁴ See PF POCKETFAG.COM YOU, ONLY SMALLER, U.S. Trademark Application Serial No. 77/768,836 (filed June 26, 2009), Office Action Outgoing, Nov. 6, 2009, <http://tsdr.uspto.gov/documentviewer?caseId=sn77768836&docId=OOA20091106164321#docIndex=1&page=1> [<http://perma.cc/WF34-DFZ2>] (denying registration of POCKETFAG.COM for section 2(a) disparagement); MARRIAGE IS FOR FAGS, U.S. Trademark Application Serial No. 77/477,549 (filed May 19, 2008), Office Action Outgoing, Nov. 19, 2008, <http://tsdr.uspto.gov/documentviewer?caseId=sn77477549&docId=OOA2008119155223#docIndex=1&page=1> [<http://perma.cc/5UDZ-UL4K>] (denying registration of MARRIAGE IS FOR FAGS for section 2(a) disparagement).

⁸⁵ See F.A.G. FABULOUS AND GAY, Registration No. 2,997,761 (registering on September 20, 2005 the mark F.A.G. FABULOUS AND GAY).

⁸⁶ 660 F.2d 481, 484 (C.C.P.A. 1981) (internal citations omitted).

⁸⁷ See Voskanyan, *supra* note 32, at 1302 (summarizing the Federal Circuit’s “terse” reliance on *McGinley* in subsequent constitutional challenges to section 2(a)). The Federal Circuit officially overturned *McGinley* in its en banc opinion in *In re Tam (Tam III)*, No. 14-1203, slip op. (Fed. Cir. Dec. 22, 2015). The effect of this reversal on section 2(a) policies and procedures has yet to be seen, however. This Comment will therefore focus on the *McGinley*-era standards.

Principal Register does still receive common law protections against infringement, as set forth in Lanham Act section 43(a).⁸⁸ However, registration confers such significant benefits⁸⁹ unto mark owners that failure to obtain registration imposes a significant burden. Rather than risk a denial under section 2(a), the mark owner will likely succumb to pressure either to change the mark such that it is not scandalous or disparaging or abandon it altogether. As I will demonstrate in Part V, this pressure results in viewpoint discrimination that violates the First Amendment.

A. Statutory Benefits of Registration

McCarthy⁹⁰ recognizes seven key protections for registered marks embedded within the Lanham Act: (1) “[f]ederal jurisdiction for infringement without the necessity of any required amount in controversy”;⁹¹ (2) available recovery of profits, costs, treble damages, and attorneys’ fees;⁹² (3) registration as prima facie evidence of the mark’s validity and the registrant’s ownership, exclusive right to use, and actual use of the mark in interstate commerce;⁹³ (4) incontestability after five years of continuous use of the registered mark, providing conclusive evidence of the registrant’s ownership and exclusive right to use the mark;⁹⁴ (5) constructive notice of the registrant’s ownership and exclusive right, “so as to eliminate any defense of good faith adoption and use made after the date of registration”;⁹⁵ (6) a “constructive use date” for the mark as of the registrant’s filing date for the application (for marks that were not used in commerce prior to registration);⁹⁶ and (7) protection against importation into the United States of foreign goods bearing an infringing mark.⁹⁷ In addition, the registrant gains “access to federal courts where there is a presumption of validity of the registration (e.g., that the mark is not immoral or scandalous).”⁹⁸ The *McGinley* court also recognized that the registrant receives some “direct

⁸⁸ See Lanham Act § 43(a), 25 U.S.C. § 1125(a) (2012) (providing a civil action as recourse for “any person who believes that he or she is or is likely to be damaged” by another’s use of a mark in commerce that is likely to cause confusion as to origin or sponsorship with the original person’s mark, whether or not it is registered).

⁸⁹ These benefits will be discussed *infra* Section III.A.

⁹⁰ 3 MCCARTHY, *supra* note 11, § 19:9.

⁹¹ *Id.* (citing Lanham Act § 39, 15 U.S.C. § 1121 (2012)).

⁹² Lanham Act § 35, 15 U.S.C. § 1117 (2012).

⁹³ *Id.* § 7(b), § 1057(b); *id.* § 33(a), § 1115(a).

⁹⁴ *Id.* § 15, § 1065; *id.* § 33(b), § 1115(b).

⁹⁵ *Id.* § 22, § 1072; 3 MCCARTHY, *supra* note 11, § 19:9.

⁹⁶ Lanham Act § 7(c), 15 U.S.C. § 1057(c) (2012).

⁹⁷ *Id.* § 42, § 1124.

⁹⁸ *In re McGinley*, 660 F.2d 481, 486 (C.C.P.A. 1981) (emphasis omitted).

government protection of the mark” because the PTO examiners refuse registration to subsequent applications that conflict with marks registered on the Principal Register.⁹⁹ All of these benefits are conferred by the PTO, and therefore by the federal government, so decisions regarding these benefits are governed by the Constitution as well as by the relevant statutes.

B. Burdens on the Trademark Owner

Even though lack of registration does not directly limit the right to use a trademark, it imposes significant burdens on the trademark owner. Primarily, an unregistered trademark does not receive the aforementioned statutory benefits of registration, which limits the mark owner’s ability to defend his mark against infringement and dilution. A mark denied registration under section 2(a) may also lose the common law protections against infringement and dilution set forth in section 43, although courts have not definitively ruled on this theory.¹⁰⁰ Additionally, marks denied under section 2(a) likely cannot receive state-level trademark protection because most state trademark statutes have a provision that mirrors section 2(a).¹⁰¹ If a mark is deemed “unregistrable” and therefore not subject to any legal protection against infringement, the trademark loses all of its economic value because a mark that can be copied without consequence cannot serve as a reliable indicator of source.¹⁰²

Without the statutory protections of registration, a trademark also loses its expressive value. When the mark is not economically viable, any identity or association that the mark owner has imputed to the mark is lost because it cannot be communicated to and shared with the public. The TTAB acknowledged this problem in *In re McGinley*, stating that “denial of

⁹⁹ *Id.*

¹⁰⁰ See *In re Tam (Tam II)*, 785 F.3d 567, 576 (Fed. Cir. 2015), *vacated and reh’g en banc granted*, 600 F. App’x 775 (mem.) (per curiam) (Fed. Cir. 2015) (arguing that trademarks denied under section 2(a) cannot receive common law protection under section 43 because such protection “is only available for unregistered trademarks that could have qualified for federal registration”); Michelle B. Lee, *Section 2(a) of the Lanham Act as a Restriction on Sports Team Names: Has Political Correctness Gone Too Far?* 4 SPORTS LAW. J. 65, 69 (1997) (“[I]t is . . . unlikely that a trademark owner whose mark has been canceled under section 2(a) will be able to avail himself of any of the protections generally provided to the owners of unregistered trademarks, specifically those provided by section 43(a) of the Lanham Act, state statute, or common law. No court has found that disparaging marks would be denied protection under section 43(a), but commentators have cited public policy reasons, which distinguish between unregistered and unregistrable marks, to say that it is likely such protection will be denied.” (footnotes omitted)).

¹⁰¹ See *Tam II*, 785 F.3d at 577 (describing section 2 of the Model State Trademark Act, which mirrors the bars to registration contained in Lanham Act section 2).

¹⁰² Lee, *supra* note 100, at 78 (“If this exclusivity is, for all intents and purposes, taken away by the prohibition of registering under section 2(a) and the resulting loss of state and common law rights, the property right in the trademark is essentially being destroyed. It is no longer economically viable.”).

registration will not affect [the] applicant's continued use of his mark, but such use . . . will be visible only to those who share applicant's interest and will be without the implied approval and the statutory benefits that would result from [f]ederal registrations."¹⁰³ Even though the TTAB and courts have expressly disclaimed that registration constitutes a "government imprimatur" approving a mark's content,¹⁰⁴ an applicant whose mark is denied may still perceive that the government has deemed the mark inappropriate for government protection. Losing the government's perceived approval through a section 2(a) denial therefore can cause a loss of the "intangible psychological benefits" that arise from such approval.¹⁰⁵ For marks deemed disparaging that nonetheless have been reclaimed by the disparaged group, the loss of government approval is especially problematic. One commentator argues that "[s]uch . . . rejection not only precludes the applicant from acquiring federal benefits for that mark, but also impedes the applicant's power to construct a chosen identity."¹⁰⁶

Therefore, denial of registration burdens mark owners economically, expressively, and psychologically, so the PTO should carefully consider these impacts when denying marks under section 2(a). However, the PTO appears to make these decisions arbitrarily, with limited opportunity for mark owners to contest and overcome them. These decisions deny applicants the benefits of registration, limiting their ability to use the marks and thus their ability to express the message behind those marks—potentially infringing First Amendment rights.

IV. VIEWPOINT DISCRIMINATION AND THE FIRST AMENDMENT

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech"¹⁰⁷ Government-sponsored discrimination against speech on the basis of the viewpoint expressed therein abridges this freedom at its most basic level, and courts have deemed viewpoint discrimination by the government as one of the most egregious violations of the First Amendment. As the Supreme Court stated in *Police Department of Chicago v. Mosley*, "above all else, the First Amendment means

¹⁰³ 206 U.S.P.Q. (BNA) 753, 756 (T.T.A.B. 1979), *aff'd*, 660 F.2d 481, 484 (C.C.P.A. 1981).

¹⁰⁴ *See, e.g., In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d (BNA) 1216, 1220 n.3 (T.T.A.B. 1993) ("[W]e have detected an undercurrent of concern that the issuance of a trademark registration for applicant's mark amounts to the awarding of the U.S. Government's 'imprimatur' to the mark. Such a notion is, of course, erroneous.").

¹⁰⁵ *Anten*, *supra* note 31, at 397.

¹⁰⁶ *Id.* at 423.

¹⁰⁷ U.S. CONST. amend. I.

that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁰⁸ Thus, the government generally cannot discriminate against speech on the basis of the viewpoint it expresses. This idea stems from the United States’ “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well [be] vehement, caustic, and sometimes unpleasantly sharp.”¹⁰⁹ Laws that discriminate against speech on the basis of viewpoint violate the First Amendment. Furthermore, laws that do not explicitly provide for viewpoint discrimination but rather indirectly permit it through the discretion afforded to the laws’ enforcers also violate the First Amendment.¹¹⁰ Section 2(a) falls into this category both because of its facial restriction on certain types of trademarks based on what they express, and also because the discretion provided to trademark examiners allows them to deny the benefits of trademark registration based on the viewpoints contained within applied-for marks.

A. Content- and Viewpoint-Based Restrictions

Content and viewpoint discrimination are related concepts, as both deal with restrictions on speech based on the content of the speech itself. In both instances, “[t]he First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects.”¹¹¹ Since content-based restrictions bear a strong risk of discriminating against particular speakers (as opposed to content-neutral restrictions, which restrict all forms of speech), they are reviewed under strict constitutional scrutiny and are presumptively invalid.¹¹² Few content-based restrictions pass constitutional muster, and those that do are within historically defined categories of speech that are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly

¹⁰⁸ 408 U.S. 92, 95 (1972); *see also* *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

¹⁰⁹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1969).

¹¹⁰ *See infra* notes 118–40 and accompanying text.

¹¹¹ *R. A. V. v. St. Paul*, 505 U.S. 377, 391 (1992) (holding an ordinance prohibiting bias-motivated disorderly conduct went beyond the permissible restriction of “fighting words” and was therefore facially invalid as a content-based restriction on speech).

¹¹² *Id.* at 382.

outweighed by the social interest in order and morality.”¹¹³ Mere “offensiveness” is not a basis for denying speech on the basis of its content.¹¹⁴

Viewpoint discrimination, then, is a subset of content discrimination that is viewed as an even more serious First Amendment violation. As Justice Kennedy expressed in *Rosenberger v. Rector and Visitors of University of Virginia*,

When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.¹¹⁵

Viewpoint-based restrictions therefore limit speech on the basis of its underlying ideas rather than just the content of the speech itself. Government restrictions on viewpoint are particularly egregious because they may distort the marketplace of ideas (and, in the case of commercial speech, the commercial marketplace) by preventing the expression of certain disfavored points of view.¹¹⁶

B. *Official Discretion and the First Amendment*

Excessive discretion stemming from unclear or standardless administrative guidelines can lead to First Amendment violations when administrators restrict certain speech on the basis of its content or viewpoint. One commentator argues that this discretion can result in discrimination that violates the First Amendment in two ways: first, by targeting speech on the basis of the ideas it conveys, and second, by targeting speakers on the basis of their inherent

¹¹³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). These categories include inciting lawless action, obscenity, defamation, fighting words, child pornography, fraud, true threats, and “speech presenting some grave and imminent threat the government has power to prevent.” *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012). Note that these classifications do not include speech that is scandalous or disparaging, the content proscribed by section 2(a).

¹¹⁴ *See Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108 (1991) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.” (citations omitted)).

¹¹⁵ 515 U.S. 819, 829 (1995) (citing *R. A. V.*, 505 U.S. at 391).

¹¹⁶ *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“Government action that stifles speech on account of its message . . . pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”).

characteristics.¹¹⁷ Such discriminatory discretion constitutes viewpoint discrimination because “viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect* against the improper exclusion of viewpoints.”¹¹⁸ Without specific procedures in place for implementing laws in a non-exclusionary manner, bureaucratic discretion can directly contravene the First Amendment by excluding speech on the basis of the viewpoint it expresses.

As such, “The Supreme Court has long recognized that vesting excessive discretion to regulate speech in the hands of public officials can be destructive to the equality that the First Amendment demands.”¹¹⁹ In *Shuttlesworth v. City of Birmingham*, the Supreme Court struck down a city ordinance that provided the Birmingham City Commission with “virtually unbridled and absolute power to prohibit any ‘parade,’ ‘procession,’ or ‘demonstration’ on the city’s streets or public ways.”¹²⁰ The officials in *Shuttlesworth* were to be guided only by “their own ideas of ‘public welfare, peace, safety, health, decency, good order, morals or convenience.’”¹²¹ Although the law requiring a license for parades was neutral on its face, the discretion left to officials allowed them to discriminate on the basis of viewpoint—specifically, against organizers of civil rights demonstrations. Relying on thirty years of First Amendment precedent, the Court determined that subjecting lawful speech to prior restraints—i.e., preventing peaceful demonstrations by denying licenses to protestors—is unconstitutional absent “narrow, objective, and definite standards to guide the licensing authority” in implementing the law in a neutral manner without regard to the content or viewpoint to be expressed by the speakers.¹²² Such prior restraints effectively lead to self-censorship because the threat of unbridled discretion can “intimidate[] parties into censoring their own speech” if they believe it will be censored by the government based on what it expresses.¹²³ Speech cannot be curbed by the

¹¹⁷ See Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2416 (2003) (“From a constitutional standpoint, two . . . considerations warrant special attention. The first is that public officials may misuse their discretion either to target speech based on the messages or ideas sought to be conveyed. The second is that official decisionmakers may misuse their discretion to discriminate based on race or ethnicity.”).

¹¹⁸ *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006).

¹¹⁹ Tokaji, *supra* note 117, at 2429-30.

¹²⁰ 394 U.S. 147, 150 (1969).

¹²¹ *Id.*

¹²² *Id.* at 151.

¹²³ *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 757 (1988); see also *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (“It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.”).

“uncontrolled will of an official,”¹²⁴ so procedural safeguards must be in place to prevent the exercise of this will in a discriminatory manner.¹²⁵

The Court has carried this reasoning into the commercial speech context as well. In *Plain Dealer Publishing Co.*, the Court struck down a city ordinance that gave the mayor unbridled authority to grant or deny permits for newsracks.¹²⁶ The mayor needed to justify such denials with only a brief statement that granting a permit was not in the public interest.¹²⁷ While newspapers are commercial entities, they are also in the “business of expression.”¹²⁸ Therefore, viewpoints can affect discretionary licensing decisions made without the guidance of neutral standards. Such covert decisions ensure that “speakers denied a license will have no way of proving that the decision was unconstitutionally motivated, and, faced with that prospect, they will be pressured to conform their speech to the licensor’s unreviewable preference.”¹²⁹ Such a situation would comprise an unconstitutional restraint on expression in both the commercial and noncommercial contexts.

The application of this First Amendment tenet to commercial speech was clarified further in *City of Cincinnati v. Discovery Network, Inc.* There, the Court found that a law disallowing the distribution of commercial handbills through newsracks violated the First Amendment by failing to establish any adequate distinction between restricted “commercial” publications and non-restricted “expressive” publications.¹³⁰ The law’s proffered distinction was unjustified except for the “naked assertion that commercial speech has ‘low value,’” an inherently content-based judgment.¹³¹ Therefore, officials could not constitutionally be vested with the discretion to determine whether a particular publication was commercial or noncommercial because the speech was protected regardless of its classification.¹³²

¹²⁴ *Shuttlesworth*, 394 U.S. at 151.

¹²⁵ See *Plain Dealer Publishing Co.*, 486 U.S. at 758 (“Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy . . .”).

¹²⁶ *Id.* at 772.

¹²⁷ *Id.*

¹²⁸ *Id.* at 761.

¹²⁹ *Id.* at 760.

¹³⁰ 507 U.S. 410, 430 (1993).

¹³¹ *Id.* at 429.

¹³² *Id.*; see also *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 361-62 (6th Cir. 1998) (holding that the defendant’s advertising policy prohibiting “controversial” advertisements was unconstitutionally overbroad because its application presented a “very real and substantial” danger that the defendant would exclude a proposed advertisement solely because of its expressed viewpoint).

What safeguards, then, are required to prevent an official from enforcing a discretionary law in a discriminatory manner? The Court summarized the standard for such safeguards in *Forsyth County v. Nationalist Movement*, stating that

a government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view. To curtail that risk, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority. The reasoning is simple: If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted.¹³³

Applying these tenets, the *Forsyth* Court struck down an ordinance that allowed administrators to decide how much to charge demonstrators for police protection because neither the ordinance nor the county's practice provided standards to guide the administrator's decision and did not require him to rely on objective evidence or provide an explanation.¹³⁴ Therefore, "[n]othing in the law or its application prevent[ed] the official from encouraging some views and discouraging others through the arbitrary application of fees."¹³⁵ In *Thomas v. Chicago Park District*, however, the Court articulated the framework as requiring "adequate standards to guide the official's decision and render it subject to effective judicial review."¹³⁶ There, the Court upheld a licensing ordinance because the administrator could deny a license only for certain enumerated reasons¹³⁷ and had to provide a clear explanation for the denial in writing.¹³⁸ Moreover, higher-level administrators and state courts could review any decisions made under the law.¹³⁹ Under this standard, laws must provide "reasonably specific and objective"¹⁴⁰ criteria that sufficiently cabin the exercise of discretion to ensure that the laws are applied in a content- and viewpoint-neutral manner in accordance with the First Amendment.

¹³³ 505 U.S. 123, 130-31 (1992) (citations omitted).

¹³⁴ *Id.* at 133.

¹³⁵ *Id.*

¹³⁶ 534 U.S. 316, 323 (2002).

¹³⁷ *Id.* at 318 n.1.

¹³⁸ *Id.* at 324.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

C. Commercial Speech and Viewpoint Discrimination

Although the Supreme Court has not explicitly analyzed trademarks under its commercial-speech framework, it has interpreted trade names in a similar manner.¹⁴¹ “Because a trademark identifies the source of a product or service for users, it is protected commercial speech.”¹⁴² Since trademarks are classified as protected commercial speech, this Section will discuss the courts’ doctrines of commercial speech and how they intersect with viewpoint discrimination.¹⁴³

Commercial speech receives protection under the First Amendment, albeit less than the protection given to political speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court first articulated that “speech which does no more than propose a commercial transaction” is protected by the First Amendment.¹⁴⁴ Justice Blackmun qualified this protection by stating that the government could restrict commercial speech if it contains false or misleading content.¹⁴⁵ Therefore, unlike other content-based restrictions (such as those on political speech), content-based restrictions on commercial speech are not presumptively invalid, and are subject to less-demanding First Amendment scrutiny. The Court further clarified the First Amendment analysis of commercial speech in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York* by setting forth a four-part test for assessing the constitutionality of restrictions on commercial speech:

For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹⁴⁶

Without a presumption of invalidity, this “intermediate” scrutiny test arguably restricts more commercial speech than is restricted under the strict

¹⁴¹ See *Friedman v. Rogers*, 440 U.S. 1, 11 (1979) (“The use of trade names in connection with optometrical practice, then, is a form of commercial speech . . .”).

¹⁴² *Tam II*, 785 F.3d 567, 575 (Fed. Cir. 2015). *But see* *Pro-Football, Inc. v. Blackhorse (Blackhorse II)*, No. 1:14-cv-01043-GBL-IDD, 2015 WL 4096277, at *11 (E.D. Va. July 8, 2015) (determining that while trademarks themselves are commercial speech, trademark registrations on the Principal Register are not commercial speech).

¹⁴³ Trademarks are not purely commercial speech, however, because they are also expressive speech. The dual speech functions of trademarks will be explored *infra* Section IV.D.

¹⁴⁴ 425 U.S. 748, 762 (1976).

¹⁴⁵ *Id.* at 771-72.

¹⁴⁶ 447 U.S. 557, 566 (1980).

scrutiny test for political speech. However, the Court has recognized that a “consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.”¹⁴⁷ Therefore, commercial speech has received increasing protection in the years since *Central Hudson*. Although the protection is not yet exactly on par with that afforded to noncommercial speech, the gap between the two has narrowed considerably.¹⁴⁸

Importantly, even though commercial speech is arguably less protected than other types of speech, content- and viewpoint-based restrictions on commercial speech are still greatly limited by the First Amendment. In *Sorrell v. IMS Health Inc.*, the Court struck down a Vermont regulation that restricted the sale, disclosure, and use of pharmaceutical records because exceptions contained within the law expressly disfavored marketing speech (a type of commercial speech) and speech made by pharmaceutical marketing representatives.¹⁴⁹ The Court held that this regulation, although applicable only to commercial speech, was improper under the First Amendment because it clearly targeted particular speech and speakers that “convey[ed] messages that are often in conflict with the goals of the state.”¹⁵⁰ Furthermore, even if a restriction on commercial speech appears neutral on its face, a “purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional.”¹⁵¹

In addition, under *Central Hudson*, courts have determined that the government does not have a substantial interest in preventing offensive speech, which means commercial speech cannot be regulated on the basis of offensive content. The Supreme Court has expressly held that offensive content, so long as obscenity is not involved, does not provide a legitimate reason for suppressing noncommercial speech.¹⁵² As applied to commercial speech, this reasoning still holds because suppressing offensive content strikes at the ideas and viewpoints expressed by the speech rather than its commercial content.¹⁵³ Although the Supreme Court has applied this standard to sexual content (i.e., content that could be deemed “scandalous”), lower courts have applied it to “disparaging” content in commercial speech as well. For example, the Sixth Circuit, relying on the above standards for

¹⁴⁷ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977).

¹⁴⁸ See Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 68 (2007) (“While it would be incorrect to suggest that commercial speech is today deemed fungible with fully protected speech in all contexts, it is at least true that the gap between the two is far narrower than it was in 1976.” (footnote omitted)).

¹⁴⁹ 131 S. Ct. 2653, 2663 (2011).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 2664.

¹⁵² *Carey v. Population Serv. Int’l*, 431 U.S. 678, 701 (1977).

¹⁵³ *Id.* at 701 n.28; see also *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 71-72 (1983).

offensiveness, held that the use of the name “Sambo’s” for a restaurant is protected commercial speech even though the name may offend some African Americans.¹⁵⁴ In light of the speaker’s First Amendment protections, the *Sambo’s* court determined that the offensive commercial speech needed to be an “intolerable” violation of citizens’ “substantial privacy interests” to justify its restriction.¹⁵⁵ In *Sambo’s*, this simply could not be demonstrated. Regardless of the commercial or noncommercial nature of speech, case law demonstrates that speech cannot be restricted solely on the basis of offensive expression.¹⁵⁶ In the “Additional Views” section of her opinion in *Tam II*, Judge Moore asserted that section 2(a)’s prohibitions cannot withstand *Central Hudson* scrutiny for precisely that reason—discouraging the use of marks that may offend cannot be a legitimate government interest, no matter how scandalous or disparaging they are perceived to be.¹⁵⁷

D. Section 2(a) as a Restriction on Viewpoint

In light of the standards articulated by courts when assessing viewpoint-based restrictions on speech in commercial and noncommercial contexts, section 2(a)’s restriction on scandalous and disparaging trademarks is clearly a viewpoint-based regulation that restricts both the economic and expressive functions of trademarks. Even though section 2(a) does not wholly restrict the use of these marks, preventing their registration based on the viewpoints they express heavily disincentivizes their use.¹⁵⁸ Such “indirect discouragements” towards using potentially scandalous and disparaging trademarks “undoubtedly have [a] coercive effect upon the exercise of First Amendment rights.”¹⁵⁹ By denying the benefits of the Principal Register, this coercion creates a financial

¹⁵⁴ *Sambo’s Rests., Inc. v. Ann Arbor*, 663 F.2d 686, 693-95 (6th Cir. 1981).

¹⁵⁵ *Id.* at 695 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

¹⁵⁶ See also Jeffery Lefstin, Note, *Does the First Amendment Bar Cancellation of Redskins?*, 52 STAN. L. REV. 665, 685-86 (2000) (“[A] government interest in ‘stamping out’ offensive matter is prima facie violative of the First Amendment, particularly when the offensive matter is specified by categories such as race or religion. Moreover, the Supreme Court has explicitly and unequivocally rejected the contention that suppression of offensive speech is a legitimate goal of commercial speech regulation.” (citations omitted)).

¹⁵⁷ *Tam II*, 785 F.3d 567, 583 (Fed. Cir. 2015). Judge Moore also argues that section 2(a) cannot be justified by an asserted government interest in controlling government speech or the use of federal time and funds, because trademarks are wholly private speech and the trademark system is funded entirely by trademark registrants. *Id.*

¹⁵⁸ See *id.* at 576 (“In effect, § 2(a) of the Lanham Act conditions trademark registration and all of its attendant benefits on the applicant’s selection of a suitable mark. . . . [Section] 2(a) allows the PTO to determine whether the trademark is suitable for registration . . . which is a moral judgment based solely and indisputably on the mark’s expressive content.”); see also *supra* notes 100–01 and accompanying text (discussing *Tam II* in greater detail).

¹⁵⁹ *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 402 (1950).

incentive for mark owners to stop using marks denied under section 2(a), thus unconstitutionally curbing expression of the mark itself. Such a limit restricts speech based on the viewpoint it expresses and restricts speech related to the mark through its economic function as an indicator of source.¹⁶⁰

Section 2(a) also serves as a noncommercial restriction on viewpoint by restricting the expressive function of trademarks. Trademarks have extraneous meaning aside from their source-indicative qualities, including communicating associations with particular lifestyles, values, ideas, and viewpoints.¹⁶¹ These expressions can include ideas that are offensive to the general public or to particular groups of people. Although these expressions are curbed by section 2(a) denials, they are protected by the First Amendment's viewpoint discrimination doctrine regardless of the level of public support they enjoy. Furthermore, section 2(a) serves as a viewpoint-based restriction in the context of disparaging marks. The statute does not restrict all expressive marks that relate to particular groups of people; instead, it only restricts marks that disparage while allowing marks that praise. Although limiting intergroup animosity is a laudable goal, it cannot be achieved by limiting expression of hostile viewpoints (in the trademark arena or otherwise) while fostering expression of analogously supportive viewpoints.¹⁶²

V. HOW DISCRETION IN THE PTO LEADS TO VIEWPOINT DISCRIMINATION

As already described, examining attorneys at the PTO have broad discretion to grant or deny trademarks under section 2(a). This Part suggests that such discretion leads to arbitrary decisionmaking regarding the

¹⁶⁰ See *Tam II*, 785 F.3d at 577 (“Section 2(a)’s content-based restrictions on registerability were adopted to reduce use of trademarks the government deemed unsuitable (such as those that disparage)—no doubt a chilling effect on speech.”); cf. *Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding “Son of Sam” laws unconstitutional because a governmental burden imposed on speech based on its content disincentivizes that speech, thus “driv[ing] certain ideas or viewpoints from the marketplace” in violation of the First Amendment).

¹⁶¹ See Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601, 1607 (2010) (“[A trademark] is both a commodity as well as a sign of speech and expressive significance.”); *id.* at 1617 (“[A] trademark can serve commercial, expressive, and communicative functions for more than one party at the same time. Part of this shift is largely attributable to the changing role of trademarks in today’s culture. Especially in the modern era, trademarks are complex symbols of both corporate identity and consumer identity.” (citation omitted)).

¹⁶² See *Tam II*, 785 F.3d at 582 (“Under this law, it is possible to register trademarks that refer to a certain group in a positive, or non-disparaging manner, but not trademarks that refer negatively to the same group. Section 2(a) discriminates against disparaging or offensive viewpoints. Under this analysis, § 2(a) is presumptively invalid, and must satisfy strict scrutiny to be found constitutional.” (footnote omitted)); Voskanyan, *supra* note 32, at 1310 (“[Section] 2(a)’s singling out of ‘disparaging’ marks is a viewpoint-based regulation because it allows registration for marks that glorify, praise, or promote ‘persons, institutions, beliefs, or national symbols’ but not for marks that take the opposite view.”).

scandalous or disparaging nature of marks on the basis of content and viewpoint. Considering that examiners are expressly instructed to disregard any First Amendment rights that the applicant may have in registering his mark,¹⁶³ there is a high risk that examiners will discriminate against marks on the basis of the viewpoints they express without regard to the constitutionality of such decisions. Additionally, the section 2(a) standards are “stated broadly in terms of ‘taste,’ ‘morality,’ ‘politics,’ or ‘controversy’ on their face,” thus “permit[ting] too much discretion by the decisionmaker to discriminate according to viewpoint.”¹⁶⁴

A. *Applying the Test for Improper Discretion*

Under the standards articulated by the courts, the discretion permitted by section 2(a) is outside the permissible bounds of the First Amendment. The determination of whether a mark is scandalous or disparaging is inherently subjective, requiring the “appraisal of facts, the exercise of judgment, and the formation of an opinion,” which is the exact scheme proscribed by *Forsyth*.¹⁶⁵ These decisions are inherently content-based because they are made on the basis of the mark’s content. Although the use of a mark is still permitted after being denied registration under section 2(a), denial still penalizes the mark owner based on what the mark expresses.¹⁶⁶ These content-based determinations are “ineffective and highly arbitrary”¹⁶⁷ because of both the limited evidence available to decisionmakers and the imprecise standards set forth by the TTAB.¹⁶⁸

Next, the standards set forth in section 2(a) and the accompanying guidance provided to examiners are not sufficiently narrow, objective, and

¹⁶³ See TMEP, *supra* note 2, § 1203.01 (“Refusal to register immoral or scandalous matter has been found not to abridge First Amendment rights, because no conduct is proscribed and no tangible form of expression is suppressed.”). This portion of the Manual does not cite to any relevant case law to support its proposition.

¹⁶⁴ Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 471 (2001).

¹⁶⁵ *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130-31 (1991) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)).

¹⁶⁶ See Voskanyan, *supra* note 32, at 1303 (“Ability to use the particular mark without registration has nothing to do with and does not resolve the problem that the registration itself, as a grant of a valuable government benefit, is premised upon regulation of the trademark’s content. . . . [E]ven though an applicant may still use the mark as an unregistered trademark, denial of registration imposes a penalty for her particular choice of a mark solely because of its content.”).

¹⁶⁷ *Carpenter & Murphy*, *supra* note 8, at 471.

¹⁶⁸ See *supra* Part III (discussing the effects of trademark denial on mark owners); see also *Carpenter & Murphy*, *supra* note 8, at 471 (“[T]he [section 2(a)] decision is made by judges and administrative agencies on a national level and a minority of hypothetically offended people can override the community standard of taste.” (citation omitted)).

definite. Although scandalousness and disparagement are particularized reasons for denial, as required by *Thomas v. Chicago Park District*,¹⁶⁹ they are vague concepts that do not lead to consistent decisionmaking. As explained previously, the terms “scandalous” and “disparaging” are not defined in section 2(a) or the legislative history of the Lanham Act. The TMEP provides some clarification as to the meanings of the terms, but it does not provide objective standards to be used by examiners when analyzing applications. Examiners can rely on any type of evidence, objective or otherwise.¹⁷⁰ In practice, they most commonly rely on dictionaries and the Internet and generally do not rely on the actual perceptions of the words by the general public or the allegedly disparaged group (unless, of course, members of that group had already brought such evidence forward). Although the examiner is required to justify a section 2(a) denial, there are no specific criteria set forth for an adequate justification. Examiners often simply recite case law and attach a definition of the word in question to support their denial decision.¹⁷¹ These explanations from examiners are in fact reviewable, but the First Amendment rights of the applicant are ignored pursuant to *McGinley*. This arguably leads to deference to the examiner’s decisionmaking, even if his evidentiary justification for denial is inadequate. Such deference to discretionary findings, combined with the low evidentiary requirements for examiner justification, allows examiners to deny marks under section 2(a) based solely on the viewpoints they express without sufficient recourse for a mark owner to challenge such a decision.

B. *Considering the Applicant’s Intent in Section 2(a) Analyses*

Without clear standards for whether and how to consider the applicant’s intent, examiners can choose whether or not to discriminate on the basis of intent when analyzing the scandalous or disparaging nature of the mark. If examiners explicitly consider intent, the potential for viewpoint discrimination increases because marks containing the same content could be selectively denied if the applicant asserted an intent to disparage or

¹⁶⁹ 534 U.S. 316, 318 n.1, 323–24 (2002) (requiring that a “regulation contain adequate standards to guide the official’s decision and render it subject to effective judicial review”).

¹⁷⁰ See *supra* subsection I.C.2.a for a discussion of the types of evidence relied upon by examiners.

¹⁷¹ See, e.g., SAME SHIT DIFFERENT CUBICLE, U.S. Trademark Application Serial No. 78/546,094 (filed Jan. 12, 2005), Office Action Outgoing, Aug. 19, 2005, <http://tsdr.uspto.gov/docu mentviewer?caseId=sn78546094&docId=OOA20050819093528#docIndex=2&page=1> [<http://perma .cc/2YNF=SN4B>] (denying mark as scandalous under section 2(a) while citing only one dictionary definition of “shit,” *In re Mavety Media Group*, and the TMEP).

scandalize.¹⁷² In the disparagement context, for example, marks that are neutral on their face could be selectively denied for applicants that intend the mark to refer to a group of people negatively, even though the same mark would be granted for applicants who assert positive or neutral intent. Such a regime “privileges some viewpoints over others” in violation of the First Amendment.¹⁷³ On the other hand, if the examiner does not consider the registrant’s intent, there is a danger of restricting changing viewpoints in favor of historical ones, which is another form of viewpoint discrimination. This is particularly problematic when a former slur is reclaimed by members of the disparaged group, as in the DYKES ON BIKES¹⁷⁴ and SLANTS¹⁷⁵ cases. Although “the reappropriation of terms that have historically disparaged marginalized groups is a common way for those same groups to reclaim the meaning of those terms and change social attitudes,”¹⁷⁶ examiners ignore this evolution by denying the legitimacy of registration to marks that attempt such reclamation.

Consideration of the intent of a section 2(a) applicant is referenced only once in the TMEP, and it is only with regard to disparaging marks. The TMEP advises, “[t]he fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable.”¹⁷⁷ Intent can be considered, but only in light of “substantial composite” evidence.¹⁷⁸ However, as shown in Part II, evidence of group members’ actual opinions on an allegedly disparaging term is rarely relied upon in section 2(a) decisions. The examiner can instead inject his own opinion of the substantial composite and disregard the applicant’s intended expression, thus employing viewpoint discrimination against that expression without any evidence to support the decision. Furthermore, no guidance is provided for considering intent in scandalousness analyses. Without any guidelines, examiners can inject evidence of intent when it suits the decision they wish to make, which can lead to viewpoint discrimination. For example,

¹⁷² See Smith, *supra* note 52, at 472 (“If the party’s assertions, rather than the numerous potential interpretations of a trademark, determine success in registration, the party’s viewpoint is being selectively evaluated.”).

¹⁷³ *Id.* at 474.

¹⁷⁴ See Kiser, *supra* note 35, at 1-3 (chronicling the four-year struggle of a lesbian motorcycle organization to overcome section 2(a) denials for the registration of the mark DYKES ON BIKES).

¹⁷⁵ See *infra* subsection V.D.2 (discussing registration of the mark SLANTS in greater detail).

¹⁷⁶ Esha Bhandari, ‘You’re Not Wrong, You’re Just an A**hole,’ ACLU: SPEAK FREELY (Mar. 6, 2015), <https://www.aclu.org/blog/speakeasy/youre-not-wrong-youre-just-ahole> [<https://perma.cc/DB8P-YX99>].

¹⁷⁷ TMEP, *supra* note 2, § 1203.03(b)(i).

¹⁷⁸ *Id.*

if the examiner seeks to deny as scandalous marks that are overtly sexual in nature, the examiner could both deny a facially neutral mark that the mark owner intends to be sexual (an innuendo, for example) and a mark that appears sexual but is expressly intended to be neutral. Within the current rules, the examiner can manipulate the consideration of intent to deny marks on the basis of the viewpoint expressed.

C. Considering the Context of the Mark in Section 2(a) Analyses

Consideration of the context of the mark has been inconsistently applied by the PTO, further risking viewpoint discrimination. In scandalousness review, marks are supposed to be considered “in the context of the relevant marketplace for the goods or services identified in the application.”¹⁷⁹ In the disparagement context, marks are supposed to be considered “as used on or in connection with the relevant goods or services.”¹⁸⁰ However, the TTAB has essentially ruled that certain words, such as profanities, are disparaging or scandalous *per se*.¹⁸¹ The contrasting consideration of context leads to dual problems: marks that are “innocent” can be deemed scandalous based on their context (therefore discriminating against the expression of that context), or words that are viewed as scandalous *per se* will be denied regardless of their context (therefore discriminating against the expression symbolized by the word itself).¹⁸² Additionally, “a trier of fact *predisposed* to find the mark unregistrable *per se* may rely on the mark owner’s recitation of goods or services to establish an expansive potential audience.”¹⁸³ Taking context into account can therefore bolster an arbitrary decision based on viewpoint discrimination. If an expansive audience will be exposed to the mark, the examiner can argue that a “substantial composite” of that audience will be scandalized or disparaged in support of his opinion—regardless of whether the examiner has actual evidence to that effect (which is unlikely to be the case, considering the PTO’s reliance on dictionaries and other non-representative evidence). *Per se* determinations would limit the arbitrary

¹⁷⁹ *Id.* § 1203.01.

¹⁸⁰ *Id.* § 1203.03(b)(i).

¹⁸¹ See, e.g., *supra* note 48 and accompanying text (discussing profanity).

¹⁸² See Theodore H. Davis, Jr., *Registration of Scandalous, Immoral, and Disparaging Matter Under Section 2(a) of the Lanham Act: Can One Man’s Vulgarity Be Another’s Registered Trademark?*, 54 OHIO ST. L.J. 331, 349 n.88 (1993) (“Under *Riverbank Canning*, the trier of fact should examine whether the intrinsic nature of the covered goods or services renders an otherwise innocent mark scandalous, immoral, or disparaging. In contrast, however, *McGinley* suggests that any doubts concerning an arguably unregistrable mark *per se* may be resolved against its owner if the unrestricted distribution or provision of the covered goods or services would increase the likelihood of the mark’s exposure to individuals particularly susceptible to being scandalized or disparaged.”).

¹⁸³ *Id.* at 349 (emphasis added).

application of context to suit a preferred outcome, and “avoid imposing competitive penalties on particular industries”¹⁸⁴ that express ideas and viewpoints perceived to be scandalous by examiners (even if not perceived as such by the general public).

On the other hand, a determination that a mark is scandalous per se based solely on its dictionary definition fails to reflect the evolving perceptions of consumers and group members, which can lead to the examiner injecting his own, perhaps outdated, opinion of a mark into his analysis.¹⁸⁵ *Tinseltown*, for example, essentially forecloses all future registrations of the word “bullshit” regardless of whether the context of the mark indicates a newer meaning that has become superior to the scandalous meaning in that particular context.¹⁸⁶ Additionally, a failure to consider context for disparagement could lead to denials for words that, in context, have alternative meanings. For example, if a mark for “redskins” is used on potatoes with red skin or other goods that depict such potatoes, the allegedly per se disparaging word would be used in a completely non-disparaging way. Per se rules would foreclose registration in all contexts, whereas a consideration of context would result in reflection on the actual meaning of the mark rather than on the basis of the view expressed by the irrelevant disparaging or scandalous meaning.

D. Case Studies: Viewpoint Discrimination in the Redskins and Slants Cases

The arbitrariness of decisionmaking under section 2(a) has recently led to viewpoint discrimination in two prominent cases. First, in the ongoing saga calling for cancellation of all trademarks of the Washington Redskins, decisionmakers in the PTO, TTAB, and federal courts have inconsistently and arbitrarily decided the disparaging nature of the marks using the exact same information. Second, the section 2(a) denial of the mark THE SLANTS for a band consisting of Asian-American members demonstrates viewpoint discrimination against the reclamation of a slur by a member of the allegedly disparaged group.

¹⁸⁴ *Id.* at 382.

¹⁸⁵ See Carpenter & Murphy, *supra* note 8, at 469 (“[T]he appropriate focus is not simply the meaning of the word or phrase, but the way that word or phrase is perceived by a substantial composite of consumers. A centralized focus on dictionary definitions fails to inquire as to the degree of perceived scandal, shock, or offense to consumers in the marketplace.”).

¹⁸⁶ *In re Tinseltown, Inc.*, 212 U.S.P.Q. (BNA) 863, 866 (T.T.A.B. 1981).

1. Cancellation of the Washington Redskins Trademarks

The trademarks owned by Pro-Football, Inc. that represent the Washington Redskins football team have long been the subject of controversy and debate. The name has been used by the team since the 1930s,¹⁸⁷ and the trademarks were registered without controversy or fanfare between 1967 and 1990.¹⁸⁸ However, many consider “redskin” to be a racist slur in reference to Native Americans. Native American groups and other protestors have pressured the team to change the name since at least the 1940s, and the pressure continues to this day.¹⁸⁹ Part of the pressure has involved legal action attempting to cancel the Redskins’ marks to strip them of the benefits of registration on the Principal Register. The first cancellation action was filed by Susan Harjo in 1992.¹⁹⁰ The TTAB decided to cancel the marks under section 2(a) in 1999, relying on linguistic and testimonial evidence showing that the term “redskin” was disparaging to a substantial composite of the Native American community at the time the Washington Redskins marks were registered.¹⁹¹ When the mark owners appealed the decision to the District Court for the District of Columbia, however, the court reversed the cancellation decision, finding that the evidence presented was insufficient to demonstrate disparagement.¹⁹² The D.C. Circuit remanded the case on other grounds, but did not disturb the lower court’s findings.¹⁹³

A new set of plaintiffs, led by Amanda Blackhorse, filed another cancellation petition while *Harjo* was still pending.¹⁹⁴ The new plaintiffs’ arguments were exactly the same as those in the *Harjo* case—that the Redskins trademarks were disparaging to a substantial composite of Native Americans at the time of registration—and relied on the exact same

¹⁸⁷ See Tom Pollin, *Dropping Back in NFL History: Lone Star and the Redskins*, FOOTBALL NATION (June 6, 2013, 9:13 AM), <http://www.footballnation.com/content/dropping-back-nfl-history-lone-star-and-the-redskins/22983/2> [<http://perma.cc/MF84-YHMD>] (explaining the franchise’s name change from “Braves” to “Redskins” in 1933 to avoid confusion with the “Braves” baseball team).

¹⁸⁸ *Blackhorse I*, 111 U.S.P.Q.2d (BNA) 1080, 1081 (T.T.A.B. 2014).

¹⁸⁹ See, e.g., Stephen Pevar, *Why “Redskins” Is Wrong*, ACLU (Nov. 25, 2013), <https://www.aclu.org/blog/racial-justice/why-redskins-wrong> [<http://perma.cc/PE5Q-LJT2>] (arguing that “Redskin” is a “vile name”); Scott Simpson, *National Civil and Human Rights Coalition Calls for Washington Football Team to Drop Offensive Name*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Dec. 12, 2013), <http://www.civilrights.org/press/2013/washington-football-team-name-change-resolution.html> [<http://perma.cc/LF7G-ABZH>] (describing the resolution passed by the Leadership Conference on Civil and Human Rights calling for the Washington Redskins to change the team’s name).

¹⁹⁰ *Harjo I*, 50 U.S.P.Q.2d (BNA) 1705, 1706 n.1 (T.T.A.B. 1999).

¹⁹¹ *Id.* at 1748-49.

¹⁹² *Pro-Football, Inc. v. Harjo (Harjo II)*, 284 F. Supp. 2d 96, 135-36 (D.D.C. 2003) (holding that the TTAB’s determination that the Redskins marks were considered disparaging by a substantial composite of Native Americans was not supported by substantial evidence).

¹⁹³ *Pro-Football, Inc. v. Harjo (Harjo III)*, 415 F.3d 44, 46 (D.C. Cir. 2005).

¹⁹⁴ *Blackhorse I*, 111 U.S.P.Q.2d (BNA) 1080, 1084 (T.T.A.B. 2014).

evidentiary record.¹⁹⁵ Without regard to the findings of the District Court in *Harjo II*, the TTAB cancelled the marks under section 2(a) as disparaging in June 2014.¹⁹⁶ Pro-Football filed suit in the Eastern District of Virginia against the Blackhorse parties seeking to reverse the TTAB's determination.¹⁹⁷ The court granted summary judgment in favor of the Blackhorse parties, upholding the TTAB's decision and finding that the cancellation of the Redskins marks was proper under section 2(a) and did not implicate the First Amendment.¹⁹⁸ Pro-Football filed its appeal to the Fourth Circuit on August 6, 2015.¹⁹⁹

The TTAB's decision in *Blackhorse I* illustrates the PTO's arbitrary decisionmaking under section 2(a). The TTAB and examiners acted arbitrarily and beyond the scope of their section 2(a) authority by taking the public discourse surrounding the Redskins marks (and perhaps their personal dislike of the Redskins marks) into consideration in ruling on the petition for cancellation—a clear case of viewpoint discrimination. The examiners and the TTAB in *Blackhorse I* relied upon virtually the same record as the District Court in *Harjo II*, but came to the opposite conclusion. The only additional evidence submitted were depositions by the named *Blackhorse* plaintiffs stating that they found the Redskins marks offensive, essentially mimicking similar depositions submitted by the original *Harjo* plaintiffs.²⁰⁰ For multiple reasons, the *Harjo II* court found this evidence insufficient to support a finding that the Redskins marks may disparage Native Americans. First, the court held that the TTAB failed to weigh conflicting evidence of disparagement and non-disparagement presented by the parties, and that its findings of fact did not “tend to prove or disprove that the marks at issue ‘may disparage’ Native Americans, during the relevant timeframe, especially when used in the context of Pro-Football's entertainment services.”²⁰¹ Second, the TTAB conflated the opinion of the general public with the opinion of a substantial composite of Native Americans; it failed to cite any evidence from Native Americans apart from the plaintiffs' depositions—who, as only seven people, cannot make up a substantial composite of a disparaged

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1114.

¹⁹⁷ Complaint at 1, *Pro-Football, Inc. v. Blackhorse*, 62 F. Supp. 3d (E.D. Va. 2014) (1:14-cv-01043-GBL-IDD). A party dissatisfied with the decision of the TTAB has the option to either appeal to the Federal Circuit or to initiate a civil action in federal district court. 15 U.S.C. § 1071(b)(1) (2012).

¹⁹⁸ *Blackhorse II*, No. 1:14-cv-01043-GBL-IDD, 2015 WL 4096277, at *11 (E.D. Va. July 8, 2015).

¹⁹⁹ Docketing Notice, *Pro-Football, Inc. v. Blackhorse*, No. 15-1874 (4th Cir. Aug. 6, 2015).

²⁰⁰ See *Blackhorse I*, 111 U.S.P.Q.2d (BNA) at 1115 (Bergsman, A.L.J., dissenting) (“The evidence from *Harjo* was augmented by depositions of the individual petitioners here, each of whom testified that they found the term ‘redskins’ in the challenged marks offensive.”); *id.* at 1115 n.229 (“The petitioners did not resubmit the depositions of the *Harjo* petitioners in this case.”).

²⁰¹ *Harjo II*, 284 F. Supp. 2d 96, 127-28 (D.D.C. 2003).

group.²⁰² Finally, the TTAB failed to consider that dictionary definitions and historical evidence did not consistently support the finding that the term was disparaging, particularly in light of the term's secondary meaning in relation to the football team.²⁰³

The court in *Harjo II* found that “the existence of a controversy” does not prove that the Redskins marks were disparaging to a substantial composite of Native Americans at the time the marks were registered.²⁰⁴ However, the TTAB appears to have taken the mounting controversy into account in the *Blackhorse* cancellation by finding that the exact same evidence—deemed insufficient to support a disparagement cancellation in 2003—had inexplicably become sufficient to support a cancellation in 2014. The *Blackhorse* decision takes into account that the term “redskin” has become increasingly unpopular, disfavored, and viewed as racist.²⁰⁵ However, terms that express such disfavored opinions are still protected by the First Amendment. By exercising their discretion to cancel the Redskins marks, in spite of the *Harjo II* precedent finding the evidence insufficient to support cancellation, the examiners and the TTAB have engaged in viewpoint discrimination against the mark owners, inhibiting their speech because the ideas being expressed are unpopular. While public pressure on the Redskins mark owners to change the team name is an entirely appropriate method to combat the use of an allegedly racist mark, this discretionary, arbitrary decision regulating viewpoint is patently unconstitutional.

2. Denying Registration to the Slants Trademark

Although less prominent than the Washington Redskins debate, the decisions made by examiners, the TTAB, and the Federal Circuit regarding a trademark for a band called “The Slants” also reflect the PTO's arbitrary decisionmaking and practice of viewpoint discrimination. Applicant Simon Shiao Tam, an Asian-American musician, applied to trademark the name of his band, “The Slants.”²⁰⁶ All of the band's members are of Asian-American descent, and the band uses Asian imagery in its logos and marketing materials.²⁰⁷ Tam has stated that he called the band by this name to “reclaim”

²⁰² *See id.* at 129 (“By focusing on the general public and inferring that the Native Americans would simply agree with those views, the TTAB made a decision unsupported by substantial evidence.”).

²⁰³ *Id.* at 130-32.

²⁰⁴ *Id.* at 135.

²⁰⁵ *Blackhorse I*, 111 U.S.P.Q.2d (BNA) at 1111 (“The recognition that this racial designation based on skin color is disparaging to Native Americans is also demonstrated by the near complete drop-off in usage of ‘redskins’ as a reference to Native Americans beginning in the 1960’s.”).

²⁰⁶ THE SLANTS, U.S. Trademark Application Serial No. 85/472,044 (filed Nov. 14, 2011).

²⁰⁷ Note that Tam did not apply for a trademark on this imagery, only on the band name.

the stereotypical, racist identity of the term as a tongue-in-cheek sign of pride.²⁰⁸ However, the PTO refused to recognize Tam's intent, denying the mark at the application stage under section 2(a) as disparaging to people of Asian descent.²⁰⁹ The TTAB upheld the denial,²¹⁰ and Tam appealed to the Federal Circuit, arguing that section 2(a) denies infringe upon the First Amendment rights of trademark owners.²¹¹

In *Tam II*, the Federal Circuit held that Tam's mark was properly denied under the *Harjo* framework.²¹² The panel determined that the examiner's and TTAB's findings that THE SLANTS may be disparaging to people of Asian descent were supported by substantial evidence.²¹³ The court also reaffirmed that *McGinley* is the controlling precedent, and as such the denial of Tam's mark under section 2(a) did not implicate the First Amendment.²¹⁴

However, Judge Kimberly Moore filed a separate nonbinding opinion in *Tam II*, entitled "Additional Views," in which she argued that the Federal Circuit should reconsider its section 2(a) precedent en banc²¹⁵ and declare section 2(a) an unconstitutional restriction on speech and viewpoint under the First Amendment.²¹⁶ She asserted that Tam's mark is both commercial and expressive because it identifies Tam's band in the commercial marketplace but also "weigh[s] in on cultural and political discussions about race and society," which are at the core of First Amendment protection.²¹⁷ Judge Moore then argued, contrary to the assertion in *McGinley*, that a section 2(a) denial does burden the speech of trademark owners by denying them both the rights conferred by registration and common-law trademark-use protection.²¹⁸ Therefore, she argued, the restrictions imposed by section 2(a)

²⁰⁸ Scott Graham, *Oregon Band 'The Slants' Takes Trademark Fight to Federal Circuit*, RECORDER (Jan. 9, 2015), <http://www.therecorder.com/id=1202714640761/Oregon-Band-The-Slants-Takes-Trademark-Fight-to-Federal-Circuit#ixzz3QhsxWfoo> [<http://perma.cc/PA35-QVLQ>].

²⁰⁹ THE SLANTS, U.S. Trademark Application Serial No. 85/472,044 (filed Nov. 14, 2011), Office Action Outgoing, June 20, 2012, <http://tsdr.uspto.gov/documentviewer?caseId=sn85472044&docId=OOA20120620173329#docIndex=5&page=1> [<http://perma.cc/F3BC-SLAF>].

²¹⁰ *In re Tam (Tam I)*, 108 U.S.P.Q.2d (BNA) 1305 (T.T.A.B. 2013).

²¹¹ Brief on Behalf of Appellant, *In re Tam*, No. 2014-1203 (Fed. Cir. Apr. 21, 2014).

²¹² *Tam II*, 785 F.3d 567, 569 (Fed. Cir. 2015).

²¹³ *Id.* at 571.

²¹⁴ *Id.* at 571-72.

²¹⁵ The Federal Circuit can only overturn its precedent through a hearing and decision en banc. See U.S. CT. APPEALS FED. CIR., INTERNAL OPERATING PROC., § 13.1 (Nov. 14, 2008) ("En banc consideration is required to overrule a prior holding of this or a predecessor court expressed in an opinion having precedential status.").

²¹⁶ *Tam II*, 785 F.3d at 575 (Moore, J., additional views).

²¹⁷ *Id.*

²¹⁸ *Id.*

must be assessed under the First Amendment.²¹⁹ Applying First Amendment doctrines, Judge Moore concluded that section 2(a) is a restriction on viewpoint and thus must be assessed under strict scrutiny.²²⁰ However, she also concluded that the law likely cannot withstand even the intermediate scrutiny applied to commercial speech because there is no legitimate government interest to support its application.²²¹

One week after *Tam II*, the Federal Circuit voted sua sponte to vacate the opinion and rehear the case en banc.²²² The court specifically requested new briefing on the constitutionality of section 2(a) under the First Amendment. On December 22, 2015, a majority of the court determined that the disparagement provision of section 2(a) is unconstitutional on its face under the First Amendment, explicitly overturning *McGinley*.²²³ However, the court also reinstated the panel's holding that THE SLANTS is a disparaging mark.²²⁴ In light of these determinations, the court vacated the TTAB's decision that Tam's mark is unregistrable and remanded the case for reconsideration.²²⁵

Tam's case further demonstrates that the PTO and courts have made section 2(a) decisions arbitrarily, therefore leading to viewpoint discrimination. To date, Tam's marks are the only marks with "slant" in the name that have been denied under section 2(a).²²⁶ The word does have non-disparaging meanings. In Tam's case, however, the PTO found disparagement by taking into account the context surrounding the mark—i.e., the Asian imagery associated with the name. The Federal Circuit panel decision also considered Tam's stated intention to reclaim the Asian stereotype of slanted eyes when determining that the mark referred to Asians in a disparaging manner.²²⁷ In the other "slant" denials, intent was not considered because it was apparently assumed that the marks were being used under the non-disparaging meaning. This is an explicit discrimination on the basis of the idea that "slants" is a slur, even though Tam did not intend to use it as such. The examiner's decision to consider Tam's stated intent privileges applicants who do not

²¹⁹ See *id.* at 581 ("The government cannot hinge the benefits of federal trademark registration on constitutionally protected speech—here, the applicant's selection of a suitable mark—unless the government's actions pass constitutional scrutiny.")

²²⁰ See *id.* at 582 (arguing that section 2(a) discriminates against disparaging viewpoints while allowing registrations for positive, non-disparaging marks that refer to groups of people).

²²¹ *Id.*

²²² Order for Sua Sponte Hearing En Banc, *In re Tam*, No. 2014-1203 (Fed. Cir. Apr. 27, 2015).

²²³ *Tam III*, No. 14-1203, slip op. at 8 n.1.

²²⁴ *Id.* at 12 n.3.

²²⁵ *Id.* at 62.

²²⁶ See *infra* Appendix, Table 2.

²²⁷ See *Tam II*, 785 F.3d at 570-71 (describing interviews with Tam and the Asian imagery associated with the band to support the conclusion that "The Slants" mark disparagingly refers to people of Asian descent).

express their intent in using the word “slant,” even if it was meant in a disparaging fashion, over Tam’s stated intent to reclaim a traditionally offensive term.²²⁸ Such an outcome is discrimination against Tam’s view that the word should be reclaimed by the Asian-American community as a point of pride rather than a point of disparagement.

In Tam’s case, there was also no substantial evidence that the mark was actually disparaging to a substantial composite of Asian Americans, which highlights the discretionary nature of the decision. The only evidence the TTAB considered when construing the opinions of Asian Americans were articles indicating that two Oregon-based Asian-American organizations found Tam’s mark “racially offensive.”²²⁹ The opinions of these two localized groups are not enough to show that a substantial composite of the Asian-American community finds the term disparaging; in fact, they may not even represent a substantial composite of the opinions of the Asian-American community in Oregon. Therefore, the evidence relied upon by the examiner and TTAB was insufficient to support a finding of disparagement. Without sufficient evidence to support a finding of disparagement, the examiner’s decision and the subsequent affirmances by the TTAB and Federal Circuit are arbitrary and discriminate against Tam solely based on the viewpoint that his mark expresses.

VI. CHANGES TO THE SECTION 2(A) REGIME: LIMITING VIEWPOINT DISCRIMINATION

Since the current application of section 2(a) has led to viewpoint discrimination at both the examination and appeal stages, changes must be made to avoid continued First Amendment violations. Some have proposed eliminating section 2(a) as a wholly unconstitutional restriction on the registration of allegedly disparaging and scandalous trademarks.²³⁰ However, I argue in this Part that the law can remain intact if the procedures at the PTO are reined in and specified to prevent discretionary decisions by examiners on the basis of the viewpoints expressed within marks.

²²⁸ See *supra* Section V.B (discussing the use of intent in section 2(a) analyses).

²²⁹ *Tam I*, 108 U.S.P.Q.2d (BNA) 1305, 1308 (T.T.A.B. 2013). At the Federal Circuit, the PTO also presented a brochure from the Japanese American Citizens League that described the term “slant” as “demeaning,” but this brochure does not appear to refer specifically to Tam’s mark. *Tam II*, 785 F.3d at 571.

²³⁰ See, e.g., *Tam III*, No. 14-1203, slip op. at 62 (holding section 2(a) unconstitutional because it violates the First Amendment); Brief of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Virginia at 3, *Pro-Football, Inc. v. Blackhorse*, 62 F. Supp. 3d 498 (E.D. Va. 2014) (1:14-cv-01043-GBL-IDD) (advocating for the court to strike down section 2(a)’s prohibition on the registration of scandalous, immoral, and disparaging marks).

First, the PTO should actually presume that potentially disparaging or scandalous marks are valid at the examination stage and refrain from ruling on section 2(a) issues until there has been an opportunity for opposition. Oppositions can bring forth more compelling, specific evidence of scandalousness or disparagement that an examiner cannot or would not consider at the initial phase, and therefore reduce the risk of an examiner relying on his own assumptions regarding public or group-wide perception of an allegedly scandalous or disparaging term. These arbitrary assumptions, conscious or not, can lead to viewpoint discrimination. In the *Tam* case, for example, the examiner presupposed that the term “slants” was considered disparaging by a substantial composite of Asian Americans without sufficient evidence of such an opinion. If a section 2(a) determination had been foreclosed until the examination phase, community members could have presented high-quality evidence, such as survey data and personal affidavits, to demonstrate that the group finds the term disparaging. If no one came forward, Tam’s argument that the term had been reclaimed by the community could have been assumed to be an accurate representation of group sentiment. Without input from the relevant group, the examiner had no basis on which to presume disparagement aside from his own opinions and discretion, thus leading to viewpoint discrimination.

Second, discretionary decisionmaking stemming from these viewpoint-based assumptions can be reduced by limiting what can be defined as a scandalous or disparaging mark to clearly defined categories of unprotected speech, such as obscenity and fighting words.²³¹ Such a policy would prevent viewpoint discrimination because trademarks would not be denied on the basis of the ideas they express unless the ideas themselves are not protected by the First Amendment. At the same time, the policy would still serve to deter applicants from using harmful speech in their trademarks by limiting the benefits of trademark registration to traditionally protected areas of speech. Since the categories of unprotected speech are very narrow, more marks would receive the benefits of registration while still keeping harmful and extremely offensive marks out of the marketplace.

Finally, a wholly deferential approach to section 2(a) cases—allowing the trademarks to be registered despite being potentially scandalous or disparaging—would shift the regulation of these marks from the government to the marketplace. Both the commercial marketplace and the marketplace of ideas can exert pressure on the users of “undesirable” marks without relying on a government entity to interfere with the mark holders’

²³¹ See *supra* note 113 and accompanying text (describing categories of traditionally unprotected speech).

First Amendment rights.²³² Under such a policy, restriction of these types of trademarks would not be state-sponsored viewpoint discrimination, but rather would constitute voluntary conformance to publicly perceived standards of scandalousness and disparagement.

CONCLUSION

The discretion-laden policies at the PTO under the section 2(a) regime of denying and cancelling trademark registrations clearly constitute viewpoint discrimination. Since neither the PTO nor the courts have articulated clear evidentiary standards for denying trademarks for being scandalous or disparaging, trademark examiners and the TTAB substitute their own opinions and judgment for the actual perceptions of the relevant public. This discretion has led to arbitrary grants and denials of marks under section 2(a), indicating examiners' ability to covertly deny registration to marks on the basis of the viewpoints that they express. To cure this violation of the First Amendment, the PTO should employ section 2(a) policies that are more deferential to mark holders. By presuming that marks are valid unless members of the scandalized or disparaged public come forward to oppose the mark's registration, the government will avoid making determinations on the basis of taste, morality, and controversy. This would allow the marketplaces of commerce and ideas to determine which marks are worthy of reaping the benefits of trademark registration. The Federal Circuit's recent determination that the disparagement provision of section 2(a) is untenable under the First Amendment is a promising indicator that the regime of viewpoint discrimination at the PTO and TTAB may soon come to an end. However, even if other circuits or the Supreme Court ultimately determine that section 2(a) does not wholly violate the First Amendment, the policies in place to implement and enforce the law at the administrative level must change to ensure it is applied in a constitutional manner that does not discriminate against trademarks on the basis of the viewpoints they express.

²³² See Gabe Rottman, *Redskins Wrong, But Legal*, ACLU (Dec. 10, 2013, 10:41 AM), <https://www.aclu.org/blog/redskins-wrong-legal> [<http://perma.cc/6TQP-66P3>] (arguing that although the Washington Redskins should succumb to public pressure and change the name of the team, relying on government standards to determine what is disparaging is at odds with the protections of the First Amendment).

APPENDIX: EMPIRICAL DATA

Table 1: Applications, Denials, and Registrations of “Scandalous” Terms

Word	Applications	Denials	Denials (² (a))	Denials (Non- ² (a))	Registrations	Registrations with ² (a) Objection	Pending
Asshole	16	15	15	0	0	0	1
Fuck	120	116	111	5	0	0	4
MILF	59	30	20	10	28	2	1
Piss	34	7	2	5	25	0	2
Shit	106	97	93	4	3	1	6
Slut	107	34	4	30	70	2	3
Tits	47	29	23	6	15	0	3
WTF	81	26	0	26	44	1	11

Table 1 (Continued):

Word	Marks Registered (Compared to Total Applications)	Marks Denied Under ² (a) (Compared to Total Denials)	Marks Registered Over ² (a) Objections (Compared to Total Registrations)
Asshole	0.00%	100.00%	N/A
Fuck	0.00%	95.69%	N/A
MILF	47.46%	66.67%	7.14%
Piss	73.53%	28.57%	0.00%
Shit	2.83%	95.88%	33%
Slut	65.42%	11.76%	2.86%
Tits	31.91%	79.31%	0.00%
WTF	54.32%	0.00%	2.27%

Table 2: Applications, Denials, and Registrations of “Disparaging” Terms*

Word	Applications	Denials	Denials (2(a))	Denials (Non-2(a))	Registrations	Registrations with 2(a) Objection	Pending
Chink	5	4	1	3	1	0	0
Dyke	16	5	1	4	11	5	0
Fag	27	10	7	3	17	3	0
Faggot	3	3	3	0	0	0	0
Hebe	11	6	0	6	5	1	0
Heeb	4	3	3	0	1	0	0
Jap	7	4	2	2	3	0	0
Nigga	9	9	9	0	0	0	0
Nigger	5	5	5	0	0	0	0
Queer	62	16	0	16	45	0	1
Redskin	18	10	4	6	8	0	0
Slant	71	6	2	4	65	0	0
Squaw	28	4	3	1	23	3	1

* Any trademarks belonging to Pro-Football, Inc. (owner of the Washington Redskins trademarks) were excluded from this analysis, since review of their cancellation is pending in the Fourth Circuit.

Table 2 (Continued):

Word	Marks Registered (Compared to Total Applications)	Marks Denied Under 2(a) (Compared to Total Denials)	Marks Registered Over 2(a) Objections (Compared to Total Registrations)
Chink	20.00%	25.00%	0%
Dyke	68.75%	20.00%	45%
Fag	62.96%	70.00%	18%
Faggot	0.00%	100.00%	N/A
Hebe	45.45%	0.00%	20%
Heeb	25.00%	100.00%	0%
Jap	42.86%	50.00%	0%
Nigga	0.00%	100.00%	N/A
Nigger	0.00%	100.00%	N/A
Queer	72.58%	0.00%	0%
Redskin	44.44%	40.00%	0%
Slant	91.55%	33.33%	0%
Squaw	82.14%	75.00%	13%

Table 3: Evidence Used by Examiners for “Scandalous” Terms

Word	No Evidence	Dictionary Evidence	Internet Evidence	T/TAB/Other Denial Evidence	Other Evidence
Asshole	0	15	2	2	2
Fuck	3	99	35	5	7
MILF	0	10	22	0	3
Piss	0	1	2	0	0
Shit	6	76	17	9	3
Slut	0	4	2	0	0
Tits	0	22	5	1	2
WTF	0	1	1	0	0

Table 3 (Continued):

Word	2(a) Analyses: No Evidence	2(a) Analyses: Dictionaries	2(a) Analyses: Internet	2(a) Analyses: Other Denial Evidence
Asshole	0.00%	100.00%	13.33%	13.33%
Fuck	2.70%	89.19%	31.53%	4.50%
MILF	0.00%	45.45%	100.00%	0.00%
Piss	0.00%	50.00%	100.00%	0.00%
Shit	6.38%	80.85%	18.09%	9.57%
Slut	0.00%	66.67%	33.33%	0.00%
Tits	0.00%	95.65%	21.74%	4.35%
WTF	0.00%	100.00%	100.00%	0.00%

Table 4: Evidence Used by Examiners for “Disparaging” Terms

Word	No Evidence	Dictionary Evidence	Internet Evidence	T/TAB/Other Denial Evidence	News Evidence	Group Member Evidence	Other Evidence
Chink	0	1	0	0	0	0	0
Dyke	0	6	1	1	2	1	0
Fag	1	9	3	0	1	0	0
Faggot	0	3	1	0	1	0	0
Hebe	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Heeb	0	2	1	0	2	0	0
Jap	0	2	0	0	1	0	0
Nigga	0	9	2	0	1	0	0
Nigger	0	4	3	0	0	0	0
Queer	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Redskin	0	4	0	0	4	4	0
Slant	0	1	2	0	2	1	0
Squaw	0	6	0	0	5	5	2

Table 4 (Continued):

Word	² (a) Analyses: No Evidence	² (a) Analyses: Dictionaries	² (a) Analyses: Internet	² (a) Analyses: Other Denial Evidence	² (a) Analyses: News Evidence	² (a) Analyses: Group Member Evidence
Chink	0.00%	100.00%	0.00%	0.00%	0.00%	0.00%
Dyke	0.00%	100.00%	16.67%	16.67%	33.33%	16.67%
Fag	10.00%	90.00%	30.00%	0.00%	10.00%	0.00%
Faggot	0.00%	100.00%	33.33%	0.00%	33.33%	0.00%
Hebe	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%
Heeb	0.00%	66.67%	33.33%	0.00%	66.67%	0.00%
Jap	0.00%	100.00%	0.00%	0.00%	50.00%	0.00%
Nigga	0.00%	100.00%	22.22%	0.00%	11.11%	0.00%
Nigger	0.00%	80.00%	60.00%	0.00%	0.00%	0.00%
Queer	N/A	N/A	N/A	N/A	N/A	N/A
Redskin	0.00%	100.00%	0.00%	0.00%	100.00%	100.00%
Slant	0.00%	50.00%	100.00%	0.00%	100.00%	50.00%
Squaw	0.00%	100.00%	0.00%	0.00%	83.33%	83.33%