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Author

Netanel, Neil Weinstock

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Ethnic References in Branding and Artificial Intelligence Content Moderation: From the Ajax ‘Jews’ to the Washington Redskins and Beyond

Neil Weinstock Netanel

1. INTRODUCTION

Sports teams sometimes adopt names – and fans sometimes adopt team nicknames – that might be viewed as derogatory epithets targeting a particular racial, ethnic, or religious group, but which serve as a badge of honour for team fans or even for members of the targeted group. How does and should trademark law address such uses, particular uses of derogatory epithets that are ‘reclaimed’ as badges of honour by a minority group? How do AI content moderation tools account for social media user postings that feature hate speech or reclaimed epithets, whether as sport team names or otherwise? And, to put those questions into their broader framework: how is regulation, whether through formal law or AI, to account for semiotic fluidity, the variable meaning of words over different temporal, spatial, and social contexts?

My essay is inspired by the Ajax ‘Jews’, a phenomenon that Bernt Hugenholtz brought to my attention some twenty-five years ago.

2. AJAX

Ajax, a club based in Amsterdam and founded in 1900, has long dominated football competition in the Netherlands.¹ Ajax has no direct connection with Jewish

1. See AFC Ajax, Wikipedia, https://en.wikipedia.org/wiki/AFC_Ajax.

organisations or the Jewish community of Amsterdam.² Nonetheless, in recent decades, fervent Ajax supporters have come to call themselves ‘Jews.’ In so doing, the supporters – very few, if any, of whom are actually Jews – have enthusiastically embraced a self-styled ‘Jewish’ identity. At Ajax matches, they waive Israeli flags, chant a version of the Israeli folk song, *Hava Nagila*, and proclaim, with great gusto, that they are ‘Joden’ (Jews) or ‘Superjoden’ (Super Jews). Many also sport Star of David pendants and tattoos.

Ajax’s association with Jews apparently stems from the fact that Ajax’s pre-World War II stadium was located adjacent to Jewish neighbourhoods in east Amsterdam. According to Ajax’s club historian: ‘The supporters of Ajax’s opponents used to arrive at Weesperpoort Station, where there were a lot of Jewish street vendors. So they would say, “We’re going to the Jews”.’³ Dutch football fans’ labelling of Ajax as a Jewish team might also derive from the Dutch view of Amsterdam as having a Jewish flavour. Amsterdam has been home to a sizeable Jewish community since the early sixteenth century. On the eve of World War II, some 80,000 Jews lived in Amsterdam, comprising roughly ten percent of the city’s population.⁴ Finally, in the 1950s several Jewish Holocaust survivors played on the team or served in its management, helping to turn Ajax into a highly successful football club.⁵

In any event, by the 1960s fans of opposing clubs came to derisively call Ajax a ‘Jew club’.⁶ In response, Ajax supporters embraced the attempted insult, recasting the ‘Jews’ label as a badge of honour. And as Ajax supporters have ardently celebrated their ersatz Jewish identity through a variety of Jewish symbols and tropes, opposing fans regularly counter by chanting anti-Semitic slogans, including calls to send the ‘Jews’ to the gas chambers. The back and forth between Ajax supporters and opponents became more virulent following the emergence of football hooliganism in the Netherlands in the 1970s. Ajax fans began to wave the Israeli flag in the early 1980s, and opposing fans increasingly invoked Nazi symbols and references to the Holocaust.⁷

2. I draw upon a number of sources in this section. They include: David S. Winner, ‘Don’t Blame Soccer’s “Jewish” Teams for Anti-Semitism’, *Foreign Policy*, 10 May 2019, <https://foreignpolicy.com/2019/05/10/dont-blame-for-anti-semitism-in-soccer-tottenham-hotspur-spurs-ajax-amsterdam/#>; Amir Vodka, ‘Superjews: Thoughts on Ajax and the Jews following Nirit Peled’s Documentary Film’, *Springerin*, February 2014, <https://www.springerin.at/en/2014/2/die-super-joden-von-ajax>; Eric Collier, ‘Ajax and the Jewish Issue’, *Le Monde*, 16 February 2005, translated by Bertrand Chardon, Ajax USA Archives, <http://ajaxusa.blogspot.com/2005/02/ajax-and-jewish-issue.html>; Craig Smith, ‘A Dutch Soccer Riddle: Jewish Regalia Without Jews’, *N.Y. Times*, 28 March 2005, <https://www.nytimes.com/2005/03/28/world/europe/a-dutch-soccer-riddle-jewish-regalia-without-jews.html>; I also draw upon Nirit Peled’s documentary film *Superjews* (2013).
3. Simon Kuper, *Ajax, the Dutch, The War: The Strange Tale of Soccer During Europe’s Darkest Hour* (Bold Type Books, 2012), 18 (quoting Ajax club historian Evert Vermeer).
4. Peter Tammes, ‘Surviving the Holocaust: Socio-demographic Differences Among Amsterdam Jews’, 30 *Eur. J. Population* (2017) 293, 294, 299.
5. Kuper, *supra* note 3, at 187.
6. *Ibid.* at 194.
7. *Ibid.* at 222.

For real Jews, the phenomenon of the Ajax 'Jews' evokes a range of responses. Some are bemused. Jewish Israelis are said to 'love the chants and symbols of Ajax supporters, whom they assume to be philosemites.'⁸ But some Amsterdam Jews experience painful discomfort at Ajax fans' appropriation of Jewish symbols to serve as unofficial emblems for a football team – and, on occasion, football hooligans. For them, the Ajax 'Jews' amounts to an unthinking usurpation of Jewish identity, particularly in the wake of the murder of some 65,000 Amsterdam Jews – three-quarters of the prewar population – at the hands of the Third Reich and its Dutch collaborators.⁹ Dutch Jews also blame Ajax fans' self-proclaimed 'Jewish' identity for provoking opponents' raucous calls to send Jews to the gas chambers. Many Jewish Ajax fans have stopped going to matches as a result.¹⁰

For their part, Ajax's management has reacted ambivalently to its fans' ardent cultivation of the club's 'Jewish' brand. At one point, ringtones of *Hava Nagila* could be downloaded from the club's official website. But Ajax management has since downplayed its historic Jewish links and generally sought to discourage Ajax fans' appropriation and refashioning of Jewish songs, chants, and symbols, especially as Ajax fans' enthusiastic embrace of 'Jewish' identity has elicited virulent anti-Semitic retorts from opposing fans. Ajax's avid supporters have responded that their decades-old self-branding as Ajax Jews has become an irrevocable part of their own identity.

3. ETHNIC REFERENCES AS SPORTS TEAM BRANDS

The phenomenon of the Ajax 'Jews' is not entirely unique. Another football team, the Tottenham Hotspurs, located adjacent to an Orthodox Jewish neighbourhood in north London, has experienced a similar clash of tropes. Opposing fans call Tottenham 'Yids' as an anti-Semitic insult and Tottenham supporters tout the label as a badge of honour.¹¹ In addition, the Ghent football club, KAA Gent, features an image of a Native American chieftain as its logo, a practice that harkens back to 1906, when the American Barnum & Bailey Circus, starring William 'Buffalo Bill' Cody and his 'Wild West Show', visited the city.¹² Aside from those examples, I'm not aware of other instances of ethnic references being employed as football team brands, whether official or unofficial, in Europe or the United Kingdom.

By contrast, in the United States thousands of professional, collegiate, and high school sports teams have long used Native American references for team names and Native American imagery for team mascots. Common team names that refer to Native Americans have included Indians, Braves, Chiefs, Warriors, Redskins, and Squaws. Team names also include the names of Native American tribes, including Sioux, Illini, and Seminole, and storied warriors, such as Black Hawk. In most cases,

8. *Ibid.* at 226.

9. See Tammes, *supra* note 4, at 305; History of the Jews in Amsterdam, Wikipedia, https://en.wikipedia.org/wiki/History_of_the_Jews_in_Amsterdam.

10. Kuper, *supra* note 3, at 226.

11. See Winner, *supra* note 2.

the names and images have been officially adopted by the team, but fans have sometimes added their own Native American references as nicknames and mascots.

The terms Redskins and Squaws have long served as derogatory racist slurs. Many Native Americans – and non-Native Americans – thus find those terms deeply offensive. The remaining common team names enumerated above do not have derogatory lexical meanings. But for many Native Americans, the use of Native American names and images for sports logos, mascots, and fan chants is inherently disparaging and dehumanising. Critics charge that such uses ‘remove humane characteristics from Native Americans, depicting them instead as objects, cartoon characters, and savages.’¹³ Further, they insist, the use of Native American symbols ‘for purely entertainment purposes has a particularly deleterious effect because it trivializes the very basis of many cultural and religious beliefs.’¹⁴

At the same time, some Native Americans appear to embrace sports teams’ use of Native American tropes, at least in ways that, they perceive, honour Native American heritage.¹⁵ Moreover, it is probably fair to say that for the vast majority of sports team fans, the team name and mascot have traditionally stood for their favourite team and virtually nothing else. To the extent logos have expressed anything relating to Native Americans, they invoke stereotypical characteristics, like bravery and physical prowess, that are regarded as laudable attributes for athletes. It seems plausible, therefore, that, for decades, team fans boisterously chanted Native American references, cheered cartoonish Native American mascots, and wore clothing featuring Native American images with no conscious intention to disparage or dehumanise – perhaps like Ajax fans’ self-proclaimed identity as ‘Jews’.

In recent years, however, it is hard to imagine that American fans remain unaware that many Native Americans find sports teams’ reference to Native Americans deeply offensive. Following decades of protests and pressure from various Native American groups, dozens of collegiate and high school teams have dropped their Native American names and mascots. Within the last two years, so have the professional football team previously named the Washington Redskins (now the Washington Football Team) and the professional baseball team previously named the Cleveland Indians (now the Cleveland Guardians).

13. Jeff Dolley, ‘The Four R’s: Use of Indian Mascots in Educational Facilities’, 32 *J.L. & Educ.* (2003) 21, 26.

14. Justin G. Blankenship, ‘The Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words that Offend?’, 72 *U. Colo. L. Rev.* (2001) 415, 424.

15. A group of academic co-authors and activists levelled a devastating critique of the framing and methodology of a poll, published by the popular sports magazine *Sports Illustrated*, that purported to show that the vast majority of Native Americans support the use of Native American mascots in sports. Nonetheless, the co-authors acknowledged that at least ‘some Native Americans not only endorse but also defend the use of Indianness in athletics.’ C. Richard King et al., ‘Of Polls and Race Prejudice: Sports Illustrated’s Errant “Indian Wars”’, 26(4) *J. Sport & Social Issues* (Nov. 2002), 381–402, at 381. Some tribes have also partnered with sports teams bearing Native American references, including the Eastern Band of Cherokee Indians (with the Atlanta Braves) and the Seminole Tribe of Florida (with the Florida State University Seminoles).

4. ETHNIC REFERENCES AS TRADEMARKS

To my knowledge, neither Ajax management nor Ajax fan clubs have sought to register a trademark for ‘Joden’, ‘Superjoden’, or any related words or symbols in connection with Ajax or football.¹⁶ But KAA Gent holds registered E.U. trademarks that feature its Native American chieftain logo.¹⁷ And in the United States, a number of American professional and collegiate sports teams hold registered trademarks that feature Native American-related symbols. The professional teams include the Washington Football Team, Cleveland Guardians, Atlanta Braves, Kansas City Chiefs, and Chicago Blackhawks, all of which hold trademarks in their names and mascots – or, with respect to Washington and Cleveland, their former names and mascots.

In the United States, Section 2(a) of the Lanham Act provides that trademarks may be refused registration if the trademark ‘comprises immoral, deceptive, or scandalous matter; or matter which may disparage ... persons ..., institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.’¹⁸ In 2014, following some fifteen years of administrative proceedings and litigation, the Trademark Trials and Appeals Board ordered the cancellation of the Washington Redskins trademarks on the grounds that they disparage Native Americans.¹⁹ The next year, a federal district court granted a summary judgment upholding the cancellation, citing evidence that the ‘Redskins’ marks may disparage Native Americans.²⁰

However, in 2017, in *Matal v. Tam*, the Supreme Court ruled that the disparagement clause of the Lanham Act is facially invalid under the First Amendment’s protection of freedom of speech.²¹ In 2018, the Fourth Circuit accordingly vacated the District Court’s summary judgment upholding the cancellation of the Redskins trademark and the Trademark Office then dismissed the Native Americans’ petition for cancellation.²² Subsequently, in 2019, in *Iancu v. Brunetti*, the Supreme Court ruled that the statutory bar on trademarks containing ‘immoral or scandalous matter’ is also facially invalid under the First Amendment.²³ In short, following *Matal* and *Iancu*, the Trademark Office may no longer refuse to register a trademark on the grounds that the trademark is either generally offensive or otherwise disparages a racial or ethnic group or a religious belief.

By contrast, in the European Union, blasphemous, racist, discriminatory, or insulting words or phrases may not be registered as trademarks. Such marks are understood to fall within the absolute prohibition on registration of ‘trade marks

16. No such trademark appears on the European Intellectual Property Office’s trademark registry. There is only a registered trademark for the official logo of Ajax Amsterdam. TM No. 000424036, registered 23 September 2002.

17. European Union Intellectual Property Office, Trademark Nos. 010316371, 011636248, and 011636289, <https://euipo.europa.eu/eSearch/#details/owners/476669>.

18. 15 U.S.C. §1052(a).

19. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080 (2014).

20. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D.Va. 2015).

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

22. *Pro-Football, Inc. v. Blackhorse*, 709 Fed. Appx. 182 (4th Cir. 2018); Trademark Trial and Appeal Board, *Blackhorse v. Pro-Football, Inc.*, Cancellation No. 92046185 (April 9, 2018), <https://ttabvue.uspto.gov/ttabvue/v?pno=92046185&pty=CAN&eno=202>

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

which are contrary to public policy or to accepted principles of morality' set out in Article 7(1)(f) of the European Community Trademark Regulation.²⁴ Pursuant to the Regulation, such marks may be invalidated and cancelled at any time, although the relevant date for determining whether a mark contravenes the Article 7(1)(f) prohibition is the date of the application for the trade mark, not the date of a petition for cancellation.²⁵ Moreover, any person – even someone who is not an EU national – may apply to invalidate a Community Trademark on those grounds.²⁶ The absolute prohibition against registering racist or discriminatory trademarks is understood to be a matter of the general public interest, not just that of members of the targeted group.

The European Union Intellectual Property Office (EUIPO) has applied Article 7(1)(f) to deny registration to marks such as NOT MADE IN CHINA,²⁷ SUDACA,²⁸ and PAKI.²⁹ The leading European judicial ruling in this area is *PAKI Logistics GmbH v. OHIM*. In *PAKI*, the European General Court upheld the EUIPO's refusal to register the word 'PAKI' as a trademark.³⁰ The Court agreed that the term contravenes accepted principles of morality and public order. PAKI, the Court found, is perceived by the English-speaking public in the European Union as a racist term, a word that connotes a derogatory, insulting designation of a Pakistani who lives in the United Kingdom.

European Union law is not unmindful that the ban on registering offensive trademarks may conflict with freedom of expression. Indeed, in its Judgment of 27 February 2020, *Constantin Film Produktion GmbH v. EUIPO*, the Court of Justice of the European Union held that 'freedom of expression, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union must ... be taken into account when applying Article 7(1)(f).'³¹ But unlike the US Supreme Court in *Matal* and *Iancu*, the CJEU did not rule that prohibitions on registering morally offensive trademarks are facially invalid. Instead, the CJEU set out a high substantive and procedural threshold that must be met for the absolute prohibition on registration to apply.

24. Council Regulation (EC) No. 207/2009.

25. Judgment of 3 June 2009, T-189/07, '*Flughörse*'; confirmed by Order of 23/04/2010, C-332/09 P, '*Flughörse*'.

26. See Susan Snedden, 'Immoral Trade Marks in the UK and at OHIM: How would the Redskins Dispute be Decided There?', 11 *J. Intellectual Property L. & Practice* (2016) 270, 272. See also Mark J. Randazza, 'Freedom of Expression and Morality-Based Impediments to the Enforcement of Intellectual Property Rights', 16 *Nev. L.J.* (2015) 107.

27. EUTM Refusals 004631305, 004688561, 004631966 (noting that the proposed mark 'casts an unpleasant slur upon the reputation of Chinese workmanship').

28. EUTM Refusals 004118915 (SUDACA), 010971752 (SUDAKA). Sudaca is a disparaging term used in Spain to refer to a South American.

29. EUTM Refusal 005148581 (PAKI). For discussion of denials of registration to racial slurs and disparaging terms, see Colin Edward Manning, 'Moral Bars on Trade Mark Registration', (September 2016), at 52–56, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875687.

30. *PAKI Logistics v. OHIM*, Case T-526/07 (General Court, 5 October 2011). Prior to March 2016, the EUIPO was named the Office for Harmonization in the Internal Market as was commonly referred to as OHIM.

31. Case C-240/18, EU:C:2020:118, ¶56.

To meet that threshold, the Court held, the mark must, at the time of the EUIPO examination, 'be perceived by the relevant public as contrary to fundamental moral values and standards of society as they exist at that time.'³² It is not enough that the mark merely be regarded as being in bad taste. In addition, an Article 7(1)(f) prohibition must rest on a factual inquiry 'based on the perception of a reasonable person with average thresholds of sensitivity and tolerance, taking into account the context in which the mark may be encountered and where appropriate, the particular circumstances of the part of the [European] Union concerned.'³³ 'To that end,' the CJEU continued, 'elements such as legislation and administrative practices, public opinion and, where appropriate, the way in which the relevant public has reacted in the past to that sign or similar signs, as well as any other factor which may make it possible to assess the perception of that public, are relevant.'³⁴

It is unclear the extent, if any, that *Constantin Film* would apply to racially disparaging marks. *Constantin Film* involved a proposed mark that featured a vulgar phrase, not a racially disparaging mark. Further, the EUIPO refused to register the vulgar mark on the sole ground that the mark would be contrary to accepted principles of morality, while racially disparaging marks are understood to be contrary to public policy as well as to accepted principles of morality.³⁵

In any event, the *Constantin Film* ruling would seem to countenance an absolute prohibition against registering marks that the relevant public perceives to be racially disparaging, even taking freedom of expression into account. First, the Article 7(1)(f) ban on racially disparaging marks is understood to rest on the general prohibition against discrimination, which, like the right to freedom of expression, is enshrined in the Charter of Fundamental Rights of the European Union.³⁶ Secondly, unlike in the United States, European law does not generally view prohibitions of racially disparaging speech as an impermissible abridgement of freedom of expression. Indeed, European countries typically make various forms of hate speech, including group defamation, neo-Nazi speech, and holocaust denial, a criminal offence.³⁷ European law recognises that individuals' freedom of expression must give way to regulations designed to protect democracy, including by combatting racial hatred through criminalising hate speech.³⁸

32. *Ibid.*, ¶41.

33. *Ibid.*, ¶42.

34. *Ibid.*

35. For further discussion of the conceptual boundaries and legal tests for the public policy and morality exclusions, including with regard to the *Constantin Film* ruling, see, generally, Alvaro Fernandez-Mora, 'Inconsistencies in European Trade Mark Law: The Public Policy and Morality Exclusions', 4 *IP Quarterly* (2020) 271.

36. *PAKI Logistics*, *supra* note 31, ¶15; Charter of Fundamental Rights of the European Union, Art. 21.

37. See Ioanna Tourkochoriti, 'Should Hate Speech Be Protected? Group Defamation, Party Bans, Holocaust Denial and the Divide between (France) Europe and the United States', 45 *Colum. Hum. Rts. L. Rev.* (2014) 552 (presenting a breakdown of EU hate speech legislation).

38. See, e.g., Council Framework Decision 2008/913/HA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, ¶(1); Art. 1 (defining racism as a violation of democratic principles and requiring European Union

Of particular relevance to our discussion, the UK Football (Offences) Act 1991 makes it a criminal offence to engage in chanting that is ‘threatening, abusive, or insulting to a person by reason of his colour, race, ... or ethnic or national origins’ at a football match.³⁹ Spain’s Law 19/2007 of July 11, Against Violence, Racism, Xenophobia and Intolerance in Sport contains a similar provision.⁴⁰ More broadly, Article 137c of the Dutch Penal Code provides that ‘[a]nyone who publicly ... intentionally insults a group of people because of their race, their religion or belief, [or] their heterosexual or homosexual orientation ... will be punished [with imprisonment of] up to one year or a fine.’⁴¹

Yet how are regulatory authorities to determine whether a trademark is disparaging to persons by reason of their race, ethnicity, or national origin? Must the trademark applicant intend to disparage? Must the mark be disparaging when used in connection with the applicant’s goods or services? Must the mark be perceived as disparaging by the public at large, relevant consumers of the applicant’s goods or services, or just the targeted group? What if the trademark is perceived as disparaging by some members of the targeted group and not others? What if a word or phrase appearing in the trademark in question has multiple meanings or if its meaning is in flux?

Those questions were addressed in both the Washington Redskins case in the United States and in *PAKI Logistics* in the European Union. In its ruling in *Pro-Football, Inc. v. Blackhorse*, the Eastern District of Virginia emphasised that the Lanham Act barred registration for marks that ‘may disparage’ ‘a substantial composite’ of Native Americans.⁴² The ‘may disparage’ standard the Court held, does not require a finding that the mark necessarily disparages. It only requires that members of the targeted group *might* find the mark disparaging or offensive. Nor does the ‘may disparage’ standard require that the mark holder possess an intent to disparage.⁴³ Further, the Court held, when determining whether the term ‘redskins’ ‘may disparage’ Native Americans, courts must look to the views of Native Americans, not those of the general public. Finally, the Court held, ‘a substantial composite is not necessarily a majority.’⁴⁴ In that regard, the Trademark Office need not conduct a poll of the targeted group to determine how members of that group might perceive the mark. Rather, it may look to whether dictionary definitions, media references, and statements of leading members of the targeted group support the view that the mark is disparaging.⁴⁵

In assessing that evidence, the Court found that the Redskins marks met the standard for ‘may disparage’ ‘a substantial composite’ of Native Americans, despite evidence presented by the mark owner that some Native Americans do not

countries to punish intentional ‘inciting to ... hatred directed against persons by reference to race, colour, religion, decent, or national or ethnic origin’).

39. Football (Offences) Act 1991, §3.

40. Law 19/2007 of July 11, Article 2.

41. Dutch Penal Code, Article 137, <https://wetten.overheid.nl/BWBR0001854/2020-07-25/#>

42. *Pro-Football, Inc. v. Blackhorse*, 112 F.Supp.3d 439, 468 (E.D. Va. 2015).

43. *Ibid.* at 472.

44. *Ibid.* at 468.

45. *Ibid.* at 473.

find the term 'redskins' disparaging.⁴⁶ Accordingly, the Court granted Blackhorse's motion for summary judgment for cancellation of the Redskins marks, a summary judgment that was later vacated after the Supreme Court ruled that the Lanham Act's ban on disparaging marks violated the First Amendment.

In *Paki Logistics*, the European General Court rejected the applicant's argument that its proposed mark, 'PAKI', did not contravene public order or morality.⁴⁷ The applicant argued that the Article 7(1)(f) prohibition should apply only to marks that are understood exclusively as a racist insult. In particular, the applicant argued that, even if a word mark would be perceived as racist and derogatory when used to refer to a given group of people, the Article 7(1)(f) prohibition should not apply when the word has no such meaning when employed as a trademark for the applicant's goods and services. In this case, the applicant argued, it marketed its services only to logistics companies and forwarding agents who would not view the 'PAKI' mark as having any racist or derogatory connotation.

In rejecting the applicant's argument, the Court held that marks consisting of racial slurs are inherently contrary to morality or public order regardless of the goods or services for which they are sought to be registered.⁴⁸ The Court further found, relying on evidence submitted by OHIM and the UK Government, that English speakers in the EU would generally understand the PAKI mark as an offensive, racial insult. Notably, the Court looked to whether the mark would generally be understood as a racial insult among English speakers in the EU, not, like the US court in *Pro-Football, Inc.*, whether the targeted group would itself understand the mark in that way.⁴⁹ Indeed, the Court dismissed evidence that Pakistanis had begun to use the term 'Paki' to refer to themselves, although it granted that, in principle, a word that originally constituted a racial insult might evolve into a term that is no longer considered offensive.⁵⁰

What, then, if the Ajax management were to reverse course and apply to register a trademark for Ajax Joden or Superjoden, or for a graphic blue-and-white Star of David superimposed over the current Ajax logo? Would such marks be prohibited under Article 7(1)(f)? Under *PAKI Logistics* the answer would depend on whether the word marks would be understood as offensive, racial insults by Dutch speakers and whether the graphic mark would be thus understood by those Europeans who would likely view the mark. By contrast, if we were to apply the *US Pro-Football, Inc.* test for marks that may be disparaging, we would look to whether a substantial composite of Jews perceive those marks as an offensive, racial insult. The mark owner's intent is not relevant under either test, except for perhaps as evidence of how the relevant publics might view the mark.

The word marks Joden and Superjoden, and the graphic blue-and-white Star of David mark, whether standing alone or in conjunction with Ajax, would not seem to be inherently offensive. The word Joden is simply the neutral dictionary

46. *Ibid.* at 485.

47. *PAKI Logistics*, *supra* note 31, ¶¶14, 18.

48. *Ibid.* at ¶15.

49. *Ibid.* at ¶¶27–28.

50. *Ibid.* at ¶¶16, 25–26.

term for Jews in Dutch. And the blue-and-white Star of David sported by Ajax fans is, for most Jews, a sign of national pride, drawn from the Israeli flag. Indeed, numerous Jewish athletes and teams have proudly displayed the Star of David in sports competitions. Nor does use of such marks by Ajax fans necessarily carry the connotation of a negative, derogatory reference to Jews.

Nonetheless, the EUIPA Board of Appeals has noted that a trademark need not necessarily have an inherently negative connotation to be offensive. Rather, ‘the banal use of some signs with a ‘highly positive’ connotation can also be offensive.’⁵¹ In *Republic of Turkey v. Yaqub*, the Board found that the banal, commercial appropriation of the name of Mustafa Kemal Atatürk, the founder of modern Turkey, would be highly offensive to the European public of Turkish origin, whose reverence for Atatürk has strong national, cultural, ideological, and even religious connotations.⁵² Accordingly, the Board ruled, the proposed mark ‘Ataturk’ may not be registered under Article 7(1)(f).⁵³ As the Board observed: ‘Signs which severely offend the religious sensitivities of a substantial group of the population are ... best kept off the register, if not for moral reasons, at least for reasons of public policy, namely the risk of causing public disorder.’⁵⁴ Similarly, a UK trademark appeals body upheld the denial of registration for Jesus for clothing, noting that the very idea that the name of Jesus may be appropriated for commercial use as a trademark would be anathema, both to believers and to others who adhere to the view that religious beliefs should be treated with respect.⁵⁵

Perhaps Ajax’s commercial appropriation of the Star of David symbol would be deemed offensive on similar grounds even if not intended or generally perceived as an ethnic or religious insult. It would arguably constitute a banal commercialisation of a symbol of national and religious identity. In that regard, moreover, the fact that Jewish athletes and sports teams have displayed the Star of David to represent their national identity would not undermine the argument against the symbol’s registration as a trademark. In *Republic of Turkey*, the EUIPA Board of Appeals distinguished the trademark application in question from the widespread use of the name and image of Mustafa Kemal Atatürk on T-shirts, stickers, and commemorative items in Turkey, where they serve as a reference to the admired Turkish statesman rather than as a brand for a particular manufacturer.⁵⁶

51. *Republic of Turkey v. Yaqub*, Case R 2623/2011-2, EUIPA Board of Appeal, 17 September 2012, ¶31.

52. *Ibid.* at ¶¶32–33

53. *Ibid.* at ¶36.

54. *Ibid.* at ¶7. Somewhat similarly, the US Trademark Trials and Appeals Board upheld a denial of registration for KHORAN, referring to the Islamic holy text, for use for wine, as disparaging the religion and beliefs of Muslim-Americans. See *In re Lebanese Arak Corp.*, 94 USPQ2d 1215 (TTAB 2010).

55. See Basic Trademark SA’s Trade Mark Application, [2005] RPC 25, discussed in Snedden, *supra* note 26, at 276–277.

56. *Ibid.* at ¶12. The Star of David may be part of a registered trademark in the United States. It might have informational or descriptive significance, however, in which case it cannot serve as a trademark absent a showing of acquired distinctiveness. See US Patent and Trademark Office, Trademark Manual of Examining Procedure, §1202.17(e)(iv) (October 2018).

5. RECLAIMED EPITHETS

As we have seen, the trademark owner's benign intent does not save an otherwise disparaging mark from falling within the absolute prohibition on registration. But what if members of a targeted group seek to adopt and register a disparaging mark to reclaim the insult as a badge of honour? Prior to the Supreme Court's ruling in *Matal v. Tam*, there were several cases in the United States in which referenced groups sought to register insulting terms as their own trademarks. *Maytal v. Tam* is, itself, a prime example. In that case, an all-Asian-American rock band adopted and sought to register the name, 'The Slants', in order to reclaim that ethnic slur of Asians as a badge of honour. Other examples of targeted groups seeking to appropriate slurs and thus to disarm their derogatory force include Blacks seeking to register 'N.I.G.G.A.' and Jews seeking to register 'Heeb'.⁵⁷ In such cases, as in its ruling on *The Slants*, the US Trademark Office and Trademark Trials and Appeals Board have repeatedly rejected registration of such marks. They have found in each case that the fact that a substantial composite of the referenced group might find the term objectionable outweighs both the trademark applicant's salutary intentions and support for, or at least a lack of objection to, the reclaimed use among other members of the referenced group.⁵⁸ On the other hand, the Trademark Office initially denied a lesbian group's application to register 'Dykes On Bikes' on the grounds that the mark was disparaging, but the Office eventually allowed registration upon reviewing significant evidence showing that the term's meaning had changed from an insult to a source of lesbian pride.⁵⁹

Similarly to the Trademark Office's reconsidered ruling regarding 'Dykes on Bikes', the EUIPO Board of Appeals approved registration for a trademark for 'Jewish Monkeys' for a satiric, contemporary klezmer band.⁶⁰ In approving registration, the Board took into account that the applicant was the band's lead singer, who, like other band members, is Jewish. The Board also considered the context in which the mark would likely be used. The Board concluded that, while the term 'Jewish Monkeys' is highly offensive when used by anti-Semites, it is unlikely to cause offense as used by a Jewish musical group that combines elements of Yiddish folklore and pop music and regularly performs at Jewish music festivals.

Under that approach might the Board approve an application by Ajax or a group of Ajax fans for a 'Joden' or 'Superjoden' trademark as a reclaimed epithet? Perhaps the Board would distinguish Ajax fans' enthusiastic, seemingly philo-Semitic,

57. 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.* (2006) 388.

58. See, e.g., *In re Tam*, 108 U.S.P.Q.2d 1305 (TTAB 2013)(upholding denial of registration for THE SLANTS); *In re Heeb Media LLC*, 898 U.S.P.Q.2d 1071 (TTAB 2008)(upholding denial of registration for HEEB for various consumer goods even though the Trademark Office had approved the mark for a Jewish culture magazine); Serial No. 76/639,548, filed 25 May 2005 (Trademark Office rejection of a Black actor's application for N.I.G.G.A., finding the mark to be both disparaging and scandalous).

59. See Sonia Katyal, 'Trademark Officials Must Distinguish Between Irony and Offense', *N.Y. Times*, 4 May 2016, <https://www.nytimes.com/roomfordebate/2016/05/04/redskins-and-other-troubling-trademarks/trademark-officials-must-distinguish-between-irony-and-offense>.

60. R 519/2015-4, *Josef Reich*, 2 September 2015 (EUIPO Board of Appeal).

self-labeling as ‘Jews’ from opposing fans’ anti-Semitic chants. But, of course, unlike the members of the Jewish Monkeys, Ajax management and fans are not actually Jews. Further, even if Ajax fans constructed a pseudo-Jewish identity as their badge of honour in response to opposing fans’ anti-Semitic derision, it is hard to say that Ajax fans have done so on behalf of real Jews. Certainly, real Jews have played no active role in this rhetorical battle and do not generally view Ajax fans’ display of Jewish symbols as an affirmation of their own Jewish identity and pride. It would thus be a stretch to treat a hypothetical application for a ‘Joden’ trademark by Ajax or its fans as a reclaimed use by a targeted ethnic group.

Moreover, the Board’s focus in ‘Jewish Monkeys’ on the identity of the applicant, likely context of trademark use, and intended audience seems out of step with the General Court’s ruling in *Paki Logistics* and other European cases that marks consisting of racial slurs are inherently contrary to morality or public order regardless of the goods or services for which they are sought to be registered and whether purchasers would understand the mark as a racial insult.⁶¹ Accordingly, as one commentator has recently observed, it is unlikely that the Board’s approach in ‘Jewish Monkeys’ toward permitting registration of a reclaimed epithet ‘will take hold in Europe, at least for the time being.’⁶²

6. SOCIAL MEDIA CONTENT MODERATION AND ARTIFICIAL INTELLIGENCE

As we have seen, the determination of when ethnic references in trademarks generally should be viewed as offensively disparaging raises multiple questions. Does it matter whether the trademark user acts without intent to disparage? Who is the relevant public for measuring offensiveness? What percentage of the relevant public must be offended? Does the trademark user’s identity matter? How offensive must the mark be to support denying registration? Must a determination of undue offensiveness rest on empirical evidence of offense or may offensiveness be presumed from dictionary definitions? May a seemingly non-disparaging term nonetheless be denied registration because the banal, commercial use of the term causes offense? European regulators and courts must grapple with such complex questions, taking care to balance prohibitions against ethnic and religious discrimination with freedom of expression. In the United States, following *Matal v. Tam*, such issues no longer impact trademark registration practice, but they continue to arise in debates surrounding the propriety of ethnic references in branding.

The widespread use of ethnic references in social media, both in branding and non-commercial speech, complicates the issue even further. The immense volume of linguistically and culturally diverse content posted on social media, and the speed at which that content is posted, greatly magnify the challenges of defining grossly offensive insults and determining whether particular posts constitute such insults. In that regard, leading social media platforms, including Facebook, Instagram, Twitter, YouTube, and, most recently, TikTok, have agreed to be bound

61. See *supra* notes 49–52 and accompanying text.

62. See Fernandez-Mora, *supra* note 36, at 290.

by the European Commission's Code of Conduct on Countering Illegal Hate Speech Online.⁶³ The Code requires that platforms expeditiously assess notifications of illegal hate speech, including racial and ethnic insults, and remove content that they determine constitute such speech. According to the most recent Commission Report, on average 90% of the notifications are reviewed within 24 hours and 71% of the content is removed.⁶⁴

As Facebook has reported, platforms increasingly rely on AI systems to detect and remove hate speech at scale. Facebook proudly proclaims that, as of the final three months of 2020, '97% of hate speech taken down from Facebook was spotted by our automated systems before any human flagged it, up from 94% in the previous quarter and 80.5% in late 2019.'⁶⁵ But social media platforms face multiple layers of difficulty in such automatic detection of hateful and/or offensive speech.⁶⁶ Words can be obfuscated in many different ways, whether to avoid automatic content moderation or simply to abbreviate language for rapid communication. In addition, as we have seen, words might be highly offensive slurs in some contexts, but not others, or may evolve over time from being innocuous to offensive or visa-versa. Accounting for these variations and contexts requires highly sophisticated, constantly updated machine learning – coupled with a mechanism for human review to supplement, and sometimes correct, AI determinations. Of note, in upholding Facebook's removal of a Russian language post that included an allegedly derogatory term for Azerbaijanis, the Facebook Oversight Board relied on independent linguistic analysis and thirty-five public comments to confirm Facebook's understanding of the term as a 'dehumanizing slur attacking national origin.'⁶⁷

In my own informal review of Facebook and Instagram, I found numerous Ajax fan accounts under the label 'Superjoden'. Almost all are devoted entirely to celebrating Ajax, with no references to Jews other than the Superjoden label or the work 'mokum', a word of Yiddish origin that refers to Amsterdam. Yet one Facebook account includes an arguably offensive video posted by a user under the tag Facebook#AjaxHumor that depicts a group of ultra-Orthodox Jews sitting around a table, presumably singing religious songs but overdubbed with a soundtrack of Ajax fans shouting a football chant. I have no way of knowing what posts from Ajax fans – or opposing fans – Facebook and Instagram might have removed.

Facebook's Community Standards define prohibited 'hate speech as a direct attack against people on the basis of ... race, ethnicity, ... [or] religious affiliation.'⁶⁸

63. Code of Conduct on Countering Illegal Hate Speech Online, 30 June 2016, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en#theeucodeofconduct

64. European Commission, Countering Illegal Hate Speech Online; 5th Evaluation of the Code of Conduct, June 2020.

65. Mike Schroepfer, 'Facebook Chief Technology Officer, Update on our Progress on AI and Hate Speech Detection', 11 February 2021.

66. See György Kovács, Pedro Alonso, and Rajkumar Saini, 'Challenges of Hate Speech Detection in Social Media; Data Scarcity and Leveraging External Resources', *SN Computer Science* (2021) 2:95.

67. Facebook Oversight Board, Case Decision 2020-003-FB-UA, 28 January 2021, <https://about.fb.com/news/2021/02/update-on-our-progress-on-ai-and-hate-speech-detection>.

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68. https://www.facebook.com/communitystandards/hate_speech.

The Standards define ‘attacks as violent or dehumanizing speech, harmful stereotypes, statements of inferiority, expressions of contempt, disgust or dismissal, cursing and calls for exclusion or segregation.’⁶⁹ The Standards would pretty clearly prohibit posts featuring anti-Semitic chants by fans who oppose Ajax, even if those fans do not primarily intend to attack real Jews. Might Ajax fans’ self-branding and intended humorous appropriation of Jewish symbols and images also constitute ‘hate speech’ under the Standards? For what it’s worth, the Royal Dutch Football Association prohibits the opposing fans’ anti-Semitic chants, but not Ajax fans’ self-branding.⁷⁰ It’s an open question whether that same dichotomy should obtain in the broader context of social media use and trademark registration.

69. *Ibid.*

70. See Chris McLaughlin, ‘How Dutch football Has Tackled Fan Trouble’, *BBC News*, 4 April 2019, <https://www.bbc.com/news/uk-scotland-47809392> (reporting that Utrecht was required to close the section of its stands in which fans shouted anti-Semitic chants against Ajax).