

## WHO ARE YOU WEARING? AVATARS, BLACKFACE AND COMMODIFICATION OF THE OTHER

WILLAJEANNE F. MCLEAN\*

### ABSTRACT

*The question “Who are you wearing?” generally elicits the name of the haute couture designer, particularly when asked during the awards season. This Article, however, uses the question to interrogate the seemingly pervasive (mis)uses of bodies of color, whether in real or virtual world spaces. As explained by bell hooks, “[w]hen race and ethnicity become commodified as resources for pleasure, the culture of specific groups, as well as the bodies of individuals, can be seen as constituting an alternative playground where members of dominating races, genders, sexual practices affirm their power-over in intimate relations with the Other.”*

*Using examples taken from various facets of American life, the Article also touches upon how the use of technology and*

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\* Distinguished Professor of Law, University of Connecticut. An earlier version of this article was presented at the 4th National People of Color Legal Scholarship Conference at American University Washington College of Law in March, 2019. The ideas in this article were greatly enhanced by comments from my co-panelists and audience. My thanks to my colleagues, Professors Tom Morawetz and Steven Wilf, who graciously gave of their time to discuss with me my ideas or to read drafts, to Anne Rajotte for her eagle eye in finding and correcting Bluebook errors and the other reference librarians at UCONN Law who expedited my requests even in the midst of the pandemic. I also thank Dr. Kishonna L. Gray for providing me with some of her articles and sources on video gaming. My thanks also to the editors of IDEA. Any errors are, of course, all mine.

*intellectual property, in particular trademarks, has helped to maintain the status quo and further the perception of “otherness.” However, in this pivotal social movement, consumers are challenging various corporate entities to abandon or to avoid practices of cultural appropriation and commodification. To achieve this goal, it is paramount that there be representation at all levels, and that any decision making include collaboration with constituent, relevant groups to determine the impact, intent, and significance of a particular social practice.*

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**I. INTRODUCTION**

*Who you wearing? Sean John, Calvin Klein  
Donna Karan's fashion line  
Valentino, YSL  
Ferragamo and Chanel  
Holsten, Gucci, Figla, Rucci  
Don't forget my Pucci  
Fendi and Armani  
God, I miss Gianni. . .*<sup>1</sup>

Who are you wearing?

That question is asked frequently on the red carpet for the Golden Globes, the Oscars, and the Emmys. The question was first asked by Joan Rivers in 1994,<sup>2</sup> and generally elicits the name of the designer of the gown or the purveyor of the jewels worn by the actresses as they arrive at the awards venue.<sup>3</sup> However, this paper seeks to upend that question by applying it to the use of avatars, blackface and the bodily appropriation of others to interrogate the use of technology and intellectual property in maintaining the power of dominant, read white, culture.

Technology has brought us the ability not only to be connected 24/7, but also the ability to play video games, for example, at any moment of time and anywhere. Supposedly the ability to transport oneself into another world and transform oneself provides respite from an angst-ridden real

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<sup>1</sup> Jimmy James, *Fashionista* (Made Records 2006).

<sup>2</sup> See generally Erin Mayer, *What She Meant to the Red Carpet*, BUSTLE (Sept. 4, 2014), <https://www.bustle.com/articles/38636-what-joan-rivers-meant-to-the-red-carpet-she-was-the-first-person-to-not> [<https://perma.cc/5LRM-MNUD>].

<sup>3</sup> This interaction between reporters and celebrities has been criticized as shallow, and there have been efforts to get reporters to ask other questions. See, e.g., Jennifer L. Schmidt, *Blurred Lines: Federal Trade Commission's Differential Responses to Online Advertising and Face to Face Marketing*, 19 J. HIGH TECH. L. 442 (2019).

world, but that is not necessarily true, particularly if the virtual world is like the real world. Unfortunately, it appears to be the case that the same unconscious racial (and misogynistic) tropes that are present in the real world rear their ugly heads in the virtual one.

The first part of the article will examine avatars in online gaming as well as viral memes and their relationship to that of the 19<sup>th</sup> central minstrel shows. The second part continues the theme of blackface and discusses how it has continued to permeate the culture in both the appropriation and commodification of others. The last sections briefly discuss the problems in determining the difference between cultural appropriation and appreciation, and the difficulties of eradicating the “racial imaginary.”<sup>4</sup>

## II. AVATARS<sup>5</sup>

*Avatars form one of the central points at which users intersect with a technological object and embody themselves, making the virtual environment and the variety of phenomenon it fosters real.*<sup>6</sup>

In an old *New Yorker* cartoon, which depicts two dogs “talking” to each other about the internet, one dog exclaims to the other that “on the internet, nobody knows

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<sup>4</sup> See Patricia J. Williams, *Revisiting the Racial Imaginary (Again. . .)*, MADLAWPROFESSOR’S WEBLOG (Feb. 19, 2019, 6:20 PM), <https://madlawprofessor.wordpress.com/2019/02/21/revisting-the-racial-imaginary-again/> [<https://perma.cc/M5PB-NCEZ>].

<sup>5</sup> LISA NAKAMURA, CYBERTYPES: RACE, ETHNICITY, AND IDENTITY ON THE INTERNET 31 (2002) (“Avatars are the embodiment, in text and/or graphic images, of a user’s online presence in social spaces.”).

<sup>6</sup> T.L. Taylor, *Living Digitally: Embodiment in Virtual Worlds, in THE SOCIAL LIFE OF AVATARS: PRESENCE AND INTERACTION IN SHARED VIRTUAL ENVIRONMENTS* 40, 41 (Ralph Schroeder ed., 2002).

that you're a dog."<sup>7</sup> This concept applies to humans as well. The internet and video gaming open up worlds of possibilities regarding one's persona. Imagine that someone black, short, and chubby with awesome glasses could transform herself on the web into the slightly taller, willowy Angela Bassett-type she always wanted to be. Or she could become a cat. . .<sup>8</sup>

Thus, the internet allows for the reinvention of self. *But whose self?* Certainly, one might think that racial representation in video games, for example, should not matter because it is, after all, only a game.<sup>9</sup> An early prevalent conception about the internet and its gaming community was that virtual worlds would be "post-racial,"<sup>10</sup>

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<sup>7</sup> I was reminded of this cartoon when reading Lisa Nakamura's essay: Lisa Nakamura, *Race in/for Cyberspace: Identity Tourism and Racial Passing on the Internet*, 13 WORKS & DAYS 181 (1995), reprinted in MIT MEDIA LAB: SOCIABLE MEDIA GROUP, <https://smg.media.mit.edu/library/nakamura1995.html> [<https://perma.cc/SHN8-C6TA>]. For the etiology of the phrase and cartoon, see Glenn Fleishman, *Cartoon Captures Spirit of the Internet*, N.Y. TIMES, Dec. 14, 2000, at G8.

<sup>8</sup> See D. Fox Harrell & Chong-U Lim, *Reimagining the Avatar Dream: Modeling Social Identity in Digital Media*, COMMUNICATIONS OF THE ACM (July 2017), <https://cacm.acm.org/magazines/2017/7/218864-reimagining-the-avatar-dream/fulltext> [<https://perma.cc/5CZQ-52C2>] (quoting Neal Stephenson ("Your avatar can look any way you want it to, up to the limitations of your equipment. If you're ugly, you can make your avatar beautiful. If you've just gotten out of bed, your avatar can still be wearing beautiful clothes and professionally applied makeup. You can look like a gorilla or a dragon or . . ." (citation omitted))).

<sup>9</sup> See Dmitri Williams et al., *The Virtual Census: Representations of Gender, Race and Age in Video Games*, 18 NEW MEDIA & SOCIETY 815, 818–20 (2009) (enumerating the reasons why representation matters).

<sup>10</sup> Pauline Hope Cheong & Kishonna Gray, *Mediated Intercultural Dialectics: Identity Perceptions and Performances in Virtual Worlds*, 4 J. INT'L & INTERCULTURAL COMM'N 265, 266 (2011) [hereinafter *Mediated Dialectics*]; Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1206 (2000) (arguing that "[b]y designing cyberspace appropriately, we may be able to alter American racial mechanics").

and utopian sites where “people choose their own abilities, gender, and skin tone instead of having them imposed by accidents of birth.”<sup>11</sup>

Yet that optimism about the internet and its virtual worlds has not yet come to fruition. There are many articles, both scientific and in the popular press,<sup>12</sup> about the systemic racism that is present and even prevalent in the video gaming world,<sup>13</sup> and on the internet, in general.<sup>14</sup> Part of the inability to have a color-blind internet or video games is because, in spite of best efforts, the development, coding and marketing are mostly under the aegis of white cis-gender men who replicate themselves at every level.<sup>15</sup> When there is no diversity in the room, the lack of representation leads

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<sup>11</sup> David J. Gunkel & Ann Hetzel Gunkel, *Terra Nova 2.0 — The New World of MMORPGs*, 26 *CRITICAL STUD. MEDIA COMM’N* 104 (2009) (quoting Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* (2001) (unpublished manuscript) <https://ssrn.com/abstract=294828> [<https://perma.cc/Z6RB-GNLD>]).

<sup>12</sup> See generally Jennifer C. Mueller et al., *Racism and Popular Culture: Representation, Resistance, and White Racial Fantasies*, in *HANDBOOKS OF SOCIOLOGY AND SOCIAL RESEARCH* 69 (Pinar Batur and Joe R. Feagin, eds., 2018).

<sup>13</sup> See generally Jordan E. Mazurek and Kishonna L. Gray, *Visualizing Blackness — Racializing Gaming: Social inequalities in virtual Gaming Communities*, in *ROUTLEDGE INTERNATIONAL HANDBOOK OF VISUAL CRIMINOLOGY* (Michelle Brown & Eamonn Carrabine, eds., 2017).

<sup>14</sup> See Kishonna L. Gray, *Power in the Visual: Examining Narratives of Controlling Black Bodies in Contemporary Gaming*, 81 *VELVET LIGHT TRAP* 62 (2018) (commenting on the representation of Black bodies in the media); Mueller et al., *supra* note 12, at 83 (noting that “race has been built into the Internet”); RUHA BENJAMIN, *RACE AFTER TECHNOLOGY* (2019) (arguing that emerging technology is based on the “New Jim Code” which amplifies racial discrimination).

<sup>15</sup> Elizabeth Hackney, *Eliminating Racism and the Diversity Gap in the Video Game Industry*, 51 *J. MARSHALL L. REV.* 863, 868–72 (2018) (discussing the demographics in the industry).

to what one scholar calls “the presence of absence.”<sup>16</sup> That is, the underrepresentation of minority characters “functions to reinforce whiteness . . . [and] the idea of the “Other,” where “people” (whites) interact with racial minorities who are driven by aspects of their collective ‘nature.’”<sup>17</sup>

Researchers have found that there are differences in social interactions between light and dark-skinned avatars.<sup>18</sup> This could be explained by realizing that “[m]uch more is at stake than just fun and games. Prejudice, bias, stereotyping, and stigma are built not only into many games, but other forms of identity representations in social networks, virtual worlds, and more. These have real-world effects on how we see ourselves and each other.”<sup>19</sup>

Take, for example, the described performative experience of law professor Jerry Kang, who chose for his avatar an African American “skin.”<sup>20</sup> He explains that he engaged in what he termed “cyber-passing,”<sup>21</sup> not only because it afforded him an opportunity to engage in a

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<sup>16</sup> See David R. Dietrich, *Avatars of Whiteness: Racial Expression in Video Game Characters*, 83 SOCIO. INQUIRY 82, 84 (2013) [hereinafter *Avatars of Whiteness*].

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

<sup>18</sup> *Id.* at 85 (discussing the research findings of Paul Eastwick and Wendi L. Gardner that racial animus against blacks was present despite the fact that the avatars were not “real”).

<sup>19</sup> See Elisabeth Soep, *Chimerical Avatars and Other Identity Experiments from Prof. Fox Harrell*, BOINGBOING (Apr. 19, 2010) <https://boingboing.net/2010/04/19/chimerical-avatars-a.html> [<https://perma.cc/8NZX-ZHF8>]; see also David Leonard, “*Live in Your World, Play in Ours*”: *Race, Video Games, and Consuming the Other*, 3 STUD. IN MEDIA & INFO. LITERACY EDUC. 1, 2 (2003) [hereinafter, *Live in Your World*] (“[R]ace matters in video games because many of them affirm the status quo”); *Avatars of Whiteness*, *supra* note 16, at 85 (“the impact of the racialized structuring of virtual worlds. . . should not be underestimated simply because it is not ‘real.’”).

<sup>20</sup> Kang, *supra* note 10, at 1133.

<sup>21</sup> *Id.* at 1179.

“transgressive challenge to American racial mechanics,”<sup>22</sup> but would also allow him the ability “to learn something about being a Black man in American society.”<sup>23</sup> Yet, at the same time, he acknowledged the pitfalls of his performance: that, among others, it risked being stereotypical due to his consumption of the tropes that are at work in the media, and that his “audience,” in not realizing that he is not black would “reinforce [Kang’s] own stereotypes about what Blackness means.”<sup>24</sup> In fact, using avatars that conform to common racial stereotypes can intensify prejudicial attitudes.<sup>25</sup>

This is a cautionary tale because, according to Professor T.L. Taylor,

Avatars are in large part the central artifacts through which [sic] people build not only social lives, but identities. They become access points in constructing affiliations, socializing, communicating, and working through various selves. They are the material out of which people embody and make themselves real. What they are and what they can be matters.<sup>26</sup>

Yet people of color may not be able to generate avatars that resemble themselves. In general, the player of color will end up “passing” for white because the “skins” and

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<sup>22</sup> *Id.* at 1180.

<sup>23</sup> *Id.* at 1181.

<sup>24</sup> *Id.* at 1184.

<sup>25</sup> See Grace S. Yang et al., *Effects of Avatar Race in Violent Video Games on Racial Attitudes and Aggression*, 5 SOC. PSYCH. & PERSONALITY SCI. 698 (2014); Alan Neuhouser, *Study: Video Games May Reinforce Racist Stereotypes*, U.S. NEWS (Mar. 21, 2014), <https://www.usnews.com/news/articles/2014/03/20/video-games-may-reinforce-racist-stereotypes-study-finds> [<https://perma.cc/YCU3-UPWX>] (noting the effects the perceptions of race has on game developers and the belief the adherence to those perceptions have on the industry).

<sup>26</sup> Taylor, *supra* note 6, at 60.



features of the avatar are just darkened <sup>27</sup> — a virtual blackface, if you will.<sup>28</sup>

### III. BLACKFACE

*Consider the advantages of invisibility. You can do mischief—more than mischief, real harm—and avoid responsibility. If others cannot see you acting, they cannot identify you. . . . Disguise, thus, is invisibility on the cheap. One ceases to be recognizable and suspends personal responsibility without the difficulty and drawbacks of being incorporeal.*<sup>29</sup>

The beginnings of blackface are rooted in the 1800s when white actors blacked their faces to (re)present their take on African-American minority life.<sup>30</sup> According to historian Eric Lott, “[t]he minstrel show was, on the one hand, a socially approved context of institutional control; and, on the other, it continually acknowledged and absorbed black culture even while defending white America against it.”<sup>31</sup> Although one could argue that minstrelsy has, at least

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<sup>27</sup> See *Avatars of Whiteness*, *supra* note 16, at 88–90 (reporting that a survey of games from 2000–2010 showed that in very few would there be a possibility to have a skin tone that was darker than tan). I will not even discuss the problems of generating hair color, hair styles or facial features.

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

<sup>29</sup> THOMAS MORAWETZ, MAKING FACES PLAYING GOD: IDENTITY AND THE ART OF TRANSFORMATIONAL MAKEUP 117–18 (2001). Although not written about blackface, *per se*, but about masks and makeup in Hollywood, I believe that Professor Morawetz is correct that disguise and anonymity provide cover for actions one might not take if unmasked.

<sup>30</sup> See generally MICHAEL D. HARRIS, COLORED PICTURES: RACE AND VISUAL REPRESENTATION 51–56 (2003) (discussing the history of blackface minstrelsy in the United States).

<sup>31</sup> ERIC LOTT, LOVE AND THEFT: BLACKFACE MINSTRELSY AND THE AMERICAN WORKING CLASS 41 (1993).

in its 19<sup>th</sup>-century form, disappeared, the use of blackface has not diminished over time.<sup>32</sup>

Certainly, this has been borne out with the recent spate of elected officials shown in deeply disturbing photographs.<sup>33</sup> Also, as posited by the epigraph above, personal responsibility is abrogated. The excuses that one is or is not the person pictured,<sup>34</sup> or that it was done in fun,<sup>35</sup> ring hollow.

Politicians, though, are not the only bad actors.<sup>36</sup> Think of the various movies and television shows in the

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<sup>32</sup> Actually, blackface never left. See generally Bim Adewunmi, *Blackface Hasn't Just Returned — It Never Left*, BUZZFEED NEWS (Feb. 15, 2019), <https://www.buzzfeednews.com/article/bimadewunmi/blackface-ralph-northam-gucci-black-history-month> [https://perma.cc/X7R6-BXS9]; Hafsa Quraishi, *Blackface Didn't End In The 1980s*, NPR (Feb. 13, 2019), <https://www.npr.org/2019/02/13/692517756/blackface-didnt-end-in-the-1980s> [https://perma.cc/FR3Y-DJMK].

<sup>33</sup> See generally Lauren Hard and Margaret Kramer, *When Blackface Photos Cause Political Storms*, N.Y. TIMES (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/us/politicians-blackface.html> [https://perma.cc/64RS-JZ7P].

<sup>34</sup> When confronted about a picture in his medical school yearbook, Virginia Governor Northam, in the space of 24 hours, admitted being the person in blackface and then denied any knowledge of that picture. He did, however, allow, that at some point he had donned black shoe polish. See Alan Blinder, *Was That Ralph Northam in Blackface? An Inquiry Ends Without Answers*, N.Y. TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/us/ralph-northam-blackface-photo.html> [https://perma.cc/P2ZD-5VFU].

<sup>35</sup> Nichelle Smith, *Ralph Northam Was Far From Alone: Why Blackface Keeps Coming Up*, USA TODAY (Feb. 6, 2019), <https://www.usatoday.com/story/news/investigations/2019/02/06/blackface-first-ralph-northam-now-mark-herring-why-so-prevalent/2792247002/> [https://perma.cc/C6FG-MVFJ] (discussing Governor Northam, the history and persistence of blackface and the argument that those who participate in wearing blackface are “just having fun imitating black people, especially the celebrities they love”).

<sup>36</sup> The list of entertainers who have performed in blackface is staggering. See *List of Entertainers Who Performed in Blackface*, WIKIPEDIA (Feb.

recent past that employed blackface — *Bamboozled*, *30 Rock*, *The Office* and *Mad Men*, to name a few.<sup>37</sup> While it could be argued that the use of blackface in these shows was satirical or in the service of providing historical context or to provoke a discussion of racism,<sup>38</sup> it is still the case that its use highlights and exaggerates differences.<sup>39</sup>

Another striking example of blackface portrayal, also known as blackfishing<sup>40</sup> or reverse passing,<sup>41</sup> is provided in

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18, 2021), [https://en.wikipedia.org/wiki/List\\_of\\_entertainers\\_who\\_performed\\_in\\_blackface](https://en.wikipedia.org/wiki/List_of_entertainers_who_performed_in_blackface) [<https://perma.cc/T3KD-7REH>].

<sup>37</sup> See Aisha Harris, *A Brief Guide to 21st-Century Blackface*, N.Y. TIMES (Sept. 25, 2020) [hereinafter *A Brief Guide*], <https://www.nytimes.com/interactive/2020/09/25/opinion/blackface-tv-movies-race.html> [<https://perma.cc/D6N2-J3NR>].

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* While it is not within the scope of this paper to discuss the same denigrating uses of yellowface or redface, I want to acknowledge that these also are “the fruit of the same poisonous tree — namely, white supremacy.” See Erik Brady, *Redface, Like Blackface, Is a Sin of White Supremacy*, THE UNDEFEATED (Feb. 25, 2019), <https://theundefeated.com/features/redface-like-blackface-is-a-sin-of-white-supremacy/> [<https://perma.cc/V9GV-MWPV>].

<sup>40</sup> “Blackfishing” is the term used when “non-Black folks ‘fish’ for features that make them appear Black, mixed-race or racially ambiguous, like altering skin tone, hairstyle or facial and body modification that they profit from or are celebrated for when the culture they’re stealing from has been historically punished for those exact things.” Chelsea Candelario, *What Is Blackfishing? The Controversial Beauty Trend You \*Don’t\* Want to Get Behind*, PURE WOW (July 24, 2020), <https://www.purewow.com/wellness/what-is-blackfishing> [<https://perma.cc/ZB8G-Q997>]. It has also been termed the “new blackface.” See Amber Borden, *Blackfishing is the New Blackface*, THE TORCH (Dec. 5, 2018), <https://www.torchonline.com/opinion/2018/12/05/blackfishing-is-the-new-blackface/> [<https://perma.cc/GXW5-XLNX>].

<sup>41</sup> The term “reverse passing” was first coined and analyzed by Khaled A. Beydoun and Erika K. Wilson. See Khaled A. Beydoun and Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 282 (2017) (in which the authors use the example of Rachel Dolezal to illustrate their examination of “reverse passing—the process in which whites conceal their true racial identity and present themselves as nonwhite”).

the person of Rachel Dolezal,<sup>42</sup> who, according to one commentator, used blackface to “experience blackness, avoid white responsibility, and co-opt blackness to authenticate herself and her work.”<sup>43</sup> Similarly, and more recently, Jessica Krug, a former professor at George Washington University, was forced to admit that for her entire professional career she had claimed to be a black Caribbean woman, when, in reality, she is white and Jewish.<sup>44</sup>

Their reasons for doing so are not entirely clear — Krug claimed that it stemmed from severe trauma in her early life,<sup>45</sup> while Dolezal has asserted multiple rationales, including growing up with adopted Black siblings.<sup>46</sup> However what is clear is that this is another exemplar of white privilege — that is, being able to appropriate features or a culture that is not one’s own, and then discard it when it no longer serves its purpose.<sup>47</sup>

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<sup>42</sup> *Id.* at 284–88 (discussing Rachel Dolezal’s passage from “white” to “black”).

<sup>43</sup> Naomi W. Nishi, Cheryl E. Matias & Roberto Montoya, *Exposing the White Avatar: Projections, Justifications, and the Ever-Evolving American Racism*, 21 SOC. IDENTITIES 459, 459 (2015).

<sup>44</sup> See Jessica A Krug, *The Truth, and the Anti-Black Violence of My Lies*, MEDIUM (Sept. 3, 2020), <https://medium.com/@jessakrug> [<https://perma.cc/4K8J-953Z>].

<sup>45</sup> *Id.*

<sup>46</sup> See Jessica Krug: The Psychodrama of Appropriation, WORD OF MOUTH OPINION (Sept. 4, 2020), <https://wordofmouthopinion.wordpress.com/2020/09/04/jessica-krug-the-psychodrama-of-appropriation/> [<https://perma.cc/64GV-4Y27>].

<sup>47</sup> See Taylyn Washington-Harmon, *What Is Blackfishing and Why Would Anyone Do It?*, MSN (Aug. 17, 2020), <https://www.msn.com/en-us/health/wellness/what-is-blackfishing-and-why-would-anyone-do-it/ar-BB184pVO> [<https://perma.cc/3W8P-MQGD>] (discussing the rationales for “blackfishing” and its base in privilege); *What Is ‘Blackfishing’? How Some Influencers Can Insinuate They Are Black When They Aren’t*, INSIDE EDITION (Dec. 4, 2018), <https://www.insideedition.com/what-blackfishing-how-some->

A. *Digital Blackface*

*Wearing a mask has long been part of the social internet. The web has operated like a Party City costume shop since dotcom-era chat rooms made cool the idea of inhabiting made-up identities and hiding behind usernames. These personas could be intensely liberating, allowing people to explore hidden ideas or sexualities, or simply enjoy a carnivalesque permissiveness to say or do something outrageous. It's all just a joke. For clout. For show.*

*But the mask of Blackness cannot be worn without consequences. It can't be worn as a joke without reaching into some deep cultural and historical ugliness, without opening a wound of abuse and humiliation.<sup>48</sup>*

Consider the internet trend known as “digital blackface.”<sup>49</sup> According to Professor Lauren Jackson, “[d]igital blackface uses the relative anonymity of online identity to embody blackness,”<sup>50</sup> and is an updated version of blackface.<sup>51</sup>

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influencers-can-insinuate-they-are-black-when-they-arent-48928  
[<https://perma.cc/LKJ9-MR75>].

<sup>48</sup> Jason Parha, *TikTok and the Evolution of Digital Blackface*, WIRED (Aug. 4, 2020, 06:00 AM), <https://www.wired.com/story/tiktok-evolution-digital-blackface/> [<https://perma.cc/Q6BC-Z6PN>].

<sup>49</sup> The term “digital blackface” describes “the act of producing, posting or circulating ‘black reaction gifs’ online and especially on social media threads.” See Aaron Nyerges, *Explainer: What Is ‘Digital Blackface’?*, UNITED STATES STUDIES CENTRE (Aug. 23, 2018), <https://www.ussc.edu.au/analysis/what-is-digital-blackface> [<https://perma.cc/J7MQ-BR3C>].

<sup>50</sup> Lauren Michele Jackson, *We Need to Talk About Digital Blackface in Reaction GIFs*, TEEN VOGUE (Aug. 2, 2017), <https://www.teenvogue.com/story/digital-blackface-reaction-gifs> [<https://perma.cc/5V5N-F3UP>].

<sup>51</sup> See Shermarie Hyppolite, *Face It, Digital Blackface Is A Huge Issue on Tik Tok*, AFFINITY (Nov. 22, 2019),

As we all know, images and memes often go viral on the internet but those containing black people are more prone to circulate widely.<sup>52</sup> Professor Jackson noted that “black people and black images are thus relied upon to perform a huge amount of emotional labor online on behalf of nonblack users.”<sup>53</sup> As a result, she commented, “[w]e are your sass, your nonchalance, your fury, your delight, your annoyance, your happy dance, your diva, your shade, your ‘yass’ moments.”<sup>54</sup>

The problem with digital blackface is that it becomes just “another way Black bodies are consumed by non-Black people in a harmful and stereotype-forming manner.”<sup>55</sup> Many who write about digital blackface reflect on the harm that it does—that it “helps reinforce an insidious dehumanization of Black people by adding a visual component to the concept of the single story.”<sup>56</sup> According to the author Chimamanda Ngozi Adichie, “the single story creates stereotypes, and the problem with stereotypes is not that they are untrue, but that they are incomplete. They make

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<http://culture.affinitymagazine.us/face-it-digital-blackface-is-a-huge-issue-on-tik-tok/> [<https://perma.cc/7Z3F-8DF7>].

<sup>52</sup> Amanda Hess & Shane O’Neill, *The White Internet’s Love Affair with Digital Blackface*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/video/arts/100000005615988/the-white-internets-love-affair-with-digital-blackface.html> [<https://perma.cc/DZ9Q-8C93>]

<sup>53</sup> Jackson, *supra* note 50.

<sup>54</sup> *Id.*

<sup>55</sup> See Naomi Day, *Reaction GIFs of Black People Are More Problematic Than You Think*, MEDIUM (Jan. 3, 2020), <https://onezero.medium.com/stop-sending-reaction-gifs-of-black-people-if-youre-not-black-b1b200244924> [<https://perma.cc/28UY-EKKX>].

<sup>56</sup> See *id.*; Madeline Howard, *What Is Digital Blackface? Experts Explain Why the Social Media Practice Is Problematic*, WOMEN’S HEALTH (July 20, 2020), <https://www.womenshealthmag.com/life/a33278412/digital-blackface/> [<https://perma.cc/79BA-F6FD>] (discussing the problems inherent in utilizing digital blackface).

one story become the only story.”<sup>57</sup> This certainly becomes true when the only experience of the “other” is through the lens of a gaze that “fixes” its subject, and “cut[s] sections of [that person’s] reality”<sup>58</sup>.

The manifestation of blackface on the internet is not solely found in its use as digital GIFs or as avatars in virtual worlds, but also in the performative aspects of digital gaming, which allows the player “to try on the other”<sup>59</sup> — just as one might put on clothing in a retail store.<sup>60</sup>

## **B. Video Games**

*Video games, like any form of media, tell stories.*<sup>61</sup>

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<sup>57</sup> Chimamanda Ngozi Adichie, *The Danger of a Single Story*, TED (July, 2009), [https://www.ted.com/talks/chimamanda\\_ngozi\\_adichie\\_the\\_danger\\_of\\_a\\_single\\_story](https://www.ted.com/talks/chimamanda_ngozi_adichie_the_danger_of_a_single_story) [<https://perma.cc/53J4-8R8X>]; see Day, *supra* note 55 (discussing Chimamanda Ngozi Adichie’s TED talk on the single story); K. L. Gray, *Deviant Bodies, Stigmatized Identities, and Racist Acts: Examining the Experiences of African-American Gamers in Xbox Live*, 18 NEW REV. HYPERMEDIA & MULTIMEDIA 261, 263 (2012) [hereinafter *Deviant Bodies*] (noting “this narrow account is the only one visible situating them as the only possible narrative”).

<sup>58</sup> See generally Nishi et al., *supra* note 43, at 461 (citing FRANZ FANON, *BLACK SKIN, WHITE MASKS* 95 (Grove Press 2008)).

<sup>59</sup> David J. Leonard, *High Tech Blackface — Race, Sports Video Games and Becoming the Other*, 4 INTELLIGENT AGENT 1,1 (2004), [http://intelligentagent.com/archive/Vol4\\_No4\\_gaming\\_leonard.htm](http://intelligentagent.com/archive/Vol4_No4_gaming_leonard.htm) [<https://perma.cc/T5QB-3RE9>] (citing MICHAEL ROGIN, *BLACKFACE, WHITE NOISE: JEWISH IMMIGRANTS IN THE AMERICAN MELTING POT* 35 (1998)).

<sup>60</sup> Susana Morris, *Black Bodies at Play: An Essay*, PLAYTIME (Jan. 2018), <http://playtime.pem.org/?p=1523/> [<https://perma.cc/9CHZ-FDRK>].

<sup>61</sup> See M. C. R. Burgess et al., *Playing with Prejudice: The Prevalence and Consequences of Racial Stereotype in Video Games*, 14 MEDIA PSYCH. 289, 308 (2011).

What are the stories that video games tell?<sup>62</sup> If one looks at the genre of “urban” games, then one might decide that it is nothing more than a “pixelated minstrel show”.<sup>63</sup> A relevant example may be drawn from the video game *Grand Theft Auto* (GTA) — one of the most successful franchises in the video gaming industry.<sup>64</sup> Known for its fidelity in replication of fictional cities based on real locales,<sup>65</sup> it is the game’s verisimilitude of urban areas that entices players.<sup>66</sup> Yet its portrayal of urban life is “premised on notions of difference that, ultimately, reproduce rather than contest racial hierarchies.”<sup>67</sup>

Unfortunately, lack of representation in the rooms where decisions about the games are made also leads to gamers playing within the confines of stereotypical tropes attached to bodies of color; such as athletes, thugs or

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<sup>62</sup> *Id.* (finding “the stories told about minorities in [video] games . . . are largely told by underrepresentation and overreliance on stereotypes”).

<sup>63</sup> Michel Marriot, *The Color of Mayhem in a Wave of Urban Gamer*, N.Y. TIMES, Aug. 12, 2004, at G1.

<sup>64</sup> Adam Ezomo, *Call of Duty, FIFA, Grand Theft Auto: What Game Made the Most Money in 2020?*, GIVEMESPORT (Jan. 7, 2021), <https://www.givemesport.com/1635768-call-of-duty-fifa-grand-theft-auto-what-game-made-the-most-money-in-2020>

[<https://perma.cc/657U-GYUW>] (Ezomo reported that Grand Theft Auto 5 came in third with earnings of \$911 million in 2020).

<sup>65</sup> See *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008) (where plaintiff, the owner of a strip club, sued Rock Star Videos, the maker and distributor of GTA games, for trademark infringement claiming that GTA impermissibly used a trademark and trade dress similar to that of the strip club).

<sup>66</sup> See Anna Everett & S. Craig Watkins, *The Power of Play: The Portrayal and Performance of Race in Video Games*, in *THE ECOLOGY OF GAMES: CONNECTING YOUTH, GAMES, AND LEARNING* 141, 144–46 (Katie Salen ed., 2008) [hereinafter *Power of Play*] (arguing that the authenticity of the representation of urban life as depicted in games like GTA is an effective means of transmitting uncontested ideas about race and culture).

<sup>67</sup> *Id.* at 147.



prostitutes.<sup>68</sup> For example, the GTA series of games is frequently criticized for its stereotypical portrayals,<sup>69</sup> as well as its violence and misogyny.<sup>70</sup> The game invites the player to step into urban gangster culture, completing missions, generally of a criminal nature, as a means of advancing in the game.<sup>71</sup> As a result, the player has “the opportunity to interact with and *perform* fantasy-driven notions of black masculinity”;<sup>72</sup> that is, encounter or “be” the stereotypical black male who is either athletic or thuggish.<sup>73</sup>

Adam Clayton Powell III referred to such stereotyping as “high-tech blackface”,<sup>74</sup> observing that “[a]ny game has a certain stereotype, negative or positive, but a computer game is going to pass that message along

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<sup>68</sup> See *Deviant Bodies*, *supra* note 57, at 262 (citing *Live in Your World*, *supra* note 19 (noting that researchers found that “80% of all African-American characters are depicted as athletic competitors in sports-oriented games and are much more likely to display aggressive behaviors such as trash talking and pushing than their white counterparts”)).

<sup>69</sup> Michael Klappenbach, *Grand Theft Auto Series Most Controversial Moments*, LIFEWIRE (Apr. 19, 2019), <https://www.lifewire.com/gta-series-most-controversial-moments-812433> [<https://perma.cc/KH44-M79T>].

<sup>70</sup> See Burgess et al., *supra* note 61, at 291 (where it is explained that the original GTA: Vice City, as explained by Reuters and CNN.com, urged players to “Kill the Haitians!” and also to “Kill the Cubans!” — this enraged representatives and activists from both of those communities). See also Dylan Dembrow, *15 Times Grand Theft Auto Games Went Way Too Far*, SCREENRANT (Mar. 22, 2018), <https://screenrant.com/grand-theft-auto-vide-game-controversies/> [<https://perma.cc/CGX6-K5QM>].

<sup>71</sup> Elizabeth Hackney, *Eliminating Racism and the Diversity Gap in the Video Game Industry*, 51 J. MARSHALL L. REV. 863, 882 (2018).

<sup>72</sup> *Power of Play*, *supra* note 66, at 149 (emphasis added).

<sup>73</sup> Nishi et al., *supra* note 43, at 467–68.

<sup>74</sup> The term “High tech Blackface” was coined by Adam Clayton Powell III to refer to stereotypical portrayals of black characters in video games. See Michel Marriott, *Blood, Gore, Sex and Now: Race*, N.Y. TIMES (Oct. 21, 1999), <https://www.nytimes.com/1999/10/21/technology/blood-gore-sex-and-now-race.html> [<https://perma.cc/9GG5-YT9A>].

pretty powerfully.”<sup>75</sup> In fact, studies have shown that “the depiction of racial representations within a video game may negatively impact individuals” who are playing the game.<sup>76</sup> Researchers posit that the “imagery that associates African-American men with the negative stereotypes of aggression, hostility, and criminality conditions viewers to associate this constellation of negativity with African-American men in general.”<sup>77</sup>

Again, this may be because “users don’t just consume images of race when they play video games. . . they perform them.”<sup>78</sup> However, in general, people of color do not have equal access to accurate self-representation, since many, if not most, characters that one can choose in a game are, by default, white.<sup>79</sup> As explained, quite starkly, by one commentator, “Black players don’t get to look like themselves in video games.”<sup>80</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> Vincent Cicchirillo & Osei Appiah, *The Impact of Racial Representations in Video Game Contexts: Identification with Gaming Characters*, 26 NEW MEDIA & MASS COMM’N 14, 16 (2014); *Mediated Dialectics*, *supra* note 10, at 268 (remarking that “imagery in virtual worlds reinforces certain cultural stereotypes which further deepens extant prejudices toward marginal and minority populations”).

<sup>77</sup> Burgess, *supra* note 61, at 292–93.

<sup>78</sup> Lisa Nakamura & Peter Chow-White, *Introduction—Race and Digital Technology: Code, the Color Line, and the Information Society*, in RACE AFTER THE INTERNET 8 (2011); Everett, *supra* note 66, at 148 (noting that urban/street gaming “establish dynamic environments for performing race and gender”).

<sup>79</sup> Cale J. Passmore, Max V. Birk & Regan L. Mandryk, *The Privilege of Immersion: Racial and Ethnic Experiences, Perceptions, and Beliefs in Digital Gaming*, CHI 2018: CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS (2018) [hereinafter *Privilege of Immersion*] (noting that “white avatars remain the ‘default’ option . . . players of color who wish to self-represent settl[e] for options that are ‘skin deep’” (citations omitted)).

<sup>80</sup> Xavier Harding, *Black Character Creator Options in Video Games Still Have a Long Way to Go*, MIC (May 4, 2017), <https://mic.com/articles/176085/black-character-creator-options-in->

In fact, a recent article found that the representation of racially and ethnically diverse characters in video games is worsening instead of improving.<sup>81</sup> Unsurprisingly, this mirrors the underrepresentation of people of color employed by game companies.<sup>82</sup> One possible reason that games are not populated with people of color acting in non-stereotypical ways is due to the industry's awareness that their games will still sell if, as one commentator noted, "the gameplay is good."<sup>83</sup>

### **C. *Commodification and Appropriation of the Other***

*The commodification of Otherness has been so successful because it is offered as a new delight, more intense, more satisfying than normal ways of doing and feeling. Within commodity culture, ethnicity becomes spice, seasoning that can liven up the dull dish that is mainstream white culture.*<sup>84</sup>

Who is this "other?" "The Other" is a way of distinguishing between "us" and them."<sup>85</sup> It is a construct,

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video-games-still-have-a-long-way-to-go#.E02xL0GFg  
[<https://perma.cc/4MXD-5SCG>].

<sup>81</sup> *Privilege of Immersion*, *supra* note 79, at 383.

<sup>82</sup> *Id.*

<sup>83</sup> Evan Narcisse, *Come On, Video Games, Let's See Some Black People I'm Not Embarrassed By*, KOTAKU (Mar. 29, 2012, 5:00 PM), <http://kotaku.com/5897227/come-on-video-games-lets-see-some-black-people-im-not-embarrassed-by> [<https://perma.cc/M5Z5-3RDS>] ("They haven't had to worry about [pushing culture forward] at this point, because they're still going to sell a ton of games if the basic gameplay is good.").

<sup>84</sup> bell hooks, *BLACK LOOKS: RACE AND REPRESENTATION* 21 (1992).

<sup>85</sup> Stephen Harold Riggins, *The Rhetoric of Othering*, in *THE LANGUAGE AND POLITICS OF EXCLUSION: OTHERS IN DISCOURSE* 3–10 (Stephen Harold Riggins, ed., 1997) (describing the concept of "the other"); MICHAEL PICKERING, *STEREOTYPING: THE POLITICS OF*

much like its conjoined twin, the stereotype, used to fix in place those designated as “different.”<sup>86</sup> The stereotype “attempts to establish an attributed characteristic as natural and given in ways inseparable from the relations of power and domination through which it operates.”<sup>87</sup> Together, “[t]he stereotype of the other is used to control the ambivalent and to create boundaries.”<sup>88</sup> When one adds the concept of representation which, through signs and symbols, provides “ways of describing and . . . thinking about [social] groups and categories,”<sup>89</sup> one can begin to see how the commodification of the other is the next logical step in keeping the *status quo*. And what better way to do that than by employing trademark law?<sup>90</sup>

Trademarks, which have expressive and communicative functions,<sup>91</sup> are a perfect vehicle for the

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REPRESENTATION 71–73 (2001) [hereinafter STEREOTYPING] (describing the concept of “the other”).

<sup>86</sup> STEREOTYPING, *supra* note 85, at 73.

<sup>87</sup> *Id.* at 5.

<sup>88</sup> *Id.* at 47 (quoting ELISABETH BRONFEN, *OVER HER DEAD BODY: DEATH, FEMININITY AND THE AESTHETIC* 182 (1992)).

<sup>89</sup> *Id.* at xiii.

<sup>90</sup> See *id.*; K.J. Greene, *Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship*, 58 SYRACUSE L. REV. 431, 444 (2008) (noting that “[t]rademarks historically played a central role in perpetuating racial subordination . . .”); Anjali Vats, *Marking Disidentification: Race, Corporeality, and Resistance in Trademark Law*, 81 S. COMM’M J. 237, 237 (2016) (arguing that “trademarks have shaped and continue to shape racial orders in significant ways. They are a visual means through which whiteness is centered, hierarchies of race are normalized, and racial identities circulate as hypervisible/unseen parts of the cultural landscape”).

<sup>91</sup> See generally Rita Heimes, *Trademarks, Identity, and Justice*, 11 J. MARSHALL REV. INTELL. PROP. L. 133, 137 (2011) (suggesting that “[trademarks] are symbols—if not drivers—of the age of consumption in which we live.”); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L. J. 1717 (1999); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 397–98 (1990);

commodification of the other. They are imbued with a symbolism that affects not only how the products are viewed,<sup>92</sup> but also affect the perceptions of and about the consumer who purchases the branded goods or services.<sup>93</sup> The usage of ethnicity to embody brand mascots and the use of degrading images on products helped to enforce and reinforce feelings of dominance — both moral and

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Giulio Ernesto Yaquinto, Note, *The Social Significance of Modern Trademarks: Authorizing the Appropriation of Marks as Source Identifiers for Expressive Works*, 95 TEX. L. REV. 739, 744 (2017) (“People rely on them [trademarks] constantly, not only for commercial purposes when it comes to differentiating between goods, but also for communicative purposes when it is easier to convey an idea embodied in a trademark by simply invoking the mark.”); Katia Assaf, *Brand Fetishism*, 43 CONN. L. REV. 83, 89 (2010) (where author posits that “some trademarks serve as social tools of interpersonal communication, and at times are even used to satisfy spiritual needs of the consumers”); Malla Pollack, *Your Image is My Image: When Advertising Dedicates Trademarks to the Public Domain—With an Example from the Trademark Counterfeiting Act of 1984*, 14 CARDOZO L. REV. 1391, 1393 (1993) (“Trademarks may become communicative symbols standing for something besides the source or sponsorship of the product in whose service they originated.”).

<sup>92</sup> Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L. J. 1, 6 (1999) (noting that “a trademark is a creature of symbolic language”); Dustin Marlan, *Visual Metaphor and Trademark Distinctiveness*, 93 WASH. L. REV. 767, 789 (2018) (describing a trademark as “a symbol”).

<sup>93</sup> Two judges, separated by about 50 years, noted the psychological power of trademarks: Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 974 (1993) (noting that “our vision of the world and of ourselves is shaped by the words we use and by the images that fill our fantasies. The words and images of trade are an important part of this panorama.”) and Felix Frankfurter in his opinion, *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942) (where he pronounced, “*The protection of trade-marks is the law’s recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them*” (emphasis added)).

intellectual — held by those in power.<sup>94</sup> By the same token, it also ensured that those depicted remained “the other.”<sup>95</sup>

I have argued elsewhere,<sup>96</sup> as have others, that trademarks provide a window on our society.<sup>97</sup> Take, for example, Aunt Jemima.<sup>98</sup> Derived from the minstrel show,

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<sup>94</sup> See DAVID SPURR, *THE RHETORIC OF EMPIRE: COLONIAL DISCOURSE IN JOURNALISM, TRAVEL WRITING, AND IMPERIAL ADMINISTRATION* 110 (1993) (“The primary affirmation of colonial discourse is one which justifies the authority of those in control of the discourse through demonstrations of moral superiority.”).

<sup>95</sup> Rosemary J. Coombe, *Embodied Trademarks: Mimesis and Alterity on American Commercial Frontiers*, 11 *CULT. ANTHRO.* 202, 210 (1996) (noting “In their visual consumption of imagery and their bodily consumption of goods, Americans envisioned and incorporated the same signs of otherness that the national body politic was simultaneously surveilling. . .”); Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 *ARIZ. ST. L. J.* 615, 652 (2000) (discussing theorists’ arguments that Black media stereotypes “perpetuate and legitimate a culture in which serious inequalities in class, race, and gender exist.” (citation omitted)).

<sup>96</sup> Willajeanne F. McLean, (Re)presentations of Race and Culture in Trademarks of the European Union and the United States, (unpublished manuscript) (on file with the author).

<sup>97</sup> See generally Sonia K. Katyal, *Trademark Intersectionality*, 57 *UCLA L. REV.* 1601, 1606 (2010) (noting that “[s]ince trademarks inhabit a multiplicity of meanings, they can operate as devices of owned property, and at other times, they can also operate as devices of expression and culture.”); Coombe, *supra* note 95, at 167 (discussing “the central role of trademarks in what we might call the visual culture of the nation”); MALTE HINRICHSSEN, *RACIST TRADEMARKS: SLAVERY, ORIENT, COLONIALISM AND COMMODITY CULTURE* 102 (2013) (commenting that “the study of trademark stereotypes can shed light on historical conditions and contemporary realities of racial exclusion”).

<sup>98</sup> There are other examples just as problematic including, *inter alia*, “Uncle Ben,” who “personified” rice for decades and is depicted as happy and servile. See K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 *AM. U. J. GENDER. SOC. POL’Y & L.* 365, 375 (2008) (characterizing Uncle Ben as “comforting, non-threatening, de-sexualized, and there to serve whites”). Also, there is United Fruit Company’s use of race and gender (in the form of a racialized and sexualized banana and, later, woman) to define

Aunt Jemima had “her” beginning, in the late 1800’s during the Jim Crow era,<sup>99</sup> as a “white man” in drag and blackface.<sup>100</sup> The ads used to represent the product (and brand mascot) were steeped in the prevailing stereotypes of the day.<sup>101</sup> Despite successive updates of the image of AUNT JEMIMA, reflecting the changing culture,<sup>102</sup> it was not until the catalyzing events of the summer of 2020 that Quaker Oats decided to retire the logo and, eventually, the brand name.<sup>103</sup>

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the features of its Chiquita Banana. See Maria Iqbal, *Bodies, Brands, and Bananas: Gender and Race in the Marketing of Chiquita Bananas*, 4 PRANDIUM J. HIST. STUD. 2 (2015), <http://jps.library.utoronto.ca/index.php/prandium/article/view/25691> [https://perma.cc/HE8Y-QHLV].

<sup>99</sup> The earliest live trademark on record for AUNT JEMIMA bears a registration date of 1906, with the first use of the mark claimed in 1889. The description of the mark reads as follows: “THE TRADE-MARK CONSISTS OF THE REPRESENTATION OF THE HEAD OF A NEGRESS AND THE WORDS ‘AUNT JEMIMA’ ASSOCIATED THEREWITH.” See AUNT JEMIMA, Registration No. 51,056.; See *infra* Figure 1 for the trademark registered in 1890.

<sup>100</sup> Malte Hinrichsen, *Racist Trademarks and the Persistence of Commodity Racism in Europe and the United States*, in DIVERSITY IN INTELL. PROP.: IDENTITIES, INTERESTS, AND INTERSECTIONS 130, 134–35 (Irene Calboli & Srividhya Ragavan eds., 2015).

<sup>101</sup> See *infra* Figure 2 for an example of the vernacular attributed to “Aunt Jemima.”

<sup>102</sup> For example, Aunt Jemima in 1990 traded in her headscarf for pearl earrings and a lace collar. The trademark prosecution history shows the attorney of record seeking to amend the depiction of Aunt Jemima, arguing that “the elimination of the *old-fashioned and unpopular* bandana and the addition of earrings” were “non-essential to the mark,” and left “*the wholesome, motherly face*” unchanged. See AUNT JEMIMA *supra* note 99 (Paper Correspondence Incoming of AUNT JEMIMA trademark file). Elsewhere, “Aunt Jemima” is described as a “working grandmother.” See M. M. MANRING, SLAVE IN A BOX: THE STRANGE CAREER OF AUNT JEMIMA 177 (Edward L. Ayers, ed. 1998).

<sup>103</sup> The murder of George Floyd created a groundswell of public outrage, prompting changes in the usages of racially insensitive and offensive marks. Quaker Oats announced that it would retire AUNT JEMIMA,

Unfortunately, there are already entrepreneurs who have submitted intent to use applications for food items using the very same trademarks, AUNT JEMIMA, ESKIMO PIE and UNCLE BEN’S- whose demise social activists were celebrating just a few short months ago.<sup>104</sup> The endurance and perpetuation of these stereotypes as brand signifiers and objects of commodification give salience to the observation by sociologist Howard Winant that “the quandary of race . . . stubbornly refuses to disappear.”<sup>105</sup> The same can be said of stereotypes<sup>106</sup> and blackface.

#### D. *Blackface as Fashion*

*Blackface is, in essence, a kind of fashion—one rooted in the dark, arrogant insecurity of white supremacy, one inspired by this country’s original sin—that keeps evolving year after year until each iteration is just a little bit different from the previous one. But they are all of a piece. Blackface isn’t a fad or a one-off. It’s a classic that’s embedded in the cultural vocabulary. Reimagined, modernized, stylized.*<sup>107</sup>

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followed by other brands promising to review their marks. See generally Tiffany Hsu, *Aunt Jemima Brand to Change Name and Image Over ‘Racial Stereotype’*, N.Y. TIMES, (June 17, 2020), <https://www.nytimes.com/2020/06/17/business/media/aunt-jemima-racial-stereotype.html> [https://perma.cc/RKM8-C59V].

<sup>104</sup> See Beth Kowitt, *Inside the Cottage Industry Trying To Revive Aunt Jemima and Other Brands With Racist Roots*, FORTUNE, Dec. 8, 2020, <https://fortune.com/2020/12/08/aunt-jemima-uncle-bens-eskimo-pie-brands-racist-roots-revived-black-lives-matter-movement-trademarks> [https://perma.cc/9VRX-PJNG].

<sup>105</sup> Howard Winant, *The Dark Side of the Force: One Hundred Years of the Sociology of Race*, in *SOCIOLOGY IN AMERICA: A HISTORY* 535, 571 (Craig Calhoun, ed., 2007).

<sup>106</sup> STEREOTYPING, *supra* note 85, at pmb1. (noting that “[s]tereotyping is a problem that refuses to go away”).

<sup>107</sup> Robin Givhan, *Blackface is White Supremacy as Fashion—and It’s Always Been in Season*, WASHINGTON POST (Feb. 7, 2019), <https://www.washingtonpost.com/lifestyle/blackface-is-white->



## Who Are You Wearing? Avatars, Blackface and Commodification of the Other 479

*For better or worse, fashion is an extension of culture. Which means the ills of a culture will inevitably appear in its fashion.*<sup>108</sup>

The fashion industry has long been accused of cultural misappropriation and commodification.<sup>109</sup> However, the issue came to a head in 2019, when there were several fashion *faux pas*,<sup>110</sup> which resulted in scathing critiques of the fashion industry and the influencers who don the clothes and sometimes design them.<sup>111</sup> Particularly

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supremacy-as-fashion--and-its-always-been-in-season/2019/02/07/fdb60c06-2b1e-11e9-b2fc-721718903bfc\_story.html?utm\_term=.f075fb919fa0 [https://perma.cc/EW79-82WW].

<sup>108</sup> Emilia Petrarca, *Is Fashion Finally Ready to Face Its Blackface Problem?*, THE CUT (Feb. 12, 2019), <https://www.thecut.com/2019/02/fashion-brands-blackface-problem.html> [https://perma.cc/R9R3-FZKM].

<sup>109</sup> See J. Janewa Osei-Tutu, *Cultural IP vs. Commercial IP*, 12 LANDSLIDE 18, 19 (2020); Brigitte Vézina, *Curbing Cultural Appropriation in the Fashion Industry with Intellectual Property*, 4 WIPO MAG. 9 (2019); Maeve McDermott, *Blackface and Beyond: Fashion Brands' Most Controversial Designs*, USA TODAY (Feb. 22, 2019), <https://www.usatoday.com/story/life/people/2019/02/22/blackface-gucci-prada-zara-burberry-fashion-most-controversial-designs/2926837002/> [https://perma.cc/KBD7-ZAY9] (discussing many fashion houses that used blackface imagery).

<sup>110</sup> This is an understatement.

<sup>111</sup> See Madeline Fry Schultz, *Opinion, A Solution for Fashion's Blackface Problem: Stop Designing Ugly Clothes*, WASHINGTON EXAMINER (Feb. 20, 2019), <https://www.washingtonexaminer.com/opinion/a-solution-for-fashions-blackface-problem-stop-designing-ugly-clothes> [https://perma.cc/64X6-EZ6B]; Crystal A. DeGregory, *From Blackface to Nooses in Fashion, Why Enough Is Enough*, FOOTWEAR NEWS (Feb. 25, 2019), <https://footwearnews.com/2019/influencers/power-players/blackface-nooses-fashion-black-history-month-crystal-degregory-1202748672> [https://perma.cc/U9RT-SRTB]; Kyle Hodge, *This Black History Month Shows Fashion Still Has a Race Problem*, HIGHSNOBIETY (Feb. 2019), <https://www.highsnobiety.com/p/fashion-race-issues/> [https://perma.cc/4YFD-8QMJ]; Patricia J. Williams, *White People Can't Quit Blackface*, THE NATION (Feb. 20,

galling were the incidents of racial insensitivity that occurred in February, a month celebrating the notable achievements of those Americans who are members of the African diaspora, known as either “Black History” or “African-American History” Month.<sup>112</sup>

For example, there was the Gucci brand balaclava sweater, which featured a cutout for the mouth and oversized red lips.<sup>113</sup> Although the fashion house claimed that it was “[i]nspired by vintage ski masks,”<sup>114</sup> many saw an inappropriate use of blackface.<sup>115</sup> Gucci apologized, removed the sweater, and vowed that it would “do better.”<sup>116</sup> These assertions of regret, understandably, rang hollow in the face of multiple other instances of fashion houses

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2019), <https://www.thenation.com/article/archive/blackface-covington-gucci-virginia/> [<https://perma.cc/2LKW-EJNN>].

<sup>112</sup> For an introduction to the origins of Black History Month and its predecessor, Black History Week, see Lisa Vox, *The Origins of Black History Month*, THOUGHTCO (July 3, 2019), <https://www.thoughtco.com/origins-of-black-history-month-p2-45346> [<https://perma.cc/H6MR-ZY48>]; Julia Zorthian, *This Is How February Became Black History Month*, TIME (Jan. 29, 2016) <https://time.com/4197928/history-black-history-month/> [<https://perma.cc/R9T8-LPSM>].

<sup>113</sup> See Sarah Young, *Gucci Jumper ‘Resembling Blackface’ Removed From Sale After Angry Backlash*, THE INDEPENDENT (Feb. 9, 2019), <https://www.independent.co.uk/life-style/fashion/gucci-blackface-sweater-balaclava-apology-reaction-twitter-controversy-a8767101.html> [<https://perma.cc/XV8A-MXPG>]; *infra* Figure 3.

<sup>114</sup> *Id.*

<sup>115</sup> See Maeve McDermott, *Blackface Shoes and Holocaust T-Shirts: Fashion Brands’ Most Controversial Designs*, USA TODAY (Feb. 22, 2019), <https://www.usatoday.com/story/life/people/2019/02/22/blackface-gucci-prada-zara-burberry-fashion-most-controversial-designs/2926837002/> [<https://perma.cc/G758-9YVW>] (noting that for consumers the sweater design was “reminiscent of blackface”).

<sup>116</sup> See Allyson Chiu, *‘Haute Couture Blackface’: Gucci Apologizes and Pulls ‘Racist’ Sweater*, WASHINGTON POST (Feb. 7, 2019), <https://www.washingtonpost.com/nation/2019/02/07/haute-couture-blackface-gucci-apologizes-pulls-racist-sweater/> [<https://perma.cc/D7NL-8XQA>].

claiming “ignorance.”<sup>117</sup> However, after meetings with black fashion influencer and designer, Daniel Day—also known as Dapper Dan—Gucci pledged to begin a diversity training program, to be more intentional in diversity hiring at leadership levels, and to fund a multicultural design scholarship program.<sup>118</sup>

On the heels of the Gucci debacle, the KATY PERRY brand shoes made their debut.<sup>119</sup> The sandal ornamentation, designed to approximate facial features, included large “red lips.”<sup>120</sup> According to the pop singer, the shoes were “envisioned as a nod to modern art and surrealism.”<sup>121</sup> Unfortunately, the design, when placed on a black shoe, evoked blackface, and some critics of the shoes observed that the sandals would complement the Gucci

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<sup>117</sup> See Kirsten Holtz Naim, *Why It’s Ridiculous for Gucci to Claim “Ignorance” in Its Blackface Designs*, SLATE (Feb. 18, 2019), <https://slate.com/human-interest/2019/02/gucci-blackface-controversy-racism-history-fashion.html> [<https://perma.cc/N5AU-3Z9R>].

<sup>118</sup> See Luisa Zargani, *Gucci Launches Initiatives to Foster Cultural Diversity and Awareness*, WWD (Feb. 15, 2019), <https://wwd.com/fashion-news/designer-luxury/gucci-launches-initiatives-to-foster-cultural-diversity-and-awareness-1203028610/> [<https://perma.cc/V97N-PRCU>].

<sup>119</sup> See Megan Cerullo, *Katy Perry Accused of Evoking “Blackface” Imagery in Shoe Design*, CBS NEWS (Feb. 12, 2019), <https://www.cbsnews.com/news/katy-perry-blackface-shoes-accused-of-evoking-racist-imagery/> [<https://perma.cc/4WQY-A8A6>]; see *infra* Figure 4.

<sup>120</sup> See generally Raquel Laneri, *Katy Perry’s Shoes Pulled After ‘Blackface’ Backlash*, NEW YORK POST (Feb. 11, 2019), <https://nypost.com/2019/02/11/katy-perrys-shoes-pulled-after-blackface-backlash/> [<https://perma.cc/ES83-FNVP>] (describing the shoes as “resembling minstrel makeup”).

<sup>121</sup> See generally Christina Caron, *Katy Perry Pulls Shoes Resembling Blackface: ‘Our Intention Was Never to Inflict Any Pain,’* N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/style/katy-perry-blackface-shoes.html> [<https://perma.cc/H98D-BB6L>].

brand sweater.<sup>122</sup> In the face of withering backlash, Katy Perry apologized and pulled the shoes from the market.<sup>123</sup>

Both of these scenarios illustrate the concerns voiced by bell hooks when she wrote:

When race and ethnicity become commodified as resources for pleasure, the culture of specific groups, as well as the bodies of individuals, can be seen as constituting an alternative playground where members of dominating races, genders, sexual practices affirm their power-over in intimate relations with the Other.<sup>124</sup>

However, neither of these above examples of the use of blackface in fashion bring home the reality of this statement as does the ill-conceived creation of designer Peggy Noland.<sup>125</sup> Ms. Noland, in collaboration with another designer, Sally Thurer, photoshopped the face of Oprah on unidentified nude black female bodies of various sizes.<sup>126</sup>

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<sup>122</sup> See Kelly Wynne, *Katy Perry Shoe Designs Accused of Blackface, Removed From Shelves*, NEWSWEEK (Feb. 11, 2019), <https://www.newsweek.com/katy-perry-shoe-designs-accused-blackface-removed-shelves-1326931> [<https://perma.cc/3UWU-3LCK>].

<sup>123</sup> Caron, *supra* note 121.

<sup>124</sup> bell hooks, *Eating the Other: Desire and Resistance*, in MEDIA AND CULTURAL STUDIES: KEYWORKS 308 (Meenakshi Gigi Durham & Douglas M. Kellner eds., 2d ed. 2012).

<sup>125</sup> Peggy Noland is an artist and a fashion designer. For more information about her and her various projects, see [peggynoland.com](http://peggynoland.com) [<https://perma.cc/95QV-99WL>].

<sup>126</sup> These “body types” are “skinny, average and obese.” Alicia Eler, *Dumb Racist Art Project: White Woman Sells Naked Oprah*, HYPERALLERGIC (Nov. 19, 2013), <https://hyperallergic.com/author/alicia-eler/> [<https://perma.cc/XNL7-RKAT>]. There is also a version with Oprah made up as a member of the band KISS, as a “nod to how ridiculous the fashion industry is at times.” See Veronica Wells, *WTF?! Designer Peggy Noland Crafts “Naked Oprah Dress”*, MADAMENOIR (Nov. 15, 2013), <https://madamenoire.com/323117/wtf-designer-peggy-noland-crafts-naked-oprah-dress/> [<https://perma.cc/4E2U-9Z9J>]. Although one can

Her rationale was that “one of Oprah’s most effective qualities is that *she’s a placeholder, she’s a stand-in for you* with her foibles and her failures — especially with her public weight issues.”<sup>127</sup>

Here, one can see the ultimate “alternative playground” at work—affirmed by Ms. Noland, who said that the use of Oprah was “kind of my own personal exploration and exploitation of [access to celebrities].”<sup>128</sup> One might ask why she did not choose Fergie, formally known as the Duchess of York, who also has had many public struggles with weight loss and weight gain.<sup>129</sup> This is not to say that such a depiction would be any less troubling,<sup>130</sup> but it is the *appropriation of the body of an African-American woman* which is so perturbing, given the nation’s complex racial history.<sup>131</sup>

Ms. Noland’s statements to the press about her motivations in crafting the dress and the “really meaningful philosophical layers” that it brought to feeling that “they’re

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find pictures of the various sized dresses on the web, including one modeled by the designer, I chose *not* to include one for this article out of respect for Oprah and the unnamed and dehumanized “body doubles.”

<sup>127</sup> Kathleen Lee Joe, *Naked Oprah Dress Sparks Controversy*, STUFF (Nov. 19, 2013), <https://www.stuff.co.nz/life-style/fashion/9413336/Naked-Oprah-dress-sparks-controversy> [https://perma.cc/YXR5-NT2H] (emphasis added).

<sup>128</sup> See Wells, *supra* note 126.

<sup>129</sup> Fergie was once ridiculed for her weight and referred to in the popular press as the “Duchess of Pork.” See Miriam Habtesellasié, *Sarah Ferguson Weight Loss—How the Duchess of York Lost an Incredible Five Stone*, WOMAN & HOME (July 26, 2018), <https://www.womanandhome.com/us/life/royal-news/sarah-ferguson-weight-loss-292416/?region-switch=1611088892/> [https://perma.cc/J4VM-E3R3].

<sup>130</sup> Eler, *supra* note 126 (Making this point particularly clear. She wrote: “these dresses consider female bodies—specifically black ones—as objects that are commodified and ultimately meant for the garbage. It’s unacceptable for any woman’s body to be thought of this way, no matter who’s looking.”)

<sup>131</sup> See *id.*

[public figures] ours, too,”<sup>132</sup> sparked (mostly) thoughtful commentary about her commodification of Oprah.<sup>133</sup> One of the more insightful observations was found in Carolyn Edgar’s article in SALON.<sup>134</sup> The article lays bare the stark reality of what Peggy Noland and her collaborator did with their crass (mis)use of Oprah’s visage: “[i]n [their] rendering, Oprah is no longer a person with her own (carefully crafted) public image. She’s no longer a person whose humanity we have to recognize, let alone respect.”<sup>135</sup> At the time,<sup>136</sup> for Ms. Noland, the ultimate answer to the question “who are you wearing?” was “[y]ou’re wearing Oprah instead of a designer.”<sup>137</sup>

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<sup>132</sup> See Wells, *supra* note 126.

<sup>133</sup> See Eler, *supra* note 126 (giving her commentary on “hipster racism” and the comments offered by readers); Wells, *supra* note 126 (discussing the attempt “to exploit ‘Oprah’s image’ and the unclothed black body for attention and economic gain”).

<sup>134</sup> See Carolyn Edgar, *Naked Screaming Oprah Dress Treats Black Women’s Bodies as Placeholders*, SALON (Nov. 15, 2013), [https://www.salon.com/2013/11/15/naked\\_screaming\\_oprah\\_dress\\_treats\\_black\\_womens\\_bodies\\_as\\_placeholders/](https://www.salon.com/2013/11/15/naked_screaming_oprah_dress_treats_black_womens_bodies_as_placeholders/) [<https://perma.cc/88KT-Y5SV>].

<sup>135</sup> *Id.*

<sup>136</sup> Ms. Noland now regrets the dress. In an interview with Emily Cox for The Pitch, undated, but posted on Noland’s website, Noland notes that “in 2013 when the Oprah dress was made and I received criticism for it, I was a long way from being able to see it was racist . . . .” She continued by saying, “I grossly assumed permission of Oprah because she was a public figure. I failed to see that by only seeing Oprah as a ‘public figure’ it erases her experience as a black woman and the history that comes with that . . . .” See Emily Cox, Questions by Emily Cox (The Pitch) <https://docs.google.com/document/d/10aeaYVfgY3sj5rhikAjNI3cp3PErOAaCPuy3QWkDwqo/edit> [<https://perma.cc/H6CC-R6ZD>].

<sup>137</sup> Wells, *supra* note 126.

#### IV. QUESTIONS PRESENTED

*Appropriation is a form of dubious representation . . .  
[t]he question is, who has the power and privilege to  
represent another culture?*<sup>138</sup>

The sixty-four-thousand-dollar question is who has the right to represent another culture? Who has the authority to use that culture or its features, defined broadly, for commercial gain? Unfortunately, the line between cultural *appreciation* and *appropriation* is thin—one whose delineations have caused much spilled ink.<sup>139</sup> As noted by Professor Patricia Williams, “[t]he politics of representation are never easy.”<sup>140</sup>

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<sup>138</sup> Tonya Blazio-Licorish & Obi Anyanwu, *How Cultural Appropriation Became a Hot-button Issue for Fashion*, WWD (Nov. 3, 2020), <https://wwd.com/fashion-news/fashion-features/how-cultural-appropriation-became-a-hot-button-issue-for-fashion-1234579968/> [<https://perma.cc/6M9J-BCAN>] (quoting Dr. Serkan Delice).

<sup>139</sup> See generally SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW (2005); Kenneth Shelton, *Understanding Cultural Appreciation v. Cultural Appropriation* (Mar. 5, 2020), <https://kennethshelton.net/understanding-cultural-appreciation-v-cultural-appropriation> [<https://perma.cc/3AD3-W8NB>] (featuring a chart with questions to help one determine if the contemplated action is appropriation or appreciation); Nadra Kareem Nittle, *A Guide to Understanding and Avoiding Cultural Appropriation*, THOUGHTCO. (June 18, 2020), <https://www.thoughtco.com/cultural-appropriation-and-why-iits-wrong-2834561> [<https://perma.cc/6EMS-FG6T>]. But see Kwame Anthony Appiah, *Cultural Borrowing is Great; the Problem is Disrespect*, WALL ST. J. (Aug 30, 2018), <https://www.wsj.com/articles/cultural-borrowing-is-great-the-problem-is-disrespect-1535639194> [<https://perma.cc/W4KQ-WC7H>] (arguing that cultural appropriation is an idea that is “ripe for the wastebasket” but that the real offense is that of disrespect).

<sup>140</sup> Patricia J. Williams, ‘White Voice,’ Blackface, and the Ethics of Representation, THE NATION (Aug. 17, 2018), <https://www.thenation.com/article/archive/white-voice-blackface-and-the-ethics-of-representation/> [<https://perma.cc/5KHL-ZD42>].

Nevertheless, it is important to think through the ramifications of creating intellectual properties based on the cultures of others. When Kim Kardashian, whom one could label a serial cultural appropriation offender,<sup>141</sup> proposed use of the term “kimono” as a trademark for her brand of women’s shapewear garments, she created a firestorm.<sup>142</sup> Apparently, Kardashian did not realize that the “kimono has an active imaginative function in the lives and minds of modern Japanese; it does not simply represent the dead weight of a traditional culture.”<sup>143</sup> Her apology was the same as countless others who have been called out for

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<sup>141</sup> There are multiple popular press stories about Kim Kardashian’s appropriated hairstyles, accessories, and dress. See e.g., Gibson Johns, *Kim Kardashian’s Latest Magazine Cover Sparks Claims of Cultural Appropriation: ‘You Are Better than This’*, AOL.COM (Dec. 19, 2019), <https://www.aol.com/article/entertainment/2019/12/19/kim-kardashians-latest-magazine-cover-sparks-claims-of-cultural-appropriation-you-are-better-than-this/23884447/> [<https://perma.cc/E2EL-D4VF>] (detailing numerous instances where Kardashian has been accused of cultural appropriation).

<sup>142</sup> See Joyce Boland-DeVito, *Fashion(ing) a Political Statement: A Review of the Legal & Social Issues that Arise from Banned Political Clothing and Other Controversial Fashion Items in Light of the U.S. Supreme Court’s Decision in Minnesota Voters Alliance v. Mansky*, 30 *FORDHAM INTELL. PROP. MEDIA & ENT. L. J.* 493 (2020) (discussing, *inter alia*, the Kim Kardashian West controversy); Vanessa Friedman, *Kim Kardashian West and the Kimono Controversy*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/fashion/kim-kardashian-west-kimono-cultural-appropriation.html> [<https://perma.cc/TD4Z-UVK4>]; Lauren Thomas, *Kim Kardashian Is Renaming Her ‘Kimono’ Company After Causing an Uproar*, CNBC (July 1, 2019), <https://www.cnbc.com/2019/07/01/kim-kardashian-is-renaming-her-kimono-company-after-causing-uproar.html> [<https://perma.cc/3FQ2-NCJT>].

<sup>143</sup> See Susan Scafidi, *Intellectual Property and Cultural Product*, 81 *B.U. L. Rev.* 793, 812 (2001) (quoting Anne Hollander) (citation omitted).



cultural appropriation and commodification: “I did so with the best intentions in mind.”<sup>144</sup>

While it is important to acknowledge that not all appropriations are exploitative, when those appropriations are, in fact, solely for the purposes of making money, “best intentions” do not, and will not, save the day. When “borrowing” cultural elements, per Professor Susan Scafidi, one should consider the three S’s: the source, significance, and similarity of the elements.<sup>145</sup> That is, if the element emanates from a source community that has been subjected to discrimination or oppression, think again. If the element has great significance, either spiritual or cultural, proceed with caution, and, finally, determine if the product is an exact copy as opposed to something that is inspired by the borrowed item.<sup>146</sup>

In an essay taken from his book, *The Lies That Bind: Rethinking Identity*, Professor Kwame Anthony Appiah takes a different approach to the issue.<sup>147</sup> He argues that one

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<sup>144</sup> Christie D’Zurilla, *Kim Kardashian West Finally Caves on Kimono Brand After Cultural Appropriation Accusation*, L.A. TIMES (July 1, 2019), [https://www.latimes.com/entertainment/la-et-kim-kardashian-west-kimono-solutionwear-new-name-20190701-story.html#:~:text=%E2%80%9CWhen%20I%20announced%20the%20name%20of%20my%20shapewear,change%20the%20name.%20\(Laura%20Thompson%20/%20TNS\)](https://www.latimes.com/entertainment/la-et-kim-kardashian-west-kimono-solutionwear-new-name-20190701-story.html#:~:text=%E2%80%9CWhen%20I%20announced%20the%20name%20of%20my%20shapewear,change%20the%20name.%20(Laura%20Thompson%20/%20TNS)) [<https://perma.cc/L5V2-U2AA>].

<sup>145</sup> Jeena Sharma, *When Does Cultural Inspiration Become Appropriation in the Fashion World?*, SOUTH CHINA MORNING POST (Nov. 6, 2017), <https://www.scmp.com/magazines/style/fashion-beauty/article/2118609/when-does-cultural-inspiration-become-appropriation> [<https://perma.cc/D6SE-3MVH>] (quoting Scafidi: “To distinguish harmful misappropriation from positive inspiration, I use a rule of three Ss: source, significance and similarity.”).

<sup>146</sup> See Francesca Willow, *How To Have the Cultural Appropriation Conversation this Halloween*, ETHICAL UNICORN (Oct. 30, 2018), <https://ethicalunicorn.com/2018/10/30/how-to-have-the-cultural-appropriation-conversation-this-halloween/> [<https://perma.cc/X8DR-KQJ3>].

<sup>147</sup> Professor Appiah has described the idea of cultural appropriation as “ripe for the wastebasket.” See Kwame Anthony Appiah, *From Yoga to*

should be cautious when using the term “cultural appropriation” as an indictment because “all cultural practices and objects are mobile; they like to spread, and almost all are themselves creations of intermixture.”<sup>148</sup> Rather, the problem occurs when the borrowing is accompanied by disrespect. According to Professor Appiah, “the offense isn’t appropriation; it’s the insult entailed by trivializing something another group holds sacred.”<sup>149</sup> Unfortunately, most of the time the disrespect is “compounded by power inequities,”<sup>150</sup> because “[t]here is a long history of treating the bodies of peoples of color as objects of white possession . . . .”<sup>151</sup>

There are other questions as well that are raised by the practice of walking in another’s skin, just as fraught, that bear some consideration.<sup>152</sup> For example, might there be instances in which putting on blackface, in whatever form, is acceptable?

Frederick Douglass had an answer—a harsh one. He called the actors who performed in blackface “the filthy scum of white society, who have stolen from us a

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*Rap, Cultural Borrowing is Great; the Problem is Disrespect*, THE WIRE (Sept. 4, 2018), <https://thewire.in/books/cultural-borrowing-kwame-anthony-appiahbook-extract-lies-that-bind> [<https://perma.cc/265Q-HZQC>]. Similarly, Minh-Ha T. Pham thinks that the uses of the terms “appropriation” and “appreciation” have reached the limit of their usefulness and suggests the term “racial plagiarism” instead. See Minh-Ha T. Pham, *Racial Plagiarism and Fashion*, 4 QED: A JOURNAL IN GLBTQ WORLDMAKING 67, 68–70 (2017).

<sup>148</sup> See KWAME ANTHONY APPIAH, *THE LIES THAT BIND: RETHINKING IDENTITY* 208 (2018).

<sup>149</sup> *Id.* at 210.

<sup>150</sup> *Id.* at 209.

<sup>151</sup> Robbie Fordyce et al., *Avatars: Addressing Racism and Racialized Address*, in *WOKE GAMING: DIGITAL CHALLENGES TO OPPRESSION AND SOCIAL INJUSTICE* 247 (Kishonna L. Gray & David J. Leonard, eds., 2020).

<sup>152</sup> I thank my colleague, Steven Wilf, for posing these questions and encouraging me to think more deeply about them.

complexion denied them by nature, *in which to make money*, and pander to the corrupt taste of their white fellow citizens.”<sup>153</sup> However, Mr. Douglass was talking about someone stepping into another’s skin in order to mock and demean the other’s perceived characteristics for filthy lucre. Might Douglass have felt differently about John Howard Griffin, an author and civil rights activist (and a white Southerner), who, with the help of medicine and a sunlamp, darkened his skin for six weeks so as to report on life below the Mason-Dixon line?<sup>154</sup> Yes, he made money—he wrote a book about his experiences—but, arguably, that was not his first intent. How would Mr. Douglass judge Professor Kang, whose forays into the virtual world represented by a black avatar were undertaken so that he could learn something about being black?<sup>155</sup> What would he think about Rachel Dolezal or Jessica Krug?<sup>156</sup> Further complicating matters, there is Spike Lee’s *Bamboozled*—a movie that scrutinized and problematized America’s love-hate-love affair with blackface.<sup>157</sup>

It is too facile an answer to assert that blackface has no place anywhere, anytime. If one were trying to analyze the use of blackface along a continuum of acceptability, one must take the context, intent, as well as the impact of the use into consideration. For example, the use of blackface in

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<sup>153</sup> Lott, *supra* note 31, at 15 (emphasis added).

<sup>154</sup> See JOHN HOWARD GRIFFIN, *BLACK LIKE ME* (1961).

<sup>155</sup> See Kang, *supra* note 10, at 1131 (discussing Professor Kang’s experiences in cyberspace).

<sup>156</sup> See Beydoun, *supra* note 41, at 284–88 (discussing Dolezal and Krug).

<sup>157</sup> See David Dennis, Jr., ‘*Bamboozled*’ 20 Years Later: We All Shortchanged Spike’s Classic Film, *MEDIUM* (Jan. 8, 2020), <https://level.medium.com/bamboozled-20-years-later-we-all-short-changed-spikes-classic-film-6a2830d0bbc0> [https://perma.cc/5WET-GMXXB]. For a nuanced take on the significance of the film and black performance, see ELIZABETH L. SANDERSON, *SPIKE LEE’S BAMBOOZLED AND BLACKFACE IN AMERICAN CULTURE* (2019).

minstrelsy, which Douglass castigated, was solely to denigrate and use the black body as a locus for fun. This is, unfortunately, no different now when donned for college parties or Hallowe'en. Such a cavalier and disrespectful attitude toward bodies of color surely places these usages in the “unacceptable and inappropriate at any time category.”

When analyzing the use of an avatar (Kang) or medical intervention (Griffin) in order to have an “unvarnished” experience of “being black” in possible hostile environments, the waters become a bit murky. Here the usage is bounded by the claim of academic curiosity—the ability to learn something about the condition of blackness. While Mr. Griffin merely wanted a better understanding of racism by experiencing it,<sup>158</sup> Professor Kang hoped that the transmutation (cyber-passing) approach would “disrupt the very notion of racial categories.”<sup>159</sup> At the same time, Professor Kang realized that in doing so there was the real possibility that racial stereotypes would be reinforced,<sup>160</sup> and that those engaging in cyber-passing would soon tire of it because maintaining multiple identities takes work.<sup>161</sup> However laudable the goals may be, those who engage in cyber-passing still have the luxury of dropping the racial veil whenever they tire of playing with blackness. In other words: “everybody wanna be black but don’t nobody wanna be black.”<sup>162</sup>

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<sup>158</sup> Griffin realized that it would not be possible in the 1950s South to have a frank conversation about race, racism, and its corrosive effects. He wrote, “[h]ow else except by becoming a Negro could a white man hope to learn the truth . . . Neither really knew what went on with those of the other race. The Southern Negro will not tell the white man the truth . . . The only way . . . to bridge the gap between us was to become a Negro.” See GRIFFIN, *supra* note 154, at 3.

<sup>159</sup> Kang, *supra* note 10, at 1136.

<sup>160</sup> *Id.* at 1184.

<sup>161</sup> *Id.* at 1183.

<sup>162</sup> This is the politically correct version of a phrase attributed to Paul Mooney. See Michael P. Jeffries, *Rachel Dolezal a Lesson in How*

Then, in the murkiest of all waters, there are Rachel Dolezal and Jessica Krug who appropriated blackness and personally operated in black spaces. Part of the furor surrounding their outings seems to be about the apparent duplicity involved<sup>163</sup> and, for those close to them, feelings of being used.<sup>164</sup>

Most of the critiques of this “performative blackness” are based on the theory that Dolezal and Krug operated within a system of choice—that is, they could at any time forego their decision to take on the mantle of blackness.<sup>165</sup>

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*Racism Works*, BOSTON GLOBE (June 13, 2015), <https://www.bostonglobe.com/opinion/2015/06/13/rachel-dolezal-story-lesson-how-racism-works/J8R27qgq2YfDRUuOVhpYGI/story.html>

[<https://perma.cc/T77C-Q44T>] (quoting Mooney in a discussion of Rachel Dolezal); ZamaMdoda, *Everybody Wanna Be Black, but Nobody Wanna Be Black*, AFROPUNK (Feb. 11, 2019), <https://afropunk.com/2019/02/everybody-wanna-be-black-but-nobody-wanna-be-black/> [<https://perma.cc/JU57-R5W8>] (discussing blackface and cultural appropriation).

<sup>163</sup> See Matthew Pratt Guterl, *Racial Fakery and the Next Postracial: Reconciliation in the Age of Dolezal*, in *RACIAL RECONCILIATION AND THE HEALING OF A NATION: BEYOND LAW AND RIGHTS* (2017) (discussing “racial fakery” and its wider implications).

<sup>164</sup> See generally, Claire Lampen, *There’s a New Rachel Dolezal*, NEW YORK MAGAZINE (Sept. 9, 2020), <https://www.thecut.com/2020/09/historian-jessica-krug-admits-to-posing-as-a-black-woman.html> (last visited Mar. 23, 2021) [<https://perma.cc/NP7M-GRER>] (discussing the pain of the George Washington community after Krug’s admission).

<sup>165</sup> See Errin Whack, *Choosing to Be Black Is the Epitome of White Privilege*, POLITICO MAGAZINE (June 17, 2015), <https://www.politico.com/magazine/story/2015/06/black-white-privilege-rachel-dolezal-119126/> [<https://perma.cc/B49J-HDBA>] (arguing that “[b]eing black is not a lifestyle or a choice”); Emily Cashour, *Rachel Dolezal And White Privilege*, MEDIUM (July 13, 2018), <https://emilycashour.medium.com/recently-i-decided-to-watch-the-documentary-the-rachel-divide-it-follows-rachel-dolezal-and-takes-2b5411ff2e7f> [<https://perma.cc/UC6G-U4Y6>] (arguing that “[p]eople of color do not have the privilege of deciding to be another race; the

Yet Dolezal, unlike Krug,<sup>166</sup> has persisted in her claims of black identity: she has legally changed her name to Nkechi Amare Diallo and has asserted that she is “transracial.”<sup>167</sup> Her refusal of “whiteness,”<sup>168</sup> and her “passing confounds our visually privileging cultural logic. It confuses the real with the artifice, and often even after a careful social excavation, it is hard to determine which is what.”<sup>169</sup> Here, the problem with the transgressive nature of Dolezal’s actions is not her intent, but the impact that it has. As observed by one commentator: “the image of Rachel Dolezal inverts the beliefs of racial indifference without tackling the racial inequality that exists. To claim that one can transition from race to race implies that we are all on a

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appearance of their skin at birth defines how they will be received and treated by society.”). *But see* Marquis Bey, *Incorporeal Blackness: A Theorization in Two Parts—Rachel Dolezal and Your Face in Mine* 20 CR: THE NEW CENTENNIAL REVIEW 205, 207 (2020), [muse.jhu.edu/article/773420](https://muse.jhu.edu/article/773420) [<https://perma.cc/X47P-JNKB>]. While not arguing in support of Dolezal’s transracial claims, Bey suggests that Dolezal “highlights how we might reassess our intellectual and sociopolitical understandings of subjectivity, of ontology, of what is possible for us to be in the world.”

<sup>166</sup> See Krug, *supra* note 46.

<sup>167</sup> See Denene Miller, *Why Rachel Dolezal Can Never Be Black*, NPR (Mar. 3, 2017), <https://www.npr.org/sections/codeswitch/2017/03/03/518184030/why-rachel-dolezal-can-never-be-black>.

[<https://perma.cc/UN6J-HJMP>]. The questions that swirl around how blackness is defined and the concept of transracialism are fraught. See Beydoun & Wilson, *supra* note 41, at 285 (discussing the definition of transracialism before and after Dolezal); Alisha Gaines, *Epilogue: The Last Soul Sister*, in *BLACK FOR A DAY: WHITE FANTASIES OF RACE AND EMPATHY* 171 (2017) [hereinafter *Epilogue*] (discussing why Dolezal’s theory of being “transracial” is invalid).

<sup>168</sup> See *Epilogue*, *supra* note 167, at 169 (commenting that “Dolezal’s self-definition of blackness is the epitome of white privilege.”); *but see* Bey, *supra* note 165, at 216 (arguing that instead of appropriating blackness, Dolezal “might be wishing to *reject whiteness*”).

<sup>169</sup> Bey, *supra* note 165 (quoting C. Riley Snorton, “*A New Hope*”: *The Psychic Life of Passing* (citation omitted)).

level playing field . . .”<sup>170</sup> Unfortunately, the playing field is not (yet) level, thus the ability for a Dolezal or a Krug to lay a false claim to blackness is but another glaring example of white privilege.<sup>171</sup>

In addition, these appropriative actions come with negative effects that allyship does not pose: the possible reallocation of precious resources that are meant for members of an underserved population.<sup>172</sup> For example, Krug obtained financial support for her academic work that was reserved for those who are people of color or first-generation students.<sup>173</sup> The concern is that “white people who can perform a nonwhite identity . . . will merely reify

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<sup>170</sup> Sarah Samira El-Taki, *White Skin, Black Masks: Rachel Dolezal, Cultural Appropriation and the Myth of Trans-Racialism*, (June 2, 2017) (thesis, Lund University) [https://www.academia.edu/36858654/White\\_Skin\\_Black\\_Masks\\_Rachel\\_Dolezal\\_Cultural\\_Appropriation\\_and\\_the\\_Myth\\_of\\_Trans\\_Racialism](https://www.academia.edu/36858654/White_Skin_Black_Masks_Rachel_Dolezal_Cultural_Appropriation_and_the_Myth_of_Trans_Racialism) [<https://perma.cc/6SCF-66SY>]; Whack, *supra* note 165 (noting that, “[f]or Dolezal to be able to ‘opt in’ suggests that those of us who were born black can ‘opt out.’”).

<sup>171</sup> See *Epilogue*, *supra* note 167, at 169 (calling “Dolezal’s self-definition of blackness . . . the epitome of white privilege.”); Elwood Watson, *Rachel Dolezal and the Complex Politics of White Privilege*, HUFFPOST (June 17, 2015), [https://www.huffpost.com/entry/rachel-dolezal-and-white-privilege\\_b\\_7600366](https://www.huffpost.com/entry/rachel-dolezal-and-white-privilege_b_7600366) [<https://perma.cc/J93D-VZMS>].

<sup>172</sup> See Robyn Autry, *Jessica Krug, Rachel Dolezal and America’s White Women Who Want To Be Black*, THINK (Sept. 7, 2020), <https://www.nbcnews.com/think/opinion/jessica-krug-rachel-dolezal-america-s-white-women-who-want-ncna1239418> [<https://perma.cc/38HT-5EMW>] (noting that, “to masquerade as the oppressed is to seek out greater rewards beyond those of whiteness itself: more social media followers, more credibility, more access to spaces and initiatives reserved for people who have been historically marginalized, including college admissions . . .”).

<sup>173</sup> See M. Yvonne Taylor, *Jessica Krug Is Just Another Culture-Appropriating White Supremacist*, DAILY BEAST (Sept. 5, 2020, 12:41 AM), <https://www.thedailybeast.com/jessica-krug-is-just-another-culture-appropriating-white-supremacist> [<https://perma.cc/9AG4-VZBD>] (discussing Krug’s receipt of an academic scholarship reserved for people of color and first-generation students).

the existing racial order, and further bolster the privileges and power attendant with whiteness.”<sup>174</sup>

Dolezal’s actions thus raise the issues of power, identity and self-determination. Similar concerns are also implicated in trademark law. Trademark law affords mark owners a similar power over (brand) identity in that the law confers a right to enjoin others from actions that are likely to confuse, to dilute, or to tarnish the owned mark.<sup>175</sup> As Professor Martha Minow observed, “[t]he relative *power* enjoyed by some people compared with others *is partly manifested through the ability to name oneself and others*, and to influence the process of negotiation over questions of identity.”<sup>176</sup>

So, too in trademark law. At the heart of the trademark cases *Harjo*, *Blackhorse*, and *Tam* were the issues of self-identity and the right of self-expression.<sup>177</sup> For the plaintiffs *Harjo* and *Blackhorse*, the issue centered on their refusal to remain “othered”;<sup>178</sup> while for *Tam*, it was about the right to subvert and claim the slur, thereby reconstructing Asian American identity.<sup>179</sup> Part of the problem in

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<sup>174</sup> See Beydoun & Wilson, *supra* note 41, at 352.

<sup>175</sup> See 15 U.S.C. § 1114 (allowing the owner of a federally registered mark to bring an action in infringement); 15 U.S.C. § 1125(a) (allowing an infringement action for an unregistered mark); 15 U.S.C. § 1125(c) (allowing an action for dilution or tarnishment).

<sup>176</sup> Martha Minow, *Identities*, 3 *YALE J. L. & HUMAN.* 97, 98–99 (1991) (citation omitted) (emphasis added).

<sup>177</sup> See *Pro-Football, Inc. v. Harjo*, 565 F. Supp. 3d 439 (D.C. Cir. 2019); *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439 (E.D.V.A. 2015), *vacated*, 709 F. App’x 182 (4th Cir. 2018).

<sup>178</sup> See Suzan Shown Harjo, *Offensive Mascots Belong in Museums and History Books*, INDIANZ.COM (Dec. 15, 2017), <https://www.indianz.com/News/2017/12/15/suzan-shown-harjo-offensive-mascots-belo.asp> [<https://perma.cc/A7C8-WA67>] (discussing *Harjo* and *Blackhorse* and distinguishing them from *Matal*).

<sup>179</sup> See Richard Schur, *Authentic Black Cool? Branding and Trademarks in Contemporary African American Culture*, in *ARE YOU ENTERTAINED?: BLACK POPULAR CULTURE IN THE TWENTY-FIRST CENTURY* (Simone C.



determining which of these remedies should be preferred—cancellation of the mark or annulment of the law which would allow for the cancellation of the mark—lies in the work that trademarks are asked to perform. Trademarks, as posited by Professor Sonia Katyal, are “neither completely commercial nor completely expressive” and therefore are situated in the intersection of both.<sup>180</sup> These are two seemingly irreconcilable positions and present an interesting conundrum for how to view them in a legal sphere.

To oppose racialized trademarks, such as those held by the Washington Football team, was an uphill battle for the Native American plaintiffs bringing the case,<sup>181</sup> because, even had they wanted to engage in transgressive uses of the mark, the law “ensures that these identities cannot be tarnished or blurred and protects against fraudulent or deceptive uses of name or identities, even if the crafted corporate identities rely on questionable assumptions or

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Drake & Dwan K. Henderson, eds., 2020) [hereinafter *Black Cool*]; Simon Tam, Opinion: *At Supreme Court, the Slants Are ‘Fighting for More Than a Band Name’*, NBC NEWS (Jan. 17, 2017), <http://www.nbcnews.com/news/asian-america/opinion-supreme-court-case-slants-are-fighting-more-band-name-n707831>

[<https://perma.cc/9NHT-9QXP>] (“It was startling and deeply frustrating to realize that despite trying to use language to help protect my community from stereotypes and racism, I was being denied the right to trademark my band’s name because of my race.”).

<sup>180</sup> Katyal, *supra* note 97, at 1641.

<sup>181</sup> The quest to cancel the Pro-Football-owned trademarks by Harjo *et al.* was long and multi-layered. Westlaw shows a history of seventy-five matters before the USPTO and federal courts. *See Harjo*, 565 F.3d 880 (determining that laches barred the case). Blackhorse picked up the mantle and filed to cancel the same registrations. *See Blackhorse*, 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014). This case was eventually vacated due to the U.S. Supreme Court case *Matal v. Tam*; *see infra* note 184. For a layperson’s history of the trademark battle, *see* Alicia Jessop, *Inside The Legal Fight To Change The Washington R\*\*\*\*\*s’ Name*, FORBES (Oct. 15, 2013), <https://www.forbes.com/sites/aliciajessop/2013/10/15/a-look-at-the-legal-fight-to-change-the-washington-redskins-name/?sh=386ed8494b20> [<https://perma.cc/GR3G-E9BG>].

stereotypes.”<sup>182</sup> The sole recourse that the plaintiffs possessed was that of an action for cancellation<sup>183</sup> on the grounds that the trademark was disparaging.<sup>184</sup>

Ultimately this, too, failed, because the United States Supreme Court sided with Simon Tam.<sup>185</sup> Tam, in a trademark case that also dealt with a racial slur, successfully argued that the disparagement clause was unconstitutional.<sup>186</sup> The rationale of the Court was that the clause “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend,”<sup>187</sup> thereby paving the way for racialized, stereotypical tropes, which may abound regardless of the offense given to those so depicted.

Professor Katyal’s elegant article calling for a nuanced approach to the now-defunct disparagement clause was written prior to the Supreme Court’s decision.<sup>188</sup> However, in the article she posited that one way to determine the appropriate response to the adoption of a mark for the purposes of self-expression and one that is commodified by a third party is to look at “whether the mark is operating in a

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<sup>182</sup> Richard Schur, *Legal Fictions: Trademark Discourse and Race*, in AFRICAN AMERICAN CULTURE AND LEGAL DISCOURSE 204 (Lovalerie King & Richard Schur, eds., 2009).

<sup>183</sup> It should be noted that cancellation would not have prevented the Washington team from using the mark; it would have only prevented them from estopping others from using the mark in a multiplicity of ways.

<sup>184</sup> The disparagement clause, found in 15 U.S.C. § 1052(a), prohibited the registration of a trademark “which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” See 15 U.S.C. § 1052(a).

<sup>185</sup> The case effectively ended with the Supreme Court’s decision that §1052(a) of the Lanham Act, also referred to as Section 2(a), was unconstitutional. See *Matal v. Tam*, 137 S.Ct. 1744 (2017).

<sup>186</sup> *Id.* at 1751.

<sup>187</sup> *Id.*

<sup>188</sup> Compare Katyal, *supra* note 97, (written in 2010), with *Matal*, 137 S.Ct. 1744 (decided in 2017, seven years later).

commercial sphere or a political sphere, [which] also depend[s] on intent, audience and context.”<sup>189</sup> I suggest that this is an appropriate extralegal way for corporations to evaluate the possible use of an “intersectional trademark.”

Note that even the commodification of bodies for “good”; that is, to effectuate social change, can be an exercise full of land mines. In startling, even shocking, advertising,<sup>190</sup> Benetton tried promoting social change by using bodies of color clothed in its colorful fashion lines.<sup>191</sup> Unlike AUNT JEMIMA, which evoked nostalgia for “old times . . . not forgotten,”<sup>192</sup> Benetton used its trademark, UNITED COLORS OF BENETTON, “to transform the color palette of Benetton into the color of the skin . . .”<sup>193</sup> in order to promote discussions of race and other social concerns.<sup>194</sup>

Despite Benetton’s lofty goals, some of their ads were deemed so controversial that they drew opprobrium in the United States.<sup>195</sup> This is because Benetton advertising executives were not aware of the connotations Americans would draw when seeing, for example, an advertisement

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<sup>189</sup> See Katyal, *supra* note 97, at 1693.

<sup>190</sup> Benetton intended to shock viewers with its advertising. According to its ad manager, “[Benetton] believe[s] our advertising needs to shock—otherwise people will not remember it.” See Kimberly Sugden, *Benetton Backlash: Does Controversy Sell Sweaters?*, 13 ADVERT. & SOC’Y REV. 1, 5 (2012) (internal quotations omitted).

<sup>191</sup> See Henry A. Giroux, *Benetton’s “World without Borders”: Buying Social Change*, <https://www.csus.edu/indiv/o/obriene/art7/readings/benetton.htm> [<https://perma.cc/B4PF-JUL8>] (“Linking the colors of Benetton clothes to the diverse ‘colors’ of their customers from all over the world, Toscani attempted to use the themes of racial harmony and world peace to register such differences within a wider unifying articulation.”).

<sup>192</sup> DANIEL DECATUR EMMETT, *I WISH I WAS IN DIXIE’S LAND* (Firth, Pond & Co. 1860).

<sup>193</sup> Sugden, *supra* note 190, at 3, 5.

<sup>194</sup> *Id.* at 4.

<sup>195</sup> See Judith Graham, *Benetton ‘colors’ the race issue*, *Advertising Age*, Sept. 11, 1989, at 3.

featuring a black woman nursing a white baby.<sup>196</sup> Perhaps if someone more culturally aware and sensitive at the helm in Benetton’s corporate hierarchy had thought about the optics and considered the audience and context in conjunction with the intended message, there would not have been such an outcry.<sup>197</sup>

This is a cautionary tale for all who would appropriate bodies to commodify products because “even when well-intentioned, the deployment of commoditised (sic) representations is not always harmless.”<sup>198</sup> Also “cultural meaning can easily shift from critical reappropriation to stereotype and back again.”<sup>199</sup>

Certainly, this is the case when considering the use of blackface in the entertainment sphere. For example, depictions of blackface within the movie and television industry, arguably sites of white privilege, also implicate the questions of context, intent and impact. If the use of blackface is merely gratuitous or for provocation, then it should be cut from the production. On the other hand, if it is being used as a critique or to provide an historical context, then perhaps the use should be considered fair. As noted by Aisha Harris, “[c]onsidering the use of blackface within its distinct narrative context — and not just as a referential snippet or meme — reveals that the mere presence of it does not necessarily mean something offensive is taking place.”<sup>200</sup>

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<sup>196</sup> This ad for many “conjured up historical images of slavery and of black people being subservient.” See Kim Foltz, *Campaign on Harmony Backfires for Benetton*, N.Y. TIMES, Nov. 20, 1989, at D8.

<sup>197</sup> Sugden, *supra* note 190, at 6 (quoting the president and co-founder of Essence magazine who thought Benetton’s error lay in being “not aware...” (internal quotations omitted)).

<sup>198</sup> Stewart Muir, *The Good Of New Age Goods: Commodified Images of Aboriginality in New Age and Alternative Spiritualities*, 8 *Culture and Religion* 233, 247 (2007).

<sup>199</sup> *Black Cool*, *supra* note 179, at 187.

<sup>200</sup> *A Brief Guide*, *supra* note 37.

Yet, in the race to be viewed as culturally sensitive during the height of summer 2020, many in the industry removed evidence of the use of blackface in their movies, skits and television series.<sup>201</sup> The erasure of an ugly part of history does not mean it never happened, and there are valuable lessons that could be learned from looking at it head-on.<sup>202</sup> For example, Lionsgate Television, which distributes the period show *Mad Men*, decided not to remove a scene where one of the characters appears in blackface.<sup>203</sup> Instead, it decided to add a disclaimer explaining the prevalence of racism during the 1960s.<sup>204</sup> The disclaimer explained why they chose to take this step, noting that “the series producers are committed to exposing the injustices and inequities within our society that continue to this day so we can examine even the most painful parts of our history in order to reflect on who we are today and who we want to become.”<sup>205</sup>

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<sup>201</sup> Andrew Tejada, *Eliminating Blackface Doesn't Start By Pretending It Didn't Happen*, TOR (Aug. 4, 2020), <https://www.tor.com/2020/08/04/eliminating-blackface-doesnt-start-by-pretending-it-didnt-happen/> [<https://perma.cc/UAY8-YAYH>] (discussing the various television and movie creators who did (not) remove blackface content from their shows).

<sup>202</sup> *Id.*; see also *A Brief Guide*, *supra* note 37 (noting that the erasure of blackface from various shows worked a disservice to those who want to understand the context of blackface in the particular show, what it represents and why it persists).

<sup>203</sup> Tejada, *supra* note 201; Denise Petski, ‘*Mad Men*’ Adds Disclaimer To Blackface Episode Ahead Of Streaming Launch, DEADLINE (July 1, 2020), <https://deadline.com/2020/07/mad-men-adds-disclaimer-blackface-episode-ahead-streaming-launch-1202975214/> [<https://perma.cc/X8SX-MQMQ>].

<sup>204</sup> Petski, *supra* note 203; Christopher Brito, ‘*Mad Men*’ won’t remove scene showing actor in blackface but will add a disclaimer, CBS NEWS (July 2, 2020), <https://www.cbsnews.com/news/mad-men-blackface-episode-john-slattery-content-warning/> [<https://perma.cc/8JH9-Z5BR>].

<sup>205</sup> Brito, *supra* note 204.

## V. CONCLUSIONS

*Being woke is not enough.*<sup>206</sup>

Here I have used avatars, blackface in some of its guises, and the misappropriation of the female body from Aunt Jemima to Oprah to show how technology and the law can be used to reify and calcify hurtful and damaging stereotypes. And yet, both can be powerful tools for changing the dynamic.

The video game industry is slowly awakening to the necessity of creating games and gaming spaces that are welcoming to all, regardless of race, gender, sexual orientation or creed. For example, there are anti-racist games that take on the challenge of providing players with the opportunity to experience different forms of discrimination.<sup>207</sup> There are social activist organizations that provide video game designers the ability to produce games that help promote social change.<sup>208</sup> These are some hopeful signs of change.

Furthermore, companies within the gaming industry have issued statements signaling a commitment to inclusion

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<sup>206</sup> See Kishonna L. Gray & David J. Leonard, *Not a Post-Racism and Post-Misogyny Promised Land: Video Games as Instruments of (In)Justice*, in *WOKE GAMING: DIGITAL CHALLENGES TO OPPRESSION AND SOCIAL INJUSTICE* 3, 20 (Kishonna L. Gray & David J. Leonard eds., 2018) [hereinafter *Not Post-Racism*]; see also Meher George, *Why Being 'Woke' Is Not Enough*, *BERKELEY POL. REV.* (Apr. 18, 2019), <https://bpr.berkeley.edu/2019/04/18/why-being-woke-is-not-enough/> [<https://perma.cc/H84F-L69X>] (discussing the concept and etiology of the term "woke", and how its ubiquity can engender a false sense of security).

<sup>207</sup> Fordyce et al., *supra* note 151, at 241–46 (describing an Australian anti-racist game, *Everyday Racism*).

<sup>208</sup> See, e.g., Taylor Anderson-Barkley and Kira Fogelson, *Activism in Video Games: A New Voice for Social Change*, in *WOKE GAMING: DIGITAL CHALLENGES TO OPPRESSION AND SOCIAL INJUSTICE* 252, 252 (Kishonna L. Gray & David J. Leonard eds., 2018).

and diversity.<sup>209</sup> Yet, words are cheap; merely having diversity as a goal is insufficient but should be a starting point to effectuate change.<sup>210</sup> At the end of the day, “[d]iversity is about variety, getting bodies with different genders and colors into the room. Equity is about how those bodies get in the door and what they are able to do in their posts.”<sup>211</sup>

The deployment of social media, such as the use of TWITTER, forced offending and offensive clothing lines to be removed, and trademarks to be changed.<sup>212</sup> A posting on Facebook led not only to Prada’s apologies, but also to the removal of its Sambo-like keychain.<sup>213</sup>

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<sup>209</sup> See generally *Inclusion & Diversity*, ELECTRONIC ARTS, <https://www.ea.com/commitments/inclusion-and-diversity> [<https://perma.cc/DV7M-6GKA>] (Electronic Arts (EA)’s form of diversity statement).

<sup>210</sup> See *Not Post-Racism*, *supra* note 206, at 19 (arguing that “it is important to push conversations about gaming and gamers beyond diversity...”).

<sup>211</sup> David J. Leonard, *Virtual Anti-racism: Pleasure, Catharsis, and Hope in Mafia III and Watch Dogs 2*, 44 HUM. & SOC’Y 111, 118 (2020) (quoting Rinku Sen) (internal quotations and citation omitted).

<sup>212</sup> For example, #KimOhNo quickly began to trend after Kardashian announced her ill-conceived plan to market her shapewear bearing the mark KIMONO. After “listening” to her critics, Kardashian changed the brand name. See Maari Sugawara, #KimOhNo: Kim Kardashian’s Culturally Offensive ‘Kimono’ Shapewear, JAPAN IN CANADA.COM (July 13, 2019), <https://japanincanada.com/kimohno/> [<https://perma.cc/UPQ2-NQ2P>]; see also Carrie Goldberg, *Kim Kardashian West Announced the Relaunch of Her “Kimono” Line As “SKIMS”*, HARPER’S BAZAAR (Aug. 26, 2019), <https://www.harpersbazaar.com/celebrity/a28244665/kim-kardashian-kimono-new-name/> [<https://perma.cc/5HXS-WAG3>].

<sup>213</sup> See Teddy Grant, *Prada Apologizes Over Selling ‘Blackface’ Keychains*, EBONY (Dec. 14, 2018), <https://www.ebony.com/news/prada-apologizes-over-selling-blackface-keychains/> [<https://perma.cc/57LT-3HFF>].

In addition, the creative use of New York City’s Human Rights Law,<sup>214</sup> which is touted as “one of the broadest and most protective antidiscrimination laws in the country”,<sup>215</sup> and the decision of the New York City Commission on Human Rights (NYCCHR) to take on anti-black racism projects in the city,<sup>216</sup> caused an unprecedented settlement agreement between Prada and the NYCCHR.<sup>217</sup> Prada agreed to put staff and executives, including those in Italy, through racial equity training as well as to create scholarships and paid internships for underrepresented groups.<sup>218</sup>

On the other hand, it was social activists and their public outrage at racial injustices that forced the hands of CEOs of major food companies to end the “servitude” of their brand mascots, such as Aunt Jemima,<sup>219</sup> and the Washington Football team to end the use of its offensive team name.<sup>220</sup> Ironically, these changes occurred without

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<sup>214</sup> N.Y.C. ADMIN. CODE § 8-107.

<sup>215</sup> See Gurjot Kaur and Dana Sussman, *Unlocking the Power and Possibility of Local Enforcement of Human and Civil Rights: Lessons Learned from the NYC Commission on Human Rights*, 51 COLUM. HUM. RTS. L. REV. 582, 598 (2020).

<sup>216</sup> *Id.* at 648, 654–55 (discussing the Commission’s anti-Black initiatives in general, and the *Prada* case, in particular).

<sup>217</sup> See Vanessa Friedman, *Miuccia Prada Will Be Getting Sensitivity Training*, N.Y. TIMES (Feb. 4, 2020), <https://www.nytimes.com/2020/02/04/style/Prada-racism-City-Commission-on-Human-Rights.html> [<https://perma.cc/YF42-WMPR>] (discussing the settlement agreement between the fashion house and New York City Commission on Human Rights).

<sup>218</sup> *Id.*

<sup>219</sup> Tiffany Hsu, *Aunt Jemima Brand to Change Name and Image Over ‘Racial Stereotype’*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/business/media/aunt-jemima-racial-stereotype.html> [<https://perma.cc/DPD8-VNFF>].

<sup>220</sup> See generally Max Burman, *Washington’s NFL team retires name long condemned as anti-Indigenous slur*, NBC NEWS (July 13, 2020), <https://www.nbcnews.com/news/sports/washington-s-nfl-team-retires->



the force of federal trademark law because the law which allowed for the cancellation of the marks, is now defunct.<sup>221</sup>

However, racism is deeply rooted and hard to deracinate. This begs the question: *Quis custodiet ipsos custodes?* Some would argue that in removing the legal guardrails that existed to prohibit disparaging trademarks, the duty to guard devolves to the consumers. In other words, the market will do its work and weed out speech and stances that are objectionable.<sup>222</sup>

Another argument is that because consumer activists are participants in corporate social responsibility, corporations will hew to the causes that their investors support.<sup>223</sup> As Noah Rothman noted: “Corporations and brands used to resist even vaguely political messaging . . . [n]ot anymore. Consumers across the political spectrum now specifically seek out brands associated with an explicit social or political ‘stance’.”<sup>224</sup> Unfortunately, the change in corporate behavior is not because effectuating equitable change is the right thing to do *per se*; rather, the motivation is that the bottom line is not affected and, in some instances, is actually improved.<sup>225</sup>

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name-long-condemned-anti-indigenous-n1233624

[<https://perma.cc/Y8C6-3DY9>].

<sup>221</sup> See *Matal*, 137 S.Ct. at 1765.

<sup>222</sup> See Jake MacKay, *Racist Trademarks and Consumer Activism: How the Market Takes Care of Business*, 42 LAW & PSYCH. REV. 131, 141 (2018) (arguing that “[t]he well-informed consumer may not purchase a product if she is offended by the view it expresses . . .”).

<sup>223</sup> SARAH BANET-WEISER, *Branding Politics: Shopping for Change?*, in AUTHENTIC™: THE POLITICS OF AMBIVALENCE IN A BRAND CULTURE 125, 127 (2012).

<sup>224</sup> Noah Rothman, *Woke Brands and the Sorry Fad of Entry-Level Politics*, DAILY WIRE (Jan. 17, 2019), <https://www.dailywire.com/news/rothman-woke-brands-and-sorry-fad-entry-level-daily-wire> [<https://perma.cc/Z9RK-P2S6>].

<sup>225</sup> *Id.* (noting that Nike’s sales jumped by 10% in the wake of its campaign featuring Colin Kaepernick).

Just as being “woke” is insufficient, for consumers to think that “buying good is doing good” is also an inadequate response because “what counts, culturally and politically as good” depends on having a large enough consumer base (or megaphone) to make it worth the cultural shift for the corporation.<sup>226</sup> The change in momentum that occurred this summer was a unique moment, and companies scrambled to meet it.

What is needed for “the hill we climb,”<sup>227</sup> not only in the video gaming world, but also in fashion houses, and corporate board rooms, is “accuracy, collaboration, and information”.<sup>228</sup> Accuracy in representation is necessary to make sure that there is no single story;<sup>229</sup> while collaboration is required to insure buy-in from constituent groups. Finally, information about the source material is critical in order to obviate the excuse of ignorance. In turn, we, if we wish to be activist consumers, need to consider the source, the significance, and the context of the games we play, the trademarks we consume and the clothing we wear.

So, who are *you* wearing?

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<sup>226</sup> BANET-WEISER, *supra* note 223, at 147.

<sup>227</sup> With apologies to Amanda Gorman: Jennifer Liu, *Read the full text of Amanda Gorman’s inaugural poem ‘The Hill We Climb’*, CNBC (Jan. 20, 2021), <https://www.cnn.com/2021/01/20/amanda-gormans-inaugural-poem-the-hill-we-climb-full-text.html> [<https://perma.cc/Q7GR-66TY>].

<sup>228</sup> Passmore et al., *supra* note 79, at 10 (noting that “accuracy, collaboration and information are paramount...[i]f digital gaming intends to represent humans then it must do so carefully, as it risks harmful negative representations.”). I would argue that any outward-facing entity should employ these same criteria.

<sup>229</sup> *Id.* at 3 (noting that “accuracy in representation is imperative”, because “[u]nawareness of these nuances and complexities leads to unintentional stereotypes (e.g., high-tech blackface) and miscommunications.”).

VI. APPENDIX

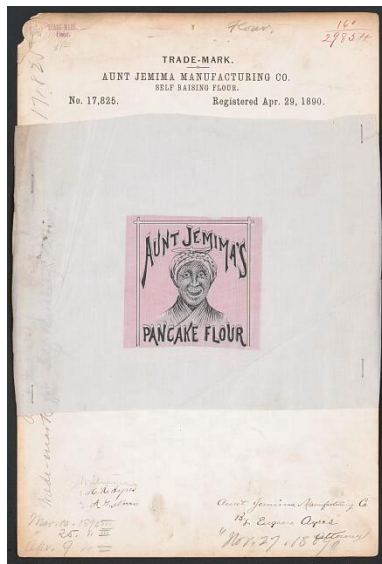


Figure 1: Early U.S. Trademark Registration for AUNT JEMIMA<sup>230</sup>



Figure 2: AUNT JEMIMA ad, circa 1940s, which exemplifies the pervasive stereotypes of the day<sup>231</sup>

<sup>230</sup> AUNT JEMIMA, *supra* note 99.

<sup>231</sup> African American Museum of Iowa, *Aunt Jemima "I'se in town, Honey!"*, YOUTUBE (Feb. 7, 2013), <https://blackiowa.org/collections-corner-aunt-jemima/> [<https://perma.cc/5Z3W-5KRN>].



**Figure 3: Gucci balaclava sweater withdrawn from the market after social media protests<sup>232</sup>**



**Figure 4: Katy Perry “RUE” slip-on loafer, removed from the market one week after the Gucci sweater<sup>233</sup>**

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<sup>232</sup> Young, *supra* note 113.

<sup>233</sup> See Samantha Lyster, *Gucci Blackface Latest in History of Fashion Political Incorrectness*, BELLA VITA STYLE (Feb. 17, 2019), <http://www.bellavitastyle.com/gucci-blackface-latest-in-history-of-fashion-political-incorrectness/> [https://perma.cc/5HCB-NGWF].