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Marking Difference in American Commerce: Trademarks and Alterity at Century's Ends*

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Since 1930, the mascot of Robertson's^R Marmalade, England's Golliwog^R (who looks like Buckwheat, but a bit more nattily attired) has appeared on over 20 million pieces of merchandise—from teapots to toothbrushes to T-shirts ... When Golly was criticized in 1984 by some of England's “oversensitive” black population, a Robertson's spokesman righteously declared, “the Golly forms part of our national tradition and attacking it is an attack on a part of British culture.”¹

This anecdote attracts both our cultural and legal attention. Capturing the central role of trademarks in national culture, it also points to a politics of ownership and protest. Accounting for its significance theoretically, however, is no easy task. Somehow, it resists easy accommodation in any of the three dominant approaches towards the commodified imagery of late capitalism. Neither Jameson's² modernist nostalgia for “our real” history (now lost in the proliferation of media imagery), nor cultural studies celebration of consumption as a potential practice of resistance and self-affirmation,³ nor Walter Benjamin's

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- * This paper was presented on the panel “The Difference Law Makes” at the American Anthropological Association Annual Meetings, Atlanta, 30 November–4 December 1994. A longer and more elaborated version of the argument titled “Embodied Trademarks: Mimesis and Alterity on American Commercial Frontiers” is forthcoming in (1996) 11:2 *Cultural Anthropology*.
1. Colin Whitehead, “Review of White on Black” *Voice Literary Supplement* (25 October 1992).
 2. Fredric Jameson, *Postmodernism or the Cultural Logic of Late Capitalism* (Durham, NC: Duke University Press, 1991).
 3. See Andrew Ross, ed., *Universal Abandon? The Politics of Postmodernism* (Minneapolis: University of Minnesota Press, 1988); Andrew Ross, *No Respect: Intellectuals and Popular Culture* (New York: Routledge, Chapman & Hall, 1989); Kobena Mercer, “Welcome to the Jungle: Identity and Diversity in Postmodern Politics” in Jonathan Rutherford, ed., *Identity: Community, Culture, Difference* (London: Lawrence & Wishart, 1990) 43.

optimism for the transcendent potential of the commodity's fetishism⁴ do justice to the dilemma posed by the Golly^R. Even "postcolonial" theory remains somehow inadequate to characterize contemporary challenges to the circulation of those commodified signs that continue to embody colonialism's Others in conditions of mass commerce.

Scholars developing the concept of the "public sphere"⁵ advocate increased attention to the cultural politics that engage the commodified signs of mass media culture because of their significance in making contemporary publics and producing subjectivities. Mass media defines and codes desire. As Michael Warner puts it: "we have brandnames all over us."⁶ Trademarks, he suggests, are constitutive parts of a public sphere—constructing a common discourse to bind the subject to the nation and to its markets.⁷ But I would hasten to add that some of "us" and "our" ancestors *are*, in fact, legally brandnames: Cherokees, Oneida, Seminoles, Winnebago, Crazy Horse, Aunt Jemima, and Uncle Ben. Some of "us" may have trademarks all over our bodies, others of "us" have bodies that are all over the commercial landscape *as* trademarks.

My recent work⁸ addresses the significance of intellectual properties in the public sphere—how they are used by subaltern groups to construct identities and

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4. See Michael Taussig, *Mimesis and Alterity: An Alternative History of the Senses* (New York: Routledge, Chapman & Hall 1993).
 5. See Craig Calhoun, "Civil Society and the Public Sphere" (1993) 5 *Public Culture* 267; Nicholas Garnham, "The Mass Media, Cultural Identity, and the Public Sphere in the Modern World" (1993) 5 *Public Culture* 251; Dana Polan, "The Public's Fear: or, Media as Monster in Habermas, Negt, and Kluge" in Bruce Robbins, ed., *The Phantom Public Sphere* (Minneapolis: University of Minnesota Press, 1993) 33.
 6. Michael Warner, "The Mass Public and the Mass Subject" in Robbins, *supra* note 5, 234 at 242.
 7. *Ibid.* at 243.
 8. Rosemary J. Coombe, "Beyond Modernity's Meanings: Encountering the Postmodern in Cultural Anthropology" (1991) 11 *Culture* 111; Rosemary J. Coombe, "Objects of Property and Subjects of Politics: Intellectual Property and Democratic Dialogue" (1991) 69 *Texas Law Review* 1853; Rosemary J. Coombe, "Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders" (1992) 10 *Cardozo Arts & Entertainment Law Journal* 365, reprinted in Martha Woodmansee & Peter Jaszi, eds., *The Construction of Authorship: Textual Appropriations in Law and Literature* (Durham, N.C.: Duke University Press, 1994) 101; Rosemary J. Coombe, "Publicity Rights and Political Aspiration: Mass Culture, Gender Identity, and Democracy" (1992) 26 *New England Law Review* 1221; Rosemary J. Coombe, "Tactics of Appropriation and the Politics of Recognition in Late Modern Democracies" (1993) 21 *Political Theory* 411; Rosemary J. Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Debates" (1993) 6 *Canadian Journal of*

communities, to challenge social exclusions, to assert difference—their ubiquity in commercial culture makes them particularly available for the signifying activities of others, and the fact that they are everywhere the same seems to invite others to use them to inscribe social difference. The law of trademark provides both a generative condition and a prohibitive boundary—managing mimesis (authorizing true copies) while it polices alterity (the resignifications of others). Laws of intellectual property—copyright, trademark, publicity rights—constitute a political economy of mimesis in capitalist societies, constructing authors, regulating the activities of reproduction, authorizing and licensing copying and imitation—in the service of maintaining the exchange value of texts.

Such legal forms always invite encounters with alterity—the other that always haunts the proper name, the difference that always already occupies the space of the signature that attempts to keep it at bay. Laws that construct the concept of the unitary and self-contained work (copyright) or the mark of origin for the commodity (trademark) simultaneously prohibit intertextuality as they deny it, and in their denial give voice to the anxiety that authorship always embodies. The trademark might well be seen as the organized control of mimesis in capitalist societies; the channelling of the cultural energy of mimesis into the form of the signature—the attempt to appropriate it under the proper name. A commercial surrogate identity—prosthetic, if you will⁹—the trademark maintains and garners exchange value in the market.

Theorists of the “public sphere” suggest that to “think the nation” we consider the emergence of new forms of “publicness”—forms of public subjectivity constructed to interrelate collectivities and imagined national communities.¹⁰ We need to look at the historical emergence of *particular* forms of mass subjectivity over the last two centuries. If, in the 18th century, a bourgeois public sphere was created through print, and a disembodied and universalized subject was created, it is appropriate to ask what new forms of

Law and Jurisprudence 349, abbreviated and reprinted in Karen Engle & Dan Danielson, eds., *After Identity: Essays in Law, Culture and Politics* (New York: Routledge, Chapman & Hall, 1994) 251; Rosemary J. Coombe, “The Cultural Life Of Things: Anthropological Approaches to Law and Society In Conditions of Globalization” (1995) 10 *American University Journal of International Law and Policy* 791; Rosemary J. Coombe, *Cultural Appropriations: Authorship, Alterity and the Law* (New York: Routledge, Chapman & Hall, [forthcoming in 1996] [hereinafter *Cultural Appropriations*]; Rosemary J. Coombe & Paul Stoller, “X Marks the Spot: The Ambiguities of African Trading in the Commerce of the Black Public Sphere” (1994) 7 *Public Culture* 249.

9. Lauren Berlant, “National Brands/National Body: Imitation of Life” in Robbins, *supra* note 5, 173 [hereinafter *Imitation of Life*].
10. Benjamin Lee, “Going Public” (1993) 5 *Public Culture* 165.

subjectivity have been constructed in the face of new forms of media. Mass-mediated consumer capitalism creates a consuming subject with a more visual orientation and a fully mediated, but nonetheless, particularized set of desires—perceived as choices, which are linked to the body through mass-mediated forms of publicity.

Lauren Berlant¹¹ and Michael Warner¹² both point to some of the differences between the bourgeois public and the mass public, and the liberal subject and the mass subject, by emphasizing their status with respect to the body. The subject of the bourgeois public sphere is disincorporated and disembodied. Embedded in the possibility of a public is a promise—“a utopian universality that would allow people to transcend the given realities of their bodies and their status”.¹³ It is, of course, a promise that has never been fulfilled:

For the ability to abstract oneself in public discussion has always been an unequally available resource ... The subject who could master this rhetoric of self-abstracting disinterest ... was implicitly—even explicitly—white, male, literate and propertied. These traits could go unmarked, while other features of bodies could only be acknowledged as the humiliating positivity of the particular.¹⁴

Access to the public sphere came in the whiteness and maleness that were denied as forms of positivity: “the white male *qua* public person was only abstract rather than white and male.”¹⁵

Asymmetries of embodiment and demarcation are argued by political theorists to be constitutive of the liberal public sphere itself:¹⁶ “Differences in the social world [always] come coded as the difference between the unmarked and the marked ... The bourgeois public sphere employs a logic of abstraction that provides a privilege for unmarked identities ...”¹⁷

Difference in the public sphere will usually be enunciated as mere positivity; the particular body cannot project itself in the bourgeois public sphere without ceasing to exist (later, I will suggest that in law, one *can* maintain a privilege for a marked identity, providing one marks that privilege with the bodies of identifiable Others). We have witnessed this time and time again, especially when it comes to the disabled, the pregnant, and others who cannot cease to

11. Berlant, *supra* note 9.

12. Warner, *supra* note 6.

13. *Ibid.* at 239.

14. *Ibid.*

15. *Ibid.*

16. See Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy” in Robbins, *supra* note 5, 1.

17. Warner, *supra* note 6 at 240.

occupy particular bodies in order to make public claims, and whose claims are often dismissed as “special interests.”

The “mass subject,” as opposed to the subject of the bourgeois public sphere, has a more ambivalent relation to the body. If the public sphere offered only self-abstraction and disincorporation, the mass-mediated sphere of consumption provides opportunities for subjects to reclaim bodies, without either surrendering privilege or suppressing difference. The realm of consumer choice allegedly creates conditions for a variety of *identifications* and an inexhaustible supply of bodily images offered for consumption, seizure, and occupation. But if such images are private properties, protected by intellectual property laws, then the politics of such identifications take on a different configuration. If trademarks are constitutive in the commerce of mass markets and bodily connection, if representation and desire are paramount in the construction of contemporary subjectivities, what political difference does law make when the bodily images of historical and cultural Others figure predominantly as marks of private commercial distinction?

I shall focus upon two moments—ends of two centuries—to explore the politics of difference in the mass-mediated spheres of commerce and the sense of belonging to an “imagined community”¹⁸ of “American consumers” that advertising produced as well as contemporary challenges to it. These two examples are drawn from my ongoing study of the cultural politics of trademark laws in American society.¹⁹ In the late 19th century, trademark laws become, for the first time, federal ones in markets recognized as national, and in the United States a particularly “American” consumer needed to be constructed. In precisely the same period we see preoccupations with the frontiers of civilization and the containment of the primitive. In the late 20th century, we witness the politicized responses of those “othered” by those late 19th-century processes; they assert the right to control their own representations in the public sphere. Indigenous peoples in Hawaii, for example, seek to rescue such indicia of their traditional culture as the hula and the lua from its commercial distortions in the tourist industry.²⁰ The problem, as we shall see, is that for many peoples, “their own” representations are often legally owned by others, as properties protected by laws of intellectual property.

In the late 19th century, we see the rise of mass manufacturing, mass communications and mass immigration. I am attempting to demonstrate that the nominal disembodiment of the American citizen²¹ was created, in part, by a realm of national signification—mass-advertised trademarks—that denied or

18. Ben Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (New York: Verso, 1991).

19. Coombe, *Cultural Appropriations*, *supra* note 8.

20. Sally Merry Engle, “Resistance and the Cultural Power of Law” (1995) 29:1 *Law & Society Review* 11.

21. Berlant, *supra* note 9.

downplayed the cultural and ethnic differences of some “Americans,” while it emphasized the cultural differences of Others. It did so through the medium of the consuming body, and the embodiment, on a national scale, of Others whose claims to an American subjectivity were complicated by contemporary relations of subjugation. The “incorporation of America” was integrally related to the corporeality of Others.

In the late 19th century, American culture was preoccupied with the nature of civilization and its alters. The discourse of commerce projected images of barbarism, conquest, and servitude to construct the subject positions of mass consumer and American citizen. Images, descriptions, and indicia that made reference to African-Americans, Indian peoples, Hispanic and mestizo subjects, as well as the perceived “tribal” groups colonized by American imperial expansion (for example, Filipinos, Hawaiians, “Eskimos”) were mass-reproduced and projected on a national scale through the medium of trademarks (hula dancers, pineapples, igloos, fur parka bonnets, etc.). Through magazine and streetcar advertising, trade cards, billboards, packaging, and premiums, concepts of savagery and civilization, primitivism and progress were legitimated.

In early American trademark law, a mark had to be distinctive; it could not be confusing, and it could not be the name of the product itself. It had to be a mark that differentiated your wares from the goods of someone else—it distinguished your product in the market. As American markets became national and culturally diverse, the mark had to be recognizable to millions of people, many of whom were illiterate. The use of images to mark products was an early development, and manufacturers were taught the semiotics of marketing quite explicitly. One marketing manual, intriguingly titled *Trademark Power: An Expedition into an Unprobed and Inviting Wilderness*,²² by one Glen Buck, lists a series of equivalences that consumers could be expected to know; one of them is a figure of an Indian with an equal sign followed by a picture of a cigar.

Manufacturers were advised to choose marks that were as distant as possible from the nature of the goods they were actually selling. Indeed, an early article in the *Albany Law Journal* suggested that foreign words, words in dead languages, and terms and images from areas of the world not known in the local market promised to be the best markers for a manufacturer's wares, precisely because their exoticism rendered them “merely arbitrary designations for the sake of distinction.” Those with perceived mimetic capacities—Indians, Eskimos, children (especially twins), talking birds, animals, and “savages” of every stripe—figure prominently as trademarks. Creatures deemed by a dominant culture to have a “sixth sense”—they served to judge similitude, while simultaneously marking difference.

22. Glen Buck, *Trademark Power: An Expedition into an Unprobed and Inviting Wilderness* (Chicago: Monroe & Southworth, 1916).

Businesses were advised to establish a "strong mark" that was not "descriptive," nor "suggestive," but "distinctive." In their quests for distinction, it is not at all surprising that producers turned to bodily signs of social difference—those indicia that Americans, via World's Fairs, were coming to recognize as the signs of the primitive *Other* that marked their own civilization. Robert Rydell²³ demonstrates that the midway imposed an evolutionary framework upon the world's peoples in American World's Fairs between 1876 and 1916 through which Americans measured their own collective progress. Certainly, the proliferation of Indian, African, and Polynesian imagery and the ubiquity of black servants in the advertising and marking of consumer goods at the turn of the century is quite remarkable.

Thus, *social difference* created a pool of cultural resources within which manufacturers fished for their own *distinction*—that is, the distinction they could claim as their *own*. The legal basis of this claim is the old mercantile notion of goodwill. The mark that accompanies all of one's goods, and makes them recognizable, attracts the "loyalty" of consumers and this loyalty is a valuable asset—goodwill. The positive value of one's trade is congealed in the exchange-value of the sign. The trademark marks the point of origin of the good—and serves as a surrogate identity for the manufacturer—in a national market in which the distances between points of production and points of consumption might be vast.

Given what Taussig²⁴ claims to be the "alleged primitivism of mimeticism," it is not surprising that manufacturers should capture the perceived mimetic abilities of the *Other* in the magic of the commodity's own mimetic circulation. Moreover, such advertising was often "internally referential, an image of the miming of miming"²⁵—as, for example, in the ubiquitous imagery of black servants on boxes holding up boxes marked with their image holding up another box, marked with yet another black servant holding a box ... ad infinitum (for example, Cream of Wheat ads). In short, the bodies a mass manufacturer might claim were not likely to be his own, but legally they were recognized as embodying his distinct place in national commerce—the difference that law makes.

Manufacturers, wholesalers, and retailers were legally enabled to make proprietary claims upon such signs against the appropriations of others by virtue of the "distinction" they could claim in the market. To assert such rights, however, one also had to make claims about the consuming public—the "average American consumer" and his habits. One early case is suggestive. In an

23. Robert Rydell, *All the World's Fair: Visions of Empire at American International Expositions, 1876-1916* (Chicago: University of Chicago Press, 1984).

24. Taussig, *supra* note 4.

25. *Ibid.* at 213.

appeal from the Milwaukee County Court in 1879, one Leidersdorf brought action against a Mr. Flint to prevent him from using a trademark that imitated his own trademark. Both were tobacco dealers. For 13 years, the plaintiff had manufactured and sold a type of smoking tobacco in paper wrappers and stamped with the words and name "NIGGER-HAIR SMOKING TOBACCO"—and claimed exclusive rights in that mark. The mark, besides the name, included "a representation of the head of a negro surmounted with a copious crop of wool, and having a large ring pending from the nose and another from the ear." The complaint alleged that:

[T]he said tobacco is a low-priced tobacco, and is to a large extent bought and consumed by a class of people who cannot read, and whose necessities and manner of living do not require them to practice more than ordinary caution when purchasing the commodities most frequently procured; and to this class of people the said tobacco has become known and is easily recognized, largely by reason of the said peculiar and distinctive trade-mark aforesaid.²⁶

The manufacturer claimed that the defendant's mark imitated their own mark and was designed to confuse and deceive customers, divert trade, and steal the goodwill it had garnered in the market. Purchasers who thought they were buying the genuine "Nigger-Hair", found themselves with an inferior product.

What makes the manufacturer's claim so remarkable today, beyond its obvious racist proprietary (if I may coin a term), is the fact that the so-called imitation mark was a representation, *not* of an African American, but of "the head of an Indian with a ring in his ear, but none in his nose"²⁷ with the words "Big Indian" under the picture. The judges were asked to permit the ongoing sale of Big Indian tobacco, on the basis that there was no cause of action, but refused to dismiss the claim. Recognizing several points of resemblance between the marks, the court decided it was possible that the public were actually deceived. They decided to let the case go to trial. A public sphere in which the bodily features of a "Nigger" and an "Indian" might be seen as equivalents—one form of alterity mimetic with another, and one mark of distinctive alterity an imitation of the other—was affirmed as both plausible and probable.

In other work,²⁸ I move forward through a century—to contemporary fields in which embodied distinctions are established and contested on frontiers on which the boundaries of the nation are still very much at stake. Struggles over publicity engaging the trademark "take place"—in hybrid sites of national

26. Benjamin Price & Arthur Steuart, *American Trade-Mark Cases Decided by the Courts of the United States, both State and Federal and by the Commissioner of Patents, and Reported Between 1879 and 1887* (Baltimore: Cushings & Bailey, 1887) at 429.

27. *Ibid.* at 429.

28. Coombe, *Cultural Appropriations*, *supra* note 8.

contention. Given the historical focus upon the “frontier” as defining the space and the possibility of American democracy, I focus on the frontiers as liminal spaces in which nations, citizens, and their differential embodiments are negotiated. The trademark, I suggest, functions as one idiom in which such negotiations are expressed.

Owners of trademarks must always cope with the presence of the *Other* in the cultural spaces they attempt to colonize. Allegiances to Indian nations, other nation-states, and transnational migrant communities, often provoke resistance by capitalism's Others to the bodily imagery by which they are othered in contemporary consumer society. One area of recent activism will suffice to illustrate. In the late 20th century, we witness renewed struggles in the spaces where mimesis and alterity occupy the commercial terrain. Today, many Indian peoples find that Americans are primarily aware of their presence as the stereotyped images that circulate in sports team mascots, tomahawk chops, and old cartoons. The contemporary conditions of their lives and their political struggles are totally obscured by representations of them that are owned by others. The ubiquity of “Trader Vic's”^R Hawaii in North American commerce makes the contemporary realities of indigenous Hawaiian peoples invisible, so completely have their identities been subsumed (and consumed) by this mythic imagery.

Long after the Frito Bandito has been laid to rest, and Black Mammy's and Little Black Sambo's have ceased to signify on American commercial terrain, Indians are still a privileged form of alterity in advertising. From Red Man^R chewing tobacco, Indian Spirit^R air freshener, Indian styleTM popcorn, Braves^R and Redskins^R, the body of the Indian marks the privileges of disembodied bourgeois subjects, those corporations that claim these marks of corporeal alterity as their own. Ironically, it appears that the most successful way for Indian peoples to challenge these stereotypical representations of themselves is to claim them—to claim the misrecognitions of others as their own property. From publicity rights suits through trademark expungement proceedings, Indian peoples are now using the proprietary forms of the bourgeois public sphere to assert a differential embodiment that is alter to, or other than, the fetishes of capitalist enchantment. They are likely to be most successful when claiming the signs of their own nations—Cherokees, Seminoles—for the law is most likely to show deference to these as markers of differential propriety.

The Indian body of mass media advertising will be much harder to remove—so ubiquitous has it become—and so invisible and unheard its real referents. If the mimetic faculty is the power to copy, imitate, yield into, and become, Other—and certainly any football, baseball or basketball game involving an “Indian” named team will provoke the activities of any number of cultural cross-dressers—it is also the case that the copy draws power from, and influences, the Original; the representation gains the power of the represented and the image affects what it is an image of. For Indian peoples, this means that

their contemporary social needs and political claims are not recognized; they are so fully identified with (or subsumed by) the warbonnetted caricatures first mass-produced in Buffalo Bill's Wild West Show and ever reproduced in commerce. Victims of the frontier and symbols of its loss in the nation's imaginary, they have figured for so long as an absence that their contemporary presence struggles to find visibility and voice in American public spheres. Commercial imitations of their embodied alterity—prosthetic selves that belong to others—mark their continuing colonization in mass-mediated culture, precluding full political engagement in the public sphere.

The mimesis and alterity embodied by the commodity sign attest to the difficulties of drawing the boundaries of nations and marking inclusion and exclusion on historic and emergent frontiers. They also testify to the politics of mass publicity in a consumer society. The bourgeois public sphere presupposes a universality and singularity of the human body that denies the ways history has written different bodies differentially, inscriptions that have often taken place in advertising itself. The bodily incorporation of the advertising image is different when the image one consumes is a stereotyped version of one's self.

For those whose bodies are marked by a history of commodification (Blacks in America) and those whose bodies are marked by alternative histories of fetishism (women and native peoples) the mimesis of mass advertising must be altered in ever new and more imaginative ways. The mass commodity form characteristic of late capitalism offers and compels a transformation of the magic of mimesis and its relation to alterity, presenting possibilities for a new body politics of publicity. Ultimately Others must interrogate the cultural mimicry of alterity upon which capital thrives—alter/ing the differences law makes.