

## Can IP Law Protect People from Harassment?

Edward Lee

IIT Chicago-Kent College of Law

This Article asks whether copyright or trademark law can recognize the goal of protecting people from harassment or exploitation, consistent with the First Amendment. U.S. copyright law does not have anti-harassment protections built in. Indeed, guarding against harassment in copyright law might seem contrary to Justice Holmes' famous admonition in *Bleistein* that judges are not to engage in content review of copyrighted works "outside of the narrowest and most obvious limits." By contrast, similar to other countries' trademark laws, U.S. trademark law contains protections against harassment or exploitation in the form of bars to registration of certain marks, such as marks "which may disparage ... persons ... or bring them into contempt, or disrepute." However, the U.S. Supreme Court in the recent *Tam* decision held that this bar constituted viewpoint discrimination in violation of the First Amendment—a decision that calls into question another statutory bar to registration in the Lanham Act against "immoral ... or scandalous matter."

Should IP law be completely silent when it comes to the creation or uses of IP in ways that harass or exploit people? The recent #MeToo movement has exposed a disturbing number of movies and other works that involved alleged sexual harassment of actresses in the movies. In one harrowing example, Salma Hayek claims that the producer Harvey Weinstein gave her an ultimatum that she perform a fully-nude sex scene with a woman in the filming of the movie *Frida* or the movie's production would stop. Harassment need not be sexual to raise concern, moreover. In *Garcia v. Google*, a male producer duped a female actress into acting for what she thought was an action movie, but the producer dubbed in someone else's voice (over the actress's voice) that stated blasphemous anti-Islamic lines that led to death threats against the female actress. An en banc Ninth Circuit held copyright law provided no basis to help the actress in seeking the removal of the (fraudulently created) depiction of her from YouTube. This Article questions the current approach and examines whether copyright and trademark can be amended by Congress or interpreted by courts in ways that recognize a goal of protecting people from certain forms of harassment or exploitation.