SEX EXCEPTIONALISM
IN
INTELLECTUAL PROPERTY

Jennifer E. Rothman
Professor of Law and Joseph Scott Fellow
Sex Exceptionalism, Negativity & Normativity

Lawrence v. Texas (US 2003)

Williams v. Morgan (11th Cir. 2007)
Trademark’s Continued Sex Negativity

Bars to Registration: Prohibition on marks that “consist[] of or comprise[] immoral … or scandalous matter.”
Bars To Registration:
Sexual Content

[Image of The Bearded Clam]

[Image of Sex Rod]

[Image of 1-800-Jack-Off]
Trademark Infringement: Likelihood of Confusion Factors

1) Competitive Proximity

2) Quality of Defendant’s Goods/Services

3) Sophistication of Purchasers & Pricing

4) Intent in Adoption of Mark
Trademark Infringement
Not All Movies are Treated Equally
Trademark Dilution
Copyright Law of Yore

No copyright for immoral, obscene, blasphemous or other works against public policy
Copyright Law of Today: See No Evil?
Copyright Revisited

1) Commentators and some Courts

2) Thin Protection

3) Fair Use
Fair Use Factors

1) The purpose and character of the use

2) The nature of the original work

3) The amount and substantiality of the portion used

4) The effect of the use upon the potential market for or value of the copyrighted work
MCA v. Wilson (2d Cir. 1981)

Cunnilingus Champion of Company C
Walt Disney Prods. v. Air Pirates
(9th Cir. 1978)
Walt Disney Prods. v. Mature Pictures
(S.D.N.Y. 1975)
IP-Based Reasons for Sex Neutrality

1) Uniformity and Federal Preemption

2) Changing Social Mores

3) Fiction of State Endorsement

4) Promotion of Progress and Incentive/Disincentive Rationale

5) Consumer Protection

6) Discouragement of Aesthetic Evaluations