

The Cult of Personality: The Use of Intellectual Property To Protect Publicity Rights in a Digital World

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I. INTRODUCTION: HEY, YOU! GET OFF MY PROPERTY!

Last fall, Toronto’s Mayor Rob Ford yelled at a horde of reporters and photographers waiting outside his home to “get off [his] property.”¹

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1. *Rob Ford: Shaken Toronto Mayor Clashes with Reporters*, TORONTO STAR (Oct. 31, 2013),

Online videos of the run-in have garnered over 160,000 views on YouTube.²

On a superficial level, this incident seems unrelated to the traditional concept of intellectual property rights. No “works of authorship,” innovations, inventions, or identifying marks are involved.³ But taken as a whole, the substance abuse allegations against Rob Ford and the accompanying media blitzkrieg symbolize the dim lines between an individual’s common law rights of publicity and federal intellectual property rights in a digital world—especially for public figures. Consider the extent to which the hype surrounding Rob Ford has spread beyond the traditional news-reporting capacity. In 2011, the Toronto-based magazine *Now* featured on its cover a “digitally altered photo [of Rob Ford] that make[s] him appear nearly nude.”⁴ Video clips representing the mayor in an unflattering context appear all over the Internet.⁵ Ford is the target of a plethora of parodies, online and otherwise.⁶ At least two businesses have marketed “art pieces” in the shape of crack-cocaine smoking pipes, each prominently featuring Ford’s face.⁷

In the past few decades, courts have witnessed an explosion of publicity rights lawsuits that assert copyright and trademark infringement claims in addition to, or even instead of, misappropriation and false endorsement claims. This type of intellectual property suit falls outside the intended scope of the Copyright Act of 1976 (Copyright Act) and the

http://www.thestar.com/news/gta/2013/10/31/rob_ford_shaken_toronto_mayor_clashes_with_reporters.html.

2. See YOUTUBE, https://www.youtube.com/results?search_query=rob%20ford%20get%20off%20of%20my%20property&sm=3 (search for “Rob Ford Get Off My Property”) (last visited Oct. 18, 2014).

3. See *Trademark, Patent, or Copyright?*, U.S. PAT. & TRADEMARK OFFICE, <http://www.uspto.gov/trademarks/basics/definitions.jsp> (last visited Oct. 18, 2014) (defining the basic principles of copyright, trademark, and patents).

4. *Dacey Rob Ford Pics Spur City Hall To Pull Paper*, CBC NEWS, <http://www.cbc.ca/news/canada/toronto/dacey-rob-ford-pics-spur-city-hall-to-pull-paper-1.1114249> (last updated Apr. 1, 2011, 6:28 PM).

5. A YouTube search for “mayor rob ford interview” returns around 86,800 results, and a YouTube search for “rob ford smoking crack” returns roughly 25,400 results.

6. See Josh Sherman, *The 10 Best Rob Ford-Related Parodies*, SPACING TORONTO (Dec. 16, 2013), <http://spacing.ca/toronto/2013/12/16/10-rob-ford-parodies/>. In New Orleans, more than 2,000 miles from Toronto, a “larger-than-life replica of [Ford] smoking a crack pipe” was featured prominently on a Mardi Gras parade float. Canadian Press, *Rob Ford Parody Float Featured at Mardi Gras Parade*, CBC NEWS, <http://www.cbc.ca/news/canada/toronto/rob-ford-parody-float-featured-at-mardi-gras-parade-1.2556382> (last updated Mar. 3, 2014, 1:48 PM).

7. Derek Flack, *'Tis the Season for Rob Ford Crack Pipes*, BLOGTO (Dec. 22, 2013), http://www.blogto.com/arts/2013/12/tis_the_season_for_rob_ford_crack_pipes/.

Lanham Act, weakening federal intellectual property protection by blurring its boundaries. Chief Judge Kozinski declared:

Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today . . . is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.⁸

This Comment seeks to apply Chief Judge Kozinski's warning to the intersection of publicity rights and intellectual property protection in the age of the Internet, specifically focusing upon copyright and trademark claims. Applying federal intellectual property laws to many publicity-based lawsuits will ultimately dam the flow of creativity, hinder free speech, and block the stream of commerce in America. Such extensive application of the Copyright and Lanham Acts will also lessen the protection afforded to non-publicity-related copyright and trademark claims.

However, this Comment does not seek to ignore the importance of publicity rights. On the contrary, it is necessary to regulate and strengthen publicity rights on a national level. A plaintiff's recourse to federal copyright and trademark claims when faced with insufficient protection under state publicity rights is strongly indicative of this fact. Due to the rise of technology and social media, publications are readily available to a worldwide audience.⁹ Implementing national publicity rights will serve the dual purpose of properly protecting individual personality rights while simultaneously maintaining the integrity of the federal intellectual property laws.

II. BLACK-LETTER LAW: AN OVERVIEW OF PROTECTION FOR THE RIGHT OF PUBLICITY

Traditionally, the right of publicity has been a "creature of state law" with no federal protection afforded, except in certain cases of misappropriation and false endorsement.¹⁰ State interests in managing publicity rights are "closely analogous to the goals of patent and

8. *White v. Samsung Elec. Am., Inc. (White II)*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).

9. Studies from recent years indicate that the public now obtains most of its news from the Internet rather than from print newspapers. See Jolie O'Dell, *For the First Time, More People Get News Online than from Newspapers*, MASHABLE (Mar. 14, 2011), <http://mashable.com/2011/03/14/online-versus-newspaper-news/>.

10. Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, COMM. LAW., Aug. 2011, at 14.

copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation [I]n ‘right of publicity’ cases the only question is *who gets to do the publishing*.¹¹ Despite their common objective, publicity rights and intellectual property rights are intended to apply to separate areas of the law.

A. *Protection for Personality: A Brief Background in Publicity and Privacy Rights*

The right of publicity, colloquially called “personality rights,” is an individual’s proprietary right to exploit the value of his or her own likeness, characteristics, traits, notoriety, or fame.¹² The rationale for publicity rights lies in “preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that [has] market value and for which he would normally pay.”¹³

This concept is rooted in the philosophies of Georg Wilhelm Friedrich Hegel and Immanuel Kant, proponents of the “view of copyright protection as a means of safeguarding a creator’s personality or identity.”¹⁴ A seminal article by Samuel Warren and Louis Brandeis, published in 1890, propelled the American movement for laws to formally recognize and protect individuals’ rights to privacy, including the right to control publicity that one received.¹⁵ The article also backed the common law right of an individual to determine “to what extent his thoughts, sentiments, and emotions shall be communicated to others” and his or her right to set the limits of the publicity given to such expressions.¹⁶

Prior to the late nineteenth century, legal remedies for the unauthorized use of an individual’s name or image were relatively scarce compared to other laws intended to protect citizens.¹⁷ State law generally formed the basis for such causes of action. For example, *The Right to*

11. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (emphasis added).

12. *McFarland v. Miller*, 14 F.3d 912, 923 (3d Cir. 1994).

13. *Zacchini*, 433 U.S. at 576 (quoting Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).

14. Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 59 n.57 (1994).

15. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

16. *Id.* at 198-99.

17. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1167 (2006).

Privacy was cited by state courts as early as 1899.¹⁸ By contrast, the article was not referenced in a United States Supreme Court opinion until 1942.¹⁹ Federal courts did not formally recognize the right of publicity until 1953, when the United States Court of Appeals for the Second Circuit recognized a prominent person's right to control and monetize the use of their image or likeness.²⁰ This decision indicated the establishment of personality rights as a matter of state law, as opposed to intellectual property protection, which was anticipated as a federal right in the United States Constitution.²¹

The breadth of legally recognized publicity rights has grown by leaps and bounds since the Second Circuit acknowledged the "right to publicity" in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*²² Some legal scholars have even argued that the current state of the law presumes that "virtually any profit-oriented use of a name or identity is . . . wrongful, with the defendant bearing the burden of establishing that its use falls within some protected exception."²³ Presently, nineteen states have implemented right-to-publicity statutes; at least six more recognize publicity rights at common law.²⁴ Thirteen states do not recognize a common law right to publicity.²⁵

18. *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285, 286 (Mich. 1899).

19. *Goldman v. United States*, 316 U.S. 129, 136 (1942) (citing Warren & Brandeis, *supra* note 15) ("[I]n numerous ways the law protects the individual against unwarranted intrusions by others into his private affairs.").

20. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953). In this case, Circuit Judge Frank coined the term "right of publicity," explaining:

[M]any prominent persons . . . would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

Id. at 868.

21. U.S. CONST. art. 1, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries?"). Though trademarks are not mentioned by name in this clause, Congress provided for trademark protection beginning with the Trademark Act of 1870.

22. *Haelan*, 202 F.2d at 868.

23. Dogan & Lemley, *supra* note 17, at 1167.

24. See J. Alexander Johnson, *Identity Crisis*, 77 TEX. B.J. 30, 32 (2014). For applicable common law publicity rights, see, for example, RESTATEMENT (SECOND) OF TORTS: APPROPRIATION OF NAME OR LIKENESS (2013) ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (2013) (recognizing liability for "appropriat[ing] the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade").

25. See Johnson, *supra* note 24, at 32. This article lists Alaska, Arizona, Connecticut, Idaho, Louisiana, Mississippi, New Hampshire, New Mexico, North Dakota, Oregon, South

Because publicity rights are managed by the states, an individual's rights are subject to substantial jurisdictional variances.²⁶ For example, California's publicity laws are notoriously more plaintiff-friendly than New York's.²⁷ Indiana's personality rights laws are "especially broad" and have been called some of "the most sweeping right of publicity statutes in the nation."²⁸ The Copyright and Lanham Acts may also limit what can be protected by a state's publicity rights, because "if federal law and policy does not protect [certain subjects,] state law should not protect them either under a right of publicity for want of a sufficient interest justifying protection."²⁹

B. *Publicity Rights at the Federal Level*

Protection under the right of publicity "confers a monopoly on the protected individual that is potentially broader, offers fewer protections and potentially competes with [the] federal statutory monopolies [copyright, trademark, and patents]."³⁰ As products of federal law, the requirements for protection under the Copyright Act and the Lanham Act are more rigid than those of state publicity rights. Both Acts generally require formal federal registration in order for their protection to apply, though exceptions can apply to certain publicity-right violations.³¹

In order for an applicant to register their trade or service mark under the Lanham Act, the mark must be used in commerce.³² Alternatively, the applicant may file an intent-to-use trademark application as a

Carolina, Vermont, and Wyoming. However, a recent case suggests that Connecticut may be moving towards recognition of common law publicity and privacy torts. *See* Gen. Star Indem. Co. v. Travelers Indem. Co., No. CVO8402333835, 2013 WL 1849285, at *11 n.8 (Sup. Ct. of Conn. J.D. of Fairfield Apr. 9, 2013) (stating that the court agrees with Missouri's definition for a breach of the right of publicity).

26. *See* Johnson, *supra* note 24.

27. *Compare* California Celebrities Rights Act, CAL. CIV. CODE §§ 3344-3344.1 (2014), with N.Y. CIV. RIGHTS §§ 50-51 (2014). California's broad rights are most likely due to the high concentration of famous individuals in California; as Chief Judge Kozinski of the Ninth Circuit dryly remarked, "For better or worse, we *are* the Court of Appeals for the Hollywood Circuit." *White II*, 989 F.2d at 1521.

28. William K. Ford & Raizel Liebler, *Games Are Not Coffee Mugs: Games and the Right of Publicity*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 11 (2013) (quoting 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:59 (2012)).

29. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 841 (6th Cir. 1983).

30. *Id.* at 840.

31. The Copyright Act exempts federal registration as a prerequisite for an infringement action when the action is brought under § 106(A), when a proper application has been made but refused, or under any other exception listed in § 411. 17 U.S.C. § 411 (2012). Unregistered trademarks or trade dress may be protected under the Lanham Act's prohibitions against commercial misrepresentation of source or origins of goods. 15 U.S.C. § 1125 (2012).

32. 15 U.S.C. § 1051(a)(3)(C).

“placeholder” until the mark is actually used in commerce.³³ Originality and fixation, rather than use, are the key factors for protection under the Copyright Act. Federal copyright protection “subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”³⁴ Unlike a trademark, a copyrightable work need not be used in commerce to garner protection under the Copyright Act.³⁵

The Copyright Act, as applicable to publicity rights, tends to limit itself to the unauthorized transmission of a person’s image to the public.³⁶ The Copyright Act specifically precludes protection for, inter alia, ideas, concepts, and principles.³⁷ A “most fundamental axiom of copyright law” is that an author may not copyright his or her ideas.³⁸ The Copyright Act specifically states that it shall not annul or limit common law or state rights and remedies as to subject matter that is unqualified for federal protection.³⁹ This is problematic in publicity-type claims in which federal copyright protection is also sought.

The Copyright Act and the Lanham Act contain provisions that protect against reputational harm. These provisions have been construed as applicable to publicity rights. The Lanham Act imposes liability for the unauthorized use of a person’s identity to falsely advertise a product or falsely designate its origin.⁴⁰ The Lanham Act also bars registrations for marks that “disparage or falsely suggest a connection with a person, living or dead . . . or bring them into contempt, or disrepute.”⁴¹ Likewise,

33. “A person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce may request registration of its trademark on the principal register.” *Id.* § 1051(b)(1). In order to gain protection under the Lanham Act, the applicant must show, within six months after the date of application, that the mark actually has been used in commerce. *Id.* § 1051(d)(1). This time period may be extended by a maximum of five six-month periods, subject to approval of the director. *Id.* After the applicant successfully proves use in commerce, federal registration will be granted, dating retroactively to the filing date of the intent-to-use application.

34. 17 U.S.C. § 102(a).

35. Almost any work fixed in a tangible medium that contains at least some kind of “creative spark” is eligible for copyright protection. *See Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003); *see also* 17 U.S.C. § 102(a).

36. A copyright owner has the exclusive right to reproduce, prepare derivative works, distribute, and publicly display the copyrighted work. 17 U.S.C. § 106. They also hold the exclusive right to authorize such acts by others. *Id.*

37. *Id.* § 102(b).

38. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-45 (1991) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 971 U.S. 539, 547 (1985)).

39. 17 U.S.C. § 301(b).

40. *See* 15 U.S.C. § 1125 (2012).

41. *Id.* § 1052(a).

the Copyright Act contains a provision guaranteeing the rights of “attribution and integrity” to the author of a work of visual art.⁴² This means that an author may “prevent the use of his or her name as the author of any work of visual art which he or she did not create,” and he or she has the right to prevent intentional distortion, mutilation, or modification of his work “which would be prejudicial to his or her honor or reputation.”⁴³ It is important to note that neither Act grants the individual an *exclusive* right to use their name, identity, or other aspects of their personality. Instead, the Acts prevent unauthorized registration or certain uses and modifications by another.

The Supreme Court first commingled publicity rights and intellectual property in *Zacchini v. Scripps-Howard Broadcasting Co.*⁴⁴ In *Zacchini*, the Supreme Court held that the petitioner’s rights were infringed when a news channel broadcast his “human cannonball” act in its entirety without the petitioner’s consent.⁴⁵ He ordinarily received compensation for his performance.⁴⁶ The Court held that the petitioner’s common law copyright and state publicity rights were not strong enough to prevent a news channel from reporting something “newsworthy.”⁴⁷ However, the Court ruled in favor of the petitioner, comparing his publicity rights to a copyright owner’s rights: “The Constitution no more prevents a state from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.”⁴⁸

Since *Zacchini*, the Supreme Court has only heard one case involving publicity rights that did not concern intellectual property issues.⁴⁹ However, lower courts have since recognized “the cousinage between copyright liability and the right to publicity.”⁵⁰

42. 17 U.S.C. § 106A.

43. *Id.*

44. 433 U.S. 563 (1977). When comparing this case to more recent suits, it is important to note that in the former, the petitioner merely sought compensation for the public broadcast of his “human cannonball” acrobatic routine; he did not seek a total enjoinder as to the broadcast of his act. *Id.* at 573-74.

45. *Id.* at 574.

46. *Id.*

47. *Id.*

48. *Id.* at 575.

49. *See* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (holding that the First and Fourteenth Amendments prohibit a public figure from recovering damages for intentional infliction of emotional distress arising from the publication of an advertisement parody if no false statement of fact is made with actual malice).

50. *See* *Hilton v. Hallmark Cards*, 599 F.3d 894, 909 n.12 (9th Cir. 2010).

III. HE SAYS, SHE SAYS: PROTECTION OF NAMES, SLOGANS, AND CATCHPHRASES

It is common for celebrities and other public figures to “attempt to trademark unique aspects of themselves for the purpose of merchandising.”⁵¹ This usually involves the person’s proper name, nickname, or a catchphrase they made popular. For example, Olympic swimmer Ryan Lochte filed an intent-to-use application with the United States Patent and Trademark Office (USPTO) to trademark his bizarre catchphrase “jeah,” claiming an intent to use the mark in conjunction with the sale of sunglasses, swim goggles, workout DVDs, key chains, and various other types of accessories and apparel.⁵²

Potential trademarks are divided into four categories: generic, descriptive, suggestive, or arbitrary/fanciful.⁵³ Suggestive, arbitrary, and fanciful marks require no proof of secondary meaning in order to acquire protection under the Lanham Act due to their inherent source-identifying nature.⁵⁴ The word “jeah” fits squarely into the definition of a “fanciful mark,” an invented or nonsensical word that “bear[s] no relationship to the product[] or service[] to which [it] is applied.”⁵⁵ Lochte himself does not even seem to know what the word means.⁵⁶ Because of the mark’s nature, if Lochte’s trademark application is successful, he is unlikely to rob competitors of a word needed to describe or market their products.⁵⁷

With this in mind, consider the phrase “that’s hot.” While starring on the television show *The Simple Life*, heiress-turned-celebrity Paris Hilton often said “that’s hot” whenever she found something interesting or amusing.⁵⁸ The younger set may have no problem associating this

51. Meredith Bennett-Smith, ‘Jeah!’ Ryan Lochte To Trademark Bizarre Catchphrase, HUFFINGTON POST, http://www.huffingtonpost.com/2012/08/21/jeah-ryan-lochte-trademark_n_1818737.html (last updated Aug. 21, 2012, 3:10 PM).

52. U.S. Trademark Application Serial No. 85,692,888 (filed Aug. 1, 2012).

53. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976).

54. *Two Pesos, Inc. v. Taco Cabana*, 505 U.S. 763, 786 (1992).

55. *Zatarains, Inc. v. Oak Grove Smokehouse Inc.*, 698 F.2d 786, 791 (5th Cir. 1983), *abrogated by* *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004). “Kodak” is a famous example of a fanciful mark. *See Eastman Kodak Co. v. Weil*, 137 Misc. 506 (N.Y. Sup. Ct. 1930).

56. When asked the meaning of “jeah,” Lochte explained: “It means, like, almost, like, everything . . . like happy. Like, if you have a good swim, you say, ‘Jeah.’ Like, it’s good. So, I guess . . . it means good.” Bennett-Smith, *supra* note 51.

57. Generic marks, which “refer to the genus of which the particular product is a species,” are never registerable as trademarks, *Two Pesos*, 505 U.S. at 768, and “merely descriptive” marks are only registerable after a showing of acquired secondary meaning, 15 U.S.C. § 1052(e) (2012), to assure that competition will not be stifled by a monopoly over a word needed to accurately describe a product.

58. *Hilton v. Hallmark Cards*, 599 F.3d 894, 899 (9th Cir. 2010).

phrase with Paris Hilton. But would older members of the consuming public, who may have missed the reality show bandwagon, automatically think of Paris Hilton upon hearing this phrase?

Paris Hilton has filed five different applications to trademark this phrase; one was granted federal registration.⁵⁹ Should the registered mark, allegedly intended for use in connection with apparel, be deemed arbitrary? An arbitrary mark is a common word utilized in an unusual way,⁶⁰ such as Apple when applied to computer products. These marks are afforded the same level of inherent distinctiveness that fanciful marks enjoy.⁶¹ Or, in this context, is “that’s hot” merely descriptive? As the name indicates, a merely descriptive mark describes a product or service’s qualities, ingredients, characteristics, and so forth.⁶² Supreme Court jurisprudence recognizes a strong public interest in prohibiting the commercial monopolization of merely descriptive marks.⁶³ These marks may not be registered under the Lanham Act without proof that “the mark has become distinctive, as used on or in connection with the applicant’s goods in commerce” over a period of no less than five years prior to the application.⁶⁴ Hilton’s catchphrase may fail the “dictionary test” that courts often apply to merely descriptive marks;⁶⁵ *Merriam-Webster’s* definition of “hot” includes “currently popular or in demand.”⁶⁶ It is certainly not uncommon for a clothing brand to imply that it is popular and stylish.

An early battle over a catchphrase was fought between a beloved television personality and a latrine. While hosting *The Tonight Show*,

59. See THAT’S HOT, Registration No. 3,209,488 (registering a trademark for men, women, and children’s clothing and accessories); U.S. Trademark Application Serial Nos. 85,901,443 (filed Apr. 11, 2013); 85,156,230 (filed Oct. 19, 2010); 77,163,240 (filed Apr. 23, 2007); 76,715,015 (filed Oct. 7, 2004).

60. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 11 n.12 (2d Cir. 1976).

61. *Id.* at 11.

62. *Id.* at 9.

63. *Park ‘N’ Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 214-15 (1985) (recognizing that Park ‘N’ Fly, in the context of airport parking, was merely descriptive and therefore unregistrable absent proof of secondary meaning).

64. 15 U.S.C. § 1052(e)-(f) (2012).

65. See *Zatarains, Inc. v. Oak Grove Smokehouse Inc.*, 698 F.2d 786, 792 (5th Cir. 1983) (“A suitable starting place [for testing if a mark is merely descriptive] is the dictionary, for the dictionary definition of the word is an appropriate and relevant indication of the ordinary significance and meaning of the words to the public.” (quoting *Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 11 n.5 (Tex. 1974) (internal quotation marks omitted))).

66. *Hot Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/hot> (last visited Mar. 21, 2014). Though it is unlikely to be used in a courtroom, a much less official, crowd-sourced dictionary defines “hot” as “something that is in some way attractive,” citing as an example “as paris hilton says, ‘thats [sic] hot.’” *Hot Definition*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=hot> (last visited Mar. 21, 2014).

Johnny Carson was introduced each night with the phrase “Here’s Johnny!”⁶⁷ A Michigan company rented and sold “Here’s Johnny” portable toilets, coupled with the phrase “The World’s Foremost Comedian,”⁶⁸ which they considered a humorous play on words.⁶⁹ In 1976, the company filed a federal trademark application for the phrase “Here’s Johnny.”⁷⁰ Johnny Carson subsequently brought an action alleging unfair competition, state and federal trademark infringement, and invasion of privacy and publicity rights.⁷¹

The United States Court of Appeals for the Sixth Circuit ultimately struck down Carson’s likelihood of confusion claim regarding his unregistered phrase.⁷² However, the court referenced *Zacchini*⁷³ and recognized a celebrity’s “protected pecuniary interest in the commercial exploitation of his identity.”⁷⁴ The majority ruled that the defendant company commercially exploited Carson’s publicity rights without actually using his name or image because the phrase “Here’s Johnny” is at the heart of his identity as a celebrity.⁷⁵ The court permanently enjoined the company from using the phrase “Here’s Johnny” on their portable toilets.⁷⁶ The dissent argued:

Th[e] phrase [“Here’s Johnny”] is not Johnny Carson’s “thumbprint”; it is not his work product; it is not original; it is a common, simple combination of a direct object, a contracted verb and a common first name; divorced from the context, it is two dimensional and ambiguous. It can hardly be said to be a symbol or synthesis, *i.e.*, a tangible “expression” of the “idea,” of Johnny Carson the comedian and talk show host, as [a famous race car driver’s racing car] was the tangible expression of the man.⁷⁷

67. Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831, 832 (6th Cir. 1983).

68. *Id.* at 833.

69. *Id.*

70. U.S. Trademark Application Serial No. 73,091,178 (filed June 21, 1976) (abandoned Feb. 25, 1985).

71. Carson, 698 F.2d at 833.

72. *Id.* at 839; *see also* 15 U.S.C. § 1125(a) (2012) (delineating the likelihood of confusion standard for infringement of an unregistered trademark or trade dress).

73. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

74. Carson, 698 F.2d at 834-35.

75. *Id.* at 836.

76. *Id.* However, the defendants did not let their ambitions go down the drain. Following Johnny Carson’s death, the company filed another application with the USPTO for the trademark “Here’s Johnny,” to be used in connection with portable toilets. U.S. Trademark Application Serial No. 77,068,472 (filed Dec. 20, 2006) (abandoned June 14, 2010). The Trademark Trial and Appeal Board held that the Sixth Circuit’s injunction still stood and precluded the applicants from registering the mark. *See* Trademark Trial and Appeal Board Opposition No. 91181092, at 19-20, *John W. Carson Found. v. Toilets.com, Inc.*, 94 U.S.P.Q. 2d 1942 (Mar. 25, 2010).

77. Carson, 698 F.2d at 844 (Kennedy, J., dissenting).

Interestingly, Johnny Carson never pursued action against a far more iconic use of “Here’s Johnny!”—the unnervingly gleeful exclamation by a homicidal Jack Nicholson in the movie *The Shining*. In fact, Carson even paid tribute to this scene during one of his annual anniversary shows.⁷⁸ Perhaps this ultimately reflects the individual’s desire to exercise control over their public identity; after all, it is far more flattering for one’s identifying catchphrase to be linked to a lauded actor than to a portable toilet.

The desire to control the use of one’s name and catchphrases persists to this day. Let us return to Paris Hilton, whose 2007 lawsuit against Hallmark followed in Carson’s footsteps. Hallmark marketed a birthday card that featured a cartoon waitress with a picture of Hilton’s head super-imposed.⁷⁹ The waitress warned a customer, “that’s hot,” in reference to a plate of food.⁸⁰ Below the picture, a caption read, “Paris’s First Day as a Waitress.”⁸¹ Hilton argued that Hallmark’s unauthorized use of her image and the phrase “that’s hot” constituted common law misappropriation of publicity, false designation of origin under the Lanham Act, and infringement of her federally registered trademark “that’s hot.”⁸² She claimed that she had “coined” the phrase on *The Simple Life* and that Hallmark subsequently misappropriated it “for its own personal gain.”⁸³ Hilton further asserted that Hallmark’s use of her likeness “directly trespassed on [her] right of publicity” because the company did not add sufficient original expression to constitute a protected transformative use.⁸⁴ Hallmark counterargued that its use of “that’s hot” was a creative use, intended to satirize the phrase and its normal meaning to Hilton.⁸⁵

Hilton’s federal trademark claim was dismissed before the case reached the United States Court of Appeals for the Ninth Circuit.⁸⁶

78. Mike Bracken, *The Shining “Heere’s Johnny!”—20 Most Iconic Horror Scenes of All Time*, MOVIEFONE (Oct. 28, 2010, 12:00 PM), <http://news.moviefone.com/2010/10/28/4-the-shining-heeeres-johnny-20-most-iconic-horror-scen/>.

79. *Hilton v. Hallmark Cards*, 599 F.3d 894, 899 (9th Cir. 2010).

80. *Id.*

81. *Id.*

82. Brief of Defendant-Appellant, *Hilton*, 599 F.3d 894 (No. 08-55443), 2008 WL 2446882.

83. Appellee Paris Hilton’s Opening Brief at 38, *Hilton*, 599 F.3d 894 (No. 08-55443), 2008 WL 6041926.

84. *See id.* at 2.

85. Oral Argument at 3, *Hilton*, 599 F.3d 894 (No. 08-55443), 2009 WL 1404745 (“[We used] in a creative different way to make fun of that phrase and it’s [sic] normal impart to her which is desirable and attractive versus literally, ‘Watch out for the plate, that’s hot.’”).

86. *Hilton*, 599 F.3d at 899.

Ultimately, Hilton and Hallmark reached a settlement outside of court.⁸⁷ However, the trend of trademarking public figures' names and catchphrases traipses onward. In 2004, Donald Trump attempted to complicate the lives of human resources managers all over the country by filing a trademark application for "you're fired," his popular catchphrase from the reality television show *The Apprentice*.⁸⁸ Rachel Zoe, a celebrity stylist, attempted to trademark the phrase "I die."⁸⁹ Nicole Pollizi, a cast member of the television show *Jersey Shore*, successfully trademarked her nickname, "Snooki";⁹⁰ her castmate Paul Delvecchio trademarked his nightlife nickname, "DJ Pauly D."⁹¹ Ring announcer Michael Buffer has reportedly earned more than \$400 million from his trademarked catchphrase, "let's get ready to rumble."⁹²

Many of these trademarks are not problematic. A trademarked monopoly over words such as "Snooki" and "jeah" allow the registrants to market their products and services while providing a federal remedy for abuse of the mark. Furthermore, these trademarks are easily classified as suggestive, arbitrary, or fanciful. Therefore, such marks are unlikely to prevent rivals in the market from competing fairly and efficiently.

However, granting federal trademark protection to certain phrases may endanger other potential users' creative rights. Michael Buffer explained that he would not enjoin an "editorial use" of "let's get ready to rumble," but would bring action against an individual or company that made a commercial or advertisement using the phrase without permission in hopes of drawing attention to their product.⁹³ But consider cases in which the trademark owner is not so tolerant. *Hilton v. Hallmark Cards* involved the use of the trademarked phrase "that's hot" on a

87. Eriq Gardner, *That's Hot: Paris Hilton Settles Hallmark Lawsuit*, REUTERS (Sept. 26, 2010, 9:04 PM), <http://www.reuters.com/article/2010/09/27/us-hilton-idUSTRE68Q04Z20100927>.

88. U.S. Trademark Application Serial No. 78,361,836 (filed Feb. 3, 2004) (abandoned Dec. 15, 2006). Trump was unsuccessful. However, JMBP, Inc.—the company that manages licensing for *The Apprentice*—currently owns a trademark for "you're fired," for use in "entertainment services in the nature of a reality television series." YOU'RE FIRED, Registration No. 78,371,659. A do-it-yourself pottery studio also owns the word mark "YOU'RE FIRED," a suggestive use that refers to the kiln-firing process. YOU'RE FIRED, Registration No. 78,850,193.

89. Trademark Registration No. 77,632,304 (filing date Dec. 12, 2008) (abandoned Sept. 2, 2012).

90. SNOOKI, Registration No. 4,365,015.

91. DJ PAULY D, Registration Nos. 4,452,823, 4,378,045.

92. John Berman & Michael Milberger, *'Let's Get Ready To Rumble' Worth \$400M*, ABC NEWS (Nov. 9, 2009), <http://abcnews.go.com/GMA/Weekend/lets-ready-rumble-meet-man-catchphrase/story?id=9022704>.

93. *Id.*

greeting card in an arguably transformative manner. “That’s hot” could easily be used in a morning weather forecast, as a warning on a coffee cup, or in an Alka-Seltzer commercial.⁹⁴ Would these uses be protected from a lawsuit? Nearly any use of a mark is, to some extent, self-promotional or commercial. Should Al Roker, famed weather presenter, be accused of appropriating Hilton’s identity every time he forecasts a hot day?

Hilton and Carson v. Here’s Johnny Portable Toilets embody yet another issue—the dangerous blocking power of publicity rights against intellectual property rights.⁹⁵ In *Hilton*, Hallmark was enjoined from selling the greeting card in question—even though Hilton’s trademark infringement claim was struck down—due to her successful publicity claims.⁹⁶ Likewise, in *Carson*, the court held that no trademark infringement or likelihood of confusion occurred.⁹⁷ Nonetheless, the defendant was permanently enjoined from using the phrase “Here’s Johnny,” in which they owned a federal trademark, because use of the phrase was found to violate Johnny Carson’s publicity rights.⁹⁸ A great risk is posed to the protection afforded by the federal intellectual property acts when a state publicity law can trump a registered trademark.

IV. FROM *WHITETO GREY*: THE APPROPRIATION OF IDENTITIES

After the release of the film *Spring Breakers*, rapper Riff Raff threatened to sue the film’s creators for \$10 million.⁹⁹ He claimed that because he was unavailable to star in the film, director Harmony Korine molded James Franco’s character in Riff Raff’s exact likeness.¹⁰⁰ Riff Raff stated, “It’s like if I have a front yard. And you’re planting soil and you’re planting trees and building peaches and houses and selling parking lots on my property . . . then I deserve to be compensated for

94. In 1969, an Alka-Seltzer commercial popularized the still-famous catchphrase “Mamma mia! That’s a spicy meatball!” See *1969 Alka Seltzer “Spicy Meatball” Commercial*, YOUTUBE (May 19, 2010), <http://www.youtube.com/watch?v=NQhwNtY3N2k>.

95. See *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (5th Cir. 1983).

96. *Hilton*, 599 F.3d at 899, 912-13.

97. *Carson*, 698 F.2d at 833-34.

98. *Id.* at 836.

99. *Riff Raff: I’m Suing for \$10 Mil.: Still Furious About Spring Breakers*, TMZ (July 16, 2013, 11:08 AM PDT), <http://www.tMZ.com/2013/07/16/riff-raff-spring-breakers-james-franco-10-million/>.

100. Kandice Lawson, *RiFF RaFF Addresses ‘Spring Breakers’ Lawsuit*, VIBE (July 19, 2013), <http://www.vibe.com/article/riff-raff-spring-breakers-lawsuit>.

some portion of that money.”¹⁰¹ In another interview, he added, “[Korine] can have my style, for 10 mil.”¹⁰²

No formal lawsuit was filed in Riff Raff’s case, but his indignation defines the basis of another publicity-rooted legal trend: the appropriation of identity. False endorsement, misappropriation, and similar claims, once firmly rooted within an individual’s publicity rights, are trickling into the field of copyright and trademark law. (And oddly enough, Riff Raff had released a song that included Franco’s name in the title prior to his *Spring Breakers* outburst.¹⁰³)

A. *Who Owns What?*

An oft-uttered phrase says that “the whole is greater than the sum of its parts.” Riff Raff is more than his cornrowed hair and “grills”;¹⁰⁴ Vanna White is more than a blonde coif and an evening gown.¹⁰⁵ Gary Hecker, the intellectual property attorney for reality superstar Kim Kardashian, once stated: “Kim Kardashian is immediately recognizable, and is known for her look and style. Her identity and persona are valuable. When her intellectual property rights are violated, she intends to enforce them.”¹⁰⁶

Enforcing violations of publicity rights, such as misappropriation or privacy claims, has been a long-standing tool for public figures who are photographed, filmed, or otherwise presented to the public without permission. For example, boxer Muhammad Ali enjoined *Playgirl* magazine from publishing an issue that contained a photograph of a nude African-American man in a boxing ring, implied to be Ali himself.¹⁰⁷

101. See *Riff Raff: I’m Suing for \$10 Mil.: Still Furious About Spring Breakers*, *supra* note 99.

102. See Lawson, *supra* note 100.

103. *Riff Raff—Rap Game James Franco (Official Video)*, YOUTUBE (Jan. 28, 2013), <https://www.youtube.com/watch?v=NlydTf5bJdo>.

104. “Grills” or “grillz” are decorative covers made of gold, silver, or jewel-encrusted precious metals that snap over one or more teeth. They are especially popular in the hip-hop community. *Grills, “Grillz” and Fronts*, 137 JADA 1192 (2006), available at http://www.ada.org/sections/scienceAndResearch/pdfs/patient_65.pdf.

105. See *White v. Samsung Elec. Am., Inc. (White J)*, 971 F.2d 1395 (9th Cir. 1992). The Ninth Circuit held that Vanna White could prevail on a claim against Samsung after they used a female-shaped robot wearing a gown, blonde wig, and large jewelry in an advertisement. The majority reasoned that “[v]iewed separately, the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict. The female-shaped robot is wearing a long gown, blond wig, and large jewelry. Vanna White dresses exactly like this at times” *Id.* at 1399.

106. Eriq Gardner, *Can Kim Kardashian Win Her Multi-Million Dollar Lawsuit Against Old Navy?* (*Analysis*), HOLLYWOOD REPORTER (July 20, 2011), <http://www.hollywoodreporter.com/thr-esq/can-kim-kardashian-win-her-213481>.

107. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

Jacqueline Kennedy Onassis prevented fashion designer Christian Dior from featuring a look-alike in an advertisement.¹⁰⁸

Ali and Onassis's claims were purely based on the right of publicity. When such a lawsuit incorporates a copyright or trademark claim, the case becomes more complicated. First, intellectual property claims necessitate the question: What exactly is being claimed as a trademark or copyright? Following that, it is necessary to determine who actually may legally exploit the trademark or copyrighted subject matter.

Sometimes, these cases are quite straightforward. For example, professional basketball player Anthony Davis trademarked the phrases "Fear the Brow" and "Raise the Brow" based on his distinctive unibrow.¹⁰⁹ More often than not, however, mixing publicity claims and federal intellectual property claims is far more confusing than those involving a singular eyebrow. A celebrity's image, catchphrases, songs, and so on "are authored by studios, the mass media, public relations agencies, fan clubs, gossip columnists, photographs, hairdressers, body-building coaches, athletic trainers, teachers, screenwriters, ghostwriters, directors, lawyers, and doctors."¹¹⁰

Consider the case of the *Cheers* bar.¹¹¹ When reflecting upon the show's characters, everybody may know their names,¹¹² but who has the right to exploit those names? The Ninth Circuit decided that it may be the actors instead of the registered copyright owners. Paramount Pictures, copyright and trademark owner for the television series *Cheers*, granted intellectual property licenses to Host International. Host then constructed a series of *Cheers*-themed airport bars, each featuring two "animatronic robot figures" in the likeness of *Cheers* actors George Wendt and John Ratzenberger. The actors sued, citing violations of the Lanham Act and California's statutory and common law right of publicity.¹¹³ In two different appeals, the Ninth Circuit held that the actors' rights under the California Celebrities Rights Act trumped Paramount's

108. *Onassis v. Christian Dior-N.Y., Inc.*, 122 Misc. 2d 603, 612 (N.Y. Sup. Ct. 1984), *aff'd*, 110 A.D.2d 1095 (1985) ("[A] person may be known not only by objective indicia—name, face, and social security number, but by other characteristics as well—voice, movement, style, coiffure, typical phrases, as well as by his or her history and accomplishments.").

109. Darren Rovell, *Anthony Davis Trademarks His Fearsome Brow*, NBC NEWS (June 19, 2013), http://business.nbcnews.com/_news/2012/06/26/12416824-anthony-davis-trademarks-his-fearsome-brow.

110. ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 94 (1998).

111. *Wendt v. Host Int'l, Inc.* (*Wendt II*), 125 F.3d 806 (9th Cir. 1997).

112. "Where Everybody Knows Your Name" is the famous *Cheers* theme song.

113. See *Wendt v. Host Int'l, Inc.* (*Wendt I*), 50 F.3d 18 (9th Cir. 1995); *Wendt II*, 125 F.3d 806.

federal copyright claims.¹¹⁴ The court also indicated that they believed the actors' likelihood of confusion claims under the Lanham Act should prevail.¹¹⁵

As Michael Albano remarked, "If *Wendt* is any indication of which direction this area of the law is headed, then the future appears bleak for federal copyright holders."¹¹⁶ Albano raises a valid point; *Wendt* does not mark an isolated ruling. Bette Miller successfully enjoined Ford Motor Company from using a soundalike singer's performance of a Midler song in a commercial, even though a license was received from the song's copyright holder.¹¹⁷ If publicity rights allow an actor or singer to exploit a scripted character or a nontangible voice in lieu of the proper license owner, is seeking protection under the Copyright and Lanham Acts pointless?

B. Use in Advertisements and the Endorsement Conundrum

On the television show *Mad Men*, the fictional ad agency Sterling Cooper developed a concept for a lingerie campaign around Jackie Kennedy and Marilyn Monroe, theorizing that "every single woman is one of them [They're] a Jackie or a Marilyn, a straight line or a curve."¹¹⁸ As Don Draper and his team recognized, celebrity endorsements, or simply implying a celebrity's connection with a product, form the beating heart of the advertising world. "People link [a] person with the items the person endorses and, if that person is famous, that link has value. Celebrities' names and likenesses are things of value."¹¹⁹

Due to the high commercial worth of such endorsements, protection for misappropriation in the context of false or unauthorized use of a name or image on an advertisement is especially strong. The Lanham Act states that the elements of a false endorsement claim are "that the defendant, (1) in commerce, (2) made a false or misleading representation of fact (3) in connection with goods or services (4) that is likely to cause consumer confusion as to the origin, sponsorship, or

114. See *Wendt I*, 50 F.3d 18; *Wendt II*, 125 F.3d 806.

115. *Wendt II*, 125 F.3d at 814 (stating that "a reasonable jury could conclude that most of the factors weigh in appellants' favor and that Host's alleged conduct creates at least the likelihood of consumer confusion," but reversing and remanding the claim for trial by jury).

116. Michael J. Albano, *Nothing To "Cheer" About: A Call for Reform of the Right of Publicity in Audiovisual Characters*, 90 GEO. L.J. 253, 263 (2001).

117. *Midler v. Ford Motor Co.*, 849 F.2d 460, 462, 464 (1988).

118. *Mad Men: Maidenform* (AMC television broadcast, Season 2, Episode 6 (Aug. 31, 2008)).

119. *McFarland v. Miller*, 14 F.3d 912, 919 (3d Cir. 1994) (internal quotation marks omitted).

approval of the goods or services.”¹²⁰ This provision prevents “the commercial hitchhiker seeking to travel on the fame of another” from stealing endorsements that they cannot buy.¹²¹ As an illustration, Woody Allen received “the largest [settlement] ever paid under the New York right-to-privacy law” when American Apparel used his name, likeness, and image in certain advertisements.¹²²

It is difficult to determine where copyright and trademark protection ends in the commercial context, particularly when an advertisement only seeks to indirectly invoke a celebrity’s likeness.¹²³ The well-known chef Paul Prudhomme once filed suit against two companies, alleging that their use of a look-alike actor in coffee commercials constituted an infringement upon his trademark.¹²⁴ In 2007, Mars, Inc., ran a video advertisement in Times Square, featuring cartoon M&Ms posing as well-known New York characters, such as the Statue of Liberty and King Kong, and as citizens and tourists engaging in “typical New York activities.”¹²⁵ Robert Burck, popularly known as the Times Square denizen “The Naked Cowboy,” filed a lawsuit against Mars, alleging that an M&M character dressed “exactly like The Naked Cowboy, wearing only a white cowboy hat, cowboy boots, and underpants, and carrying a guitar . . . infringed his [federal] trademarks . . . by using his likeness, persona, and image for commercial purposes . . . and by falsely suggesting that he has endorsed M & M candy.”¹²⁶

Along with a state misappropriation claim, Burck asserted trademark infringement under section 1125(a) of the Lanham Act.¹²⁷ Burck had federally registered the name “Naked Cowboy” as a mark for entertainment services, but not his “signature outfit.”¹²⁸ The judge denied Mars’ motion to dismiss the trademark infringement claim, stating that Burck’s complaint “plausibly argues that consumers would believe that the M & M Cowboy characters were promoting a product . . . and that

120. *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 455 (S.D.N.Y. 2008).

121. *Onassis v. Christian Dior—N.Y., Inc.*, 122 Misc. 2d 603, 612 (N.Y. Sup. Ct. 1984).

122. Christopher Palmeri, *American Apparel Settles with Woody Allen*, BUSINESSWEEK (May 18, 2009), http://www.businessweek.com/bwdaily/dnflash/content/may2009/db20090518_942184.htm.

123. K.J. Greene, *Right of Publicity, Identity, and Performance*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 865, 873 (2012).

124. *Prudhomme v. Procter & Gamble Co.*, 800 F. Supp. 390, 393 (E.D. La. 1992).

125. *Burck*, 571 F. Supp. at 449.

126. *Id.* at 448 (internal quotation marks omitted).

127. *Id.* at 450; *see also* 15 U.S.C. § 1125(a) (2012).

128. NAKED COWBOY, Serial No. 77,781,761.

The Naked Cowboy had endorsed M & Ms. Hence, the complaint has alleged sufficient facts to support a false endorsement claim.”¹²⁹

While the court’s trademark-based protection of The Naked Cowboy’s “trade dress” could be considered a long shot,¹³⁰ Burck’s alter ego seems to have acquired secondary meaning through his popularity. In addition to his job as a street entertainer, Burck has personally appeared as The Naked Cowboy in movies, television shows, video games, and advertisements.¹³¹ A reasonable person could assume that an advertisement featuring a character dressed as The Naked Cowboy was, in fact, endorsed by the real Naked Cowboy.

The Naked Cowboy has a legitimate trademark argument, grounded in facts that comport with the purpose behind the Lanham Act. Unfortunately, this is not always the case. The commingling of established publicity rights with more dubious intellectual property claims are most frequently traced to game show icon Vanna White. In an infamous lawsuit, Vanna White sued Samsung Electronics over an advertisement that featured a “robot, dressed in a wig, gown, and jewelry . . . posed next to a game board . . . recognizable as the Wheel of Fortune game show set.”¹³² White prevailed, and the court essentially ruled that White’s appearance is a protectable “trademark.”¹³³ The dissent vehemently argued:

The performer depicted in the commercial advertisement is unmistakably a lifeless robot. Vanna White has presented no evidence that any consumer confused the robot with her identity. Indeed, no reasonable consumer could confuse the robot with Vanna White or believe that, because the robot appeared in the advertisement, Vanna White endorsed Samsung’s product.¹³⁴

Recent lawsuits have slipped even further past the unauthorized use of an image or name into the speculative realm of ideas and connotations. For instance, Lindsay Lohan filed a lawsuit against E*Trade after the

129. *Burck*, 571 F. Supp. at 456.

130. Trade dress infringement is established by a demonstration that (1) the dress qualifies for protection, which requires considering functionality, distinctiveness, and secondary meaning and (2) that the dress has been infringed, which requires considering the likelihood of confusion. *Two Pesos, Inc. v. Taco Cabana*, 505 U.S. 763, 786 (1992). The *Burck* court did not consider the potential secondary acquired meaning of The Naked Cowboy’s outfit. See generally *Burck*, 571 F. Supp. 446.

131. *Burck*, 571 F. Supp. at 449.

132. *White I*, 971 F.2d 1395, 1396 (9th Cir. 1992).

133. *Id.* at 1400 (“In cases involving confusion over endorsement by a celebrity plaintiff, ‘mark’ means the celebrity’s persona [and] [t]he ‘strength’ of the mark refers to the level of recognition the celebrity enjoys among members of society.”).

134. *Id.* at 1408 (Alarcon, Circuit J., dissenting).

company aired a commercial involving the mere mention of a “milkaholic” baby named Lindsay.¹³⁵ Kim Kardashian sued Old Navy for using an alleged look-alike in a commercial.¹³⁶

These suits beg the question: How far will celebrities go in asserting false endorsements under both publicity and intellectual property claims? How could a look-alike infringe upon Kardashian’s “intellectual property rights,” as her attorney mentioned, without any traditional form of registration, fixation, or identity appropriation?¹³⁷ Did Lindsay Lohan legitimately expect to succeed in her suit against E*Trade? After all, “Lindsay” and “Lindsey” have consistently ranked among the top 500 baby names in the United States,¹³⁸ and it is difficult to believe that the mere implication of substance abuse would automatically make a consumer think of Lohan. It is remarkable to note how far the concept of publicity has strayed from the *Zacchini* court’s idea of publicity rights, which focused upon the “right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.”¹³⁹

B. *Noncommercial Creative Usage*

The desire of the individual to exercise control over his or her image is by no means limited to commercial use. Plaintiffs in right of publicity cases

don’t just want to prevent the use of their names and likenesses in commercial advertising Rather, they seek to (and increasingly do) control any use of their name or image (or any other aspect of their “personality”) for profit, even where the desire is to depict the plaintiff in an artistic or news format.¹⁴⁰

Such cases frequently incorporate copyright and trademark infringement claims.

135. Mike Masnick, *E*Trade Settles Lindsay Lohan’s Milkaholic Lawsuit*, TECHDIRT (Sept. 23, 2010, 4:17 PM), <https://www.techdirt.com/articles/20100921/04091111091/e-trade-settles-lindsay-lohan-s-milkaholic-lawsuit.shtml>.

136. Anthony McCartney, *Kim Kardashian Old Navy Lawsuit Finally Settled*, HUFFINGTON POST (Aug. 29, 2013, 3:51 PM), http://www.huffingtonpost.com/2012/08/29/kim-kardashian-old-navy-lawsuit-settled-2012_n_1840671.html.

137. Gardner, *supra* note 106.

138. See *Top 10 Baby Names for 2013*, SOCIAL SECURITY, <http://www.ssa.gov/OACT/babynames/> (click on “Popularity of a Name”; type “Lindsay” or “Lindsey”; then click “Go”) (last visited Sept. 10, 2014).

139. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

140. Dogan & Lemley, *supra* note 17, at 1205.

The fair use defense in the Copyright and Lanham Acts are often an alleged infringer's best friend. The fair use doctrine is "a balancing exercise that reconciles property rights with societal needs for scholarship, criticism, and parody. As such, it performs the function . . . of assessing the strength of those competing claims and arriving at an equitable answer."¹⁴¹ In *Campbell v. Acuff-Rose*, the Supreme Court weighed four factors when deciding whether an infringing copyright constituted fair use:

- (1) the purpose and character of the use, including whether the use is of a commercial nature . . . ;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁴²

As applied to trademarks, fair use allows an alleged infringer to use a registered mark if that mark is used in a manner that is merely descriptive of the infringer's goods or services and if the mark is used fairly and in good faith.¹⁴³

The parody defense, a branch of fair use that applies to both the Copyright and Lanham Acts,¹⁴⁴ requires that a work uses "some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."¹⁴⁵ Most trademark infringement cases involve advertisements, endorsements, or another commercial use. Courts have also determined that a celebrity's name may be used in the title or narrative description of a work of art if there is some artistic relevance.¹⁴⁶ As a result, copyright infringement claims are more common with regards to creative works that are not explicitly commercial in nature.

Fan fiction is a strange product of the "fair use" defense (and, on occasion, the parody defense). Fan fiction refers to stories involving popular fictional characters that are written by fans and, most commonly nowadays, posted on the Internet.¹⁴⁷ Gene Rodenberry, creator of the *Star Trek* television series, "welcomed and embraced" his fans' use of his

141. Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 466 (1999).

142. *Campbell v. Acuff-Rose*, 510 U.S. 569, 577 (1994).

143. 15 U.S.C. § 1115(b)(4) (2012) (emphasis added).

144. See *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 455 (S.D.N.Y. 2008) ("[The] Supreme Court's parody explication as to copyrights . . . is relevant to trademarks.").

145. *Campbell*, 510 U.S. at 576-77.

146. *ETW Corp. v. Jireh Publ'g Inc.*, 332 F.3d 915, 920 (6th Cir. 2003).

147. *Fan Fiction Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/fan%20fiction> (last visited Mar. 20, 2013, 4:21 PM).

intellectual property, writing, “[T]here is no more profound way in which people could express what *Star Trek* has meant to them than by creating their own personal *Star Trek* things”¹⁴⁸ One of today’s most scandalous examples of fan fiction is E.L. James’ *50 Shades of Grey* trilogy, which originally gained popularity online as a work of fan fiction based on Stephenie Meyer’s young adult series *Twilight*.¹⁴⁹ James’ story eventually garnered a seven-figure book deal and a movie deal.¹⁵⁰ Despite James’ commercial success, neither Meyer nor anyone on her publishing team has filed any copyright infringement claims. In fact, Meyer has publicly expressed a mildly approving attitude towards James.¹⁵¹

The infringement-friendly genre of fan fiction seems to be an anomaly. “When an artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit [that celebrity’s] fame, then the artist’s right of free expression is outweighed by the [celebrity’s] right of publicity,” and the celebrity may defeat that author’s copyrighted work.¹⁵²

A disturbing interpretation of federal copyrights occurred in a recent Ninth Circuit case. Plaintiff Cindy Lee Garcia filed suit when her performance for a supposed “low-budget amateur movie” was instead used in an anti-Islamic video that was uploaded to YouTube.¹⁵³ When Garcia began receiving death threats, she, quite understandably, took steps to have the video removed.¹⁵⁴ Oddly, Garcia sought a preliminary injunction under the Copyright Act, rather than utilizing California’s generous publicity and misappropriation laws. Garcia filed takedown notices under the Digital Millennium Copyright Act and, on appeal,

148. Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works and Copyright*, 70 U. PITT. L. REV. 387, 389-90 (2009) (citing GENE RODDENBERRY, INTRODUCTION TO STAR TREK: THE NEW VOYAGES (Sondra Marshak & Myrna Culbreath eds., 1976)).

149. Jason Boog, *The Lost History of Fifty Shades of Grey*, MEDIABISTRO (Nov. 21, 2012, 8:23 PM), http://www.mediabistro.com/galleycat/fifty-shades-of-grey-wayback-machine_b49124.

150. *Id.*

151. When asked about the success of *50 Shades of Grey*, Meyer replied, “Good on her—she’s doing well. That’s great!” Jason Boog, *Stephanie Meyer on E.L. James & Fan Fiction: ‘Obviously, She Had a Story in Her,’* MEDIABISTRO (May 31, 2012, 2:42 PM), http://www.mediabistro.com/galleycat/stephenie-meyer-on-e-l-james-fan-fiction-obviously-she-had-a-story-in-her_b52299. She also stated, “Obviously, [James] had a story in her, and [without *Twilight*], it would’ve come out in some other way.” *Id.*

152. *Hilton v. Hallmark Cards*, 599 F.3d 894, 909 (9th Cir. 2010) (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (2001)).

153. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1261-62 (9th Cir. 2014).

154. *Id.* at 1262.

argued that her “performance within the film [was] independently copyrightable.”¹⁵⁵

In general, an individual may not maintain ownership over a film’s copyrights in the absence of a clear agreement proving that all parties involved intended for the others to be “joint authors.”¹⁵⁶ Even Spike Lee is not considered to be a coauthor or co-owner of the films he directs for Warner Brothers.¹⁵⁷ Furthermore, an actor’s performance in a film or theatrical performance tends to be classified as a “work made for hire,”¹⁵⁸ relinquishing the hired actor’s copyright interest in the work. But in *Garcia*, the majority held that Garcia was likely to succeed on her copyright claim, despite acknowledging that “the author of a single poem does not necessarily become a co-author of the anthology.”¹⁵⁹

This decision forecasts potentially disastrous consequences for film studios, publishing houses, theater groups, and any other institution that generates creative works involving more than one person. Authorship is a fundamental requirement for protection under the Copyright Act,¹⁶⁰ and as the *Garcia* dissent pointed out:

[Garcia] conceded . . . that she had no creative control over the script or her performance. [The director] provided the script, the equipment, and the direction. As a result, Garcia was not the originator of ideas or concepts. She simply acted out others’ ideas or script. Her brief appearance in the film, even if a valuable contribution to the film, does not make her an author. Indeed, it is difficult to understand how she can be considered an “inventive or master mind” of her performance under these facts.¹⁶¹

Contemplate a world where any actor, writer, or public figure can completely bypass the laws governing publicity and, instead, can prevail on a federal copyright claim simply because they are unhappy with a film, magazine, or photograph that features their work or image. It is difficult to fathom how such a widespread application of *Garcia*’s holding could in any way “promote the Progress of [the] useful Arts.”¹⁶²

155. *Id.*

156. *See* *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000); *Thompson v. Larson*, 147 F.3d 195, 201-02 (2d Cir. 1998).

157. *Aalmuhammed*, 202 F.3d at 1235.

158. *See* 17 U.S.C. § 101 (2012) (stating that a “work made for hire” is a work prepared by an employee in the scope of his employment or a work “specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work”).

159. *Garcia*, 743 F.3d at 1264-65.

160. 17 U.S.C. § 102(a) (“Copyright protection subsists . . . in *original works of authorship* . . .” (emphasis added)).

161. *Garcia*, 743 F.3d at 1272 (Smith, Circuit J., dissenting).

162. U.S. CONST., art. I, § 8, cl. 8.

V. BLACK AND WHITE AND RED ALL OVER: USING INTELLECTUAL PROPERTY TO TROLL AND BLOCK “NEWSWORTHY” USE

A. *Paying the Troll Toll: The Rise of Nonproducing Entities*

“Trolls,” formally referred to as nonproducing entities, are individuals with ambiguous claims to any actual performance who profit from bringing infringement lawsuits, seeking settlements, or extracting licensing fees.¹⁶³ This concept is well established in patent law; a “patent troll” is a term describing

a non-manufacturing patent owner who owns one or more patents and asserts the patent(s) against alleged infringers, with a desire typically to obtain settlement rather than actually trying any lawsuit. . . . [Considering the high cost of patent litigation,] [t]he result is that the patent owner walks away with \$4 million and then goes after the next batch of [alleged infringers].¹⁶⁴

Trolls pose a special threat to trademark law, which is far more rooted in commerce and product quality than copyright law. A central purpose of the Lanham Act is

[t]he “search costs” rationale—trademarks reduce consumer search costs, thus promoting overall economic efficiency. At the same time, trademarks allow their owners to benefit from the reputation of their goods, thus encouraging investment in the quality of these goods. Underlying trademark law is the assumption that a trademark has no value in itself. Its only significance lies in the goodwill it represents, i.e., a reputation for product quality.¹⁶⁵

Since 1999, the “cybersquatter,” a very specific version of the troll, has been recognized in the Lanham Act.¹⁶⁶ The Anticybersquatting Consumer Protection Act (ACPA) creates liability for persons who have a bad-faith intent to profit from registering an Internet domain name that is identical, confusingly similar, or dilutive of a trademark.¹⁶⁷

Recently, a new breed of cybersquatting has developed, colloquially dubbed “brandjacking” or “username jacking.”¹⁶⁸ This involves a

163. Greene, *supra* note 123, at 874.

164. Donald W. Rupert, *Trolling for Dollars: A New Threat to Patent Owners*, 21 INTELL. PROP. & TECH. L.J. 1, 3 (2009); *see also* Tex. Data Co., L.L.C. v. Target Brands, Inc., 771 F. Supp. 2d 630, 638 (E.D. Tex. 2011).

165. Katya Assaf, *Brand Fetishism*, 43 CONN. L. REV. 83, 104 (2010).

166. Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) (2012).

167. *Id.* § 1125(d)(1)(A).

168. *See* Arik Hesseldahl, *‘Brandjacking’ on the Web*, BUSINESSWEEK (May 1, 2007), <http://www.businessweek.com/stories/2007-05-01/brandjacking-on-the-webbusinessweek-business-news-stock-market-and-financial-advice>; Dan Malachowski, *“Username Jacking” in*

scenario in which someone other than a public figure or brand owner controls that figure or brand's name—trademarked or not—on a social media site such as Twitter, Facebook, or LinkedIn.¹⁶⁹ As a result, the user has the power to exercise bad-faith control over the public figure or brand's image online.¹⁷⁰ Social media sites are extremely wary of username jacking. Twitter specifically states that it may permanently suspend accounts that participate in “attempts to sell, buy, or solicit other forms of payment in exchange for usernames.”¹⁷¹ Facebook actually blocks registration as, or name changes to, certain famous names—for example, Barack Obama; Sarah Palin; Quentin Tarantino; Harrison Ford; and even Edward Cullen, the protagonist of the young adult series *Twilight*.¹⁷² These types of regulations are advantageous for celebrities, public figures, and trademark owners. For example, Twitter allowed famous rapper Kanye West to reclaim the username “@kanyewest,” which a private individual previously owned, after he publicly questioned the authenticity of Twitter's celebrity accounts.¹⁷³

These sites' strict monitoring has its obvious downsides, even for celebrities. An individual who, in good faith, owned the username “@jb” on Twitter and Instagram—a username valued at \$500,000 due to its demand among brands and celebrities—has been the target of frequent hacking attempts.¹⁷⁴ Facebook is adamant that users register under their “real names.” Once, Facebook deactivated famous author Salman Rushdie's account, refusing to reactivate his profile under any name but “Ahmed Rushdie,” the name on the author's passport.¹⁷⁵

Social Media: Should Celebrities and Brand Owners Recover from Social Networking Sites When Their Social Media Usernames are Stolen?, 60 DEPAUL L. REV. 223 (2010).

169. Malachowski, *supra* note 168, at 225-26.

170. *Id.*

171. *Username Squatting Policy*, TWITTER, <https://support.twitter.com/groups/56-policies-violations/topics/236-twitter-rules-policies/articles/18370-username-squatting-policy> (last visited Oct. 9, 2014).

172. When one attempts to register with one of these names, Facebook displays the message: “It seems like you're trying to create a timeline for a celebrity. Fake or impersonating profiles aren't allowed on Facebook. If this isn't your real identity, your timeline could be suspended. If you think this is a mistake, please let us know.”

173. Julia Angwin, *Who Owns Your Name on Twitter?*, WALL ST. J. (May 19, 2009, 12:01 AM), <http://online.wsj.com/news/articles/SB124269417597532869>.

174. Josh Bryant, *How I Almost Lost My \$500,000 Twitter User Name @jb . . . and My Startup*, ARS TECHNICA (Jan. 31, 2013, 4:20 PM), <http://arstechnica.com/security/2014/01/how-i-almost-lost-my-500000-twitter-username-jb-and-my-startup/>.

175. Kevin Sexton, *Salman Rushdie Triumphs Over Facebook in Identity Battle*, VERGE (Nov. 15, 2011, 02:59 PM), <http://www.theverge.com/2011/11/15/2563504/salman-rushdie-facebook-identity-battle>. In a humorous twist, Rushdie's account was restored to its full status after an outpouring support for the author on Twitter, after which the author tweeted, “Victory! . . . I'm Salman Rushdie again!” *Id.*

Trademark trolls tend to adopt a “sit-and-wait” approach—that is, they register trademarks, domain names, or usernames that they know or anticipate will be in demand and then attempt to extract payment from a rightful owner. Copyright trolls, on the contrary, usually bring an action after a publication occurs. In short, a copyright troll is “a copyright owner who . . . acquires a copyright . . . for the primary purpose of pursuing past, present, or future infringement actions [and] exploits the copyright system in contravention of [genuine] copyright objectives.”¹⁷⁶ For example, Righthaven, LLC, a “copyright enforcement firm,” bought news stories from several major newspapers and subsequently sued publications who quoted the articles.¹⁷⁷ In a Massachusetts case, the court accused an adult film company of “misusing the subpoena powers of the court” by seeking the identities of certain file-sharing users in order to act as copyright trolls, who, after obtaining the identities, would send demand letters to coerce settlements, rather than to pursue legitimate copyright claims.¹⁷⁸

Nonproducing entities in intellectual property law tend to be individuals or companies who intend to profit from the trademarks or works of authorship of celebrities, public figures, or brands. However, the converse occasionally occurs—for example, a celebrity may sue for copyright infringement, in addition to making privacy claims, simply to keep a photograph out of newspapers.

B. *Whose News?*

On October 15, 2012, Gawker Media (Gawker) posted to its website a short clip of a sex tape featuring Terry Bollea—better known by his stage name Hulk Hogan.¹⁷⁹ Bollea promptly filed a lawsuit, asserting various privacy claims and violation of Florida’s publicity laws.¹⁸⁰ The court held that Bollea was not entitled to a preliminary injunction requiring Gawker to remove the video, because Gawker was acting

176. Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 59 (2014).

177. Patricia Aufdelfeide, *Journalists, Social Media and Copyright: Demystifying Fair Use in the Emergent Digital Environment*, 9 J. BUS. & TECH. LAW 61 (2014); see also *Righthaven LLC v. Hoehn*, 716 F.3d 1166 (9th Cir. 2013).

178. *Third Degree Films v. Does 1-47*, 286 F.R.D. 188, 190 (D. Mass. 2012).

179. A.J. Daulerio, *Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed Is Not Safe for Work but Watch It Anyway*, GAWKER (Oct. 4, 2012, 2:15 PM), <http://gawker.com/5948770/even-for-a-minute-watching-hulk-hogan-have-sex-in-a-canopy-bed-is-not-safe-for-work-but-watch-it-anyway>.

180. *Bollea v. Gawker Media, LLC (Bollea I)*, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624, at *2 (M.D. Fla. Tampa Div. 2012).

within the news-reporting function of their website.¹⁸¹ One month later, Bollea filed another motion for preliminary injunction, this time claiming copyright infringement.¹⁸² The court expressed doubt that Bollea legitimately sought to enforce the copyright or “intended to publish the video” in the future.¹⁸³ The court also reasserted their previous reasoning that Gawker was acting “in conjunction with the news reporting function.”¹⁸⁴ The court denied Bollea’s motion for preliminary injunction to enjoin copyright infringement.¹⁸⁵

Terry Bollea’s battle against the media represents a tendency to file copyright and trademark claims to keep gossip out of the public eye when publicity claims fail. Utilizing intellectual property claims as a “backup plan” is not limited to celebrities. Christopher Hare, a Maryland resident, filed a lawsuit against gossip site TheDirty.com, after seeing several posts that portrayed him in an unflattering light.¹⁸⁶ He asserted a defamation claim, in addition to various violations of his publicity and privacy rights.¹⁸⁷ Though he repeatedly claimed that the website published copyrighted images without permission, he did not expressly assert any claims under the Copyright Act.¹⁸⁸

“Blocking” suits, such as Bollea’s, seem to be rare. But if plaintiffs succeed in using frivolous copyright claims to block the media’s news-reporting function, the press’s rights under the First Amendment could be adversely impacted.

VI. THERE’S A PROBLEM—CAN WE SOLVE IT?

Advertising, television, news publications, and other media sources are not going away any time soon. Nor is the Internet, which provides unprecedented media and news access to a worldwide audience.¹⁸⁹ The E*Trade commercial that so offended Lindsay Lohan is easily accessible

181. *Id.* at *3.

182. *Bollea v. Gawker Media, LLC (Bollea II)*, 913 F. Supp. 2d 1325, 1326-27 (M.D. Fla., Tampa Div. 2012) (“Plaintiff seeks an order requiring Defendants to remove the excerpts [from] www.gawker.com . . . because Defendants’ display of these excerpts constitute an infringement of Plaintiff’s copyright.” (internal quotation marks omitted)).

183. *Id.* at 1329.

184. *Id.* at 1328.

185. *Id.* at 1331.

186. *Hare v. Richie*, No. ELH-11-3488, 2012 WL 3773116 (D. Md. Aug. 29, 2012).

187. *Id.* at *5.

188. *Id.*

189. For example, while writing this Comment, the author, a Louisiana resident, accessed several Canadian newspapers via the Internet in less time than it takes to make a ham sandwich.

online, even though it is no longer aired on television.¹⁹⁰ Even Mars' advertisement featuring the M&M dressed as The Naked Cowboy, publically displayed solely in Times Square, can be viewed by anyone with access to Google.¹⁹¹ In such a technologically connected world, it is no longer sufficient for publicity rights to remain in the control of fifty different states.

The escalating misuse of intellectual property protection as a means of creating a brand of federally protected publicity rights indicates two distinct disturbances in the law. First, should this trend continue, the structure of federal intellectual property laws will less efficiently serve their distinct purpose—to “promote the Progress of [the] useful Arts.”¹⁹²

Second, the mishandling of intellectual property indicates that leaving protection of personality to the states may no longer be sufficient in a world full of media undaunted by jurisdictional borders. Several other countries have already implemented publicity rights on a national level. France, for example, recognizes every citizen's “entitle[ment] to respect of private life” in the French Civil Code.¹⁹³ The German Federal Court has upheld a “general right of personality,” under which an individual may pursue claims regarding personality rights and privacy claims akin to those recognized in American common law.¹⁹⁴ The Jamaican Supreme Court recognizes a property interest attached to a personality separate from any privacy interest, explaining that the law “must . . . recognize that property rights attach to the goodwill generated by a celebrity's personality. On that basis, those rights are violated where the indicia of a celebrity's personality are appropriated for commercial purposes.”¹⁹⁵ It is high time for American lawmakers to follow these countries' cues, reevaluate the state of the media, and accordingly develop a uniform set of laws governing publicity. This will safeguard protection for both our intellectual property and our own persons.

190. *E-TRADE Baby Commercial (Girlfriend) MILK-A-HOLIC (Lindsay Lohan Sues)*, YOUTUBE, https://www.youtube.com/watch?v=JgZfA8_1mY0 (last visited Mar. 20, 2014).

191. M&Ms Naked Cowboy Times Square Billboard Images, GOOGLE, <http://google.com> (click on “Images”; then search for “M&Ms Naked Cowboy Times Square Billboard”) (last visited Sept. 10, 2014).

192. U.S. CONST. art. 1, § 8, cl. 8.

193. Elisabeth Logeais & Jean-Baptiste Schroeder, *The French Right of Image: An Ambiguous Concept Protecting the Human Persona*, 18 LOY. L.A. ENT. L. REV. 511, 514 (1998); see also C. CIV. art. 9(1)-(2) (Fr.).

194. Corinna Coors, *Headwind from Europe: The New Position of the German Courts on Personality Rights After the Judgment of the European Court of Human Rights*, 11 GERMAN L.J. 527, 529 (2010).

195. B. St. Michael Hylton & Peter Goldson, *The New Tort of Appropriation of Personality: Protecting Bob Marley's Face*, 55 CAMBRIDGE L.J. 56, 63 (1996) (quoting *Robert Marley Found. Ltd. v. Dino Michelle Ltd.*, JM 1994 SC 032 (Jam.)).