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RIGHT OF PUBLICITY, IDENTITY, AND PERFORMANCE

K.J. Greene†

My intellectual property (IP) scholarship was among the first to explore the impact of intellectual property rights on African-American cultural production—and vice-versa.[1] While IP law does not explicitly mention social status, such as race or gender, my work posits that the history of black artists and performers is inextricably tied to legal structures, such as copyright law, and social structures, such as racial discrimination.[2] Although black artists and performers shaped American culture by pioneering whole musical art forms, from ragtime to hip-hop,[3] the work of pioneering blues and jazz artists was often deprived of copyright protection.[4]

Other forms of IP impacted the central issue of race in America in other ways. I previously showed how trademark law played a critical role in promoting widespread dissemination of some of America's pernicious and enduring racial stereotypes.[5] The trademarked imagery of characters from Sambo to Aunt Jemima sold products by pandering to the cultural stereotypes of the day.[6] While

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1. *See* K.J. Greene, *Copyright Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1999) [hereinafter Greene, *Black Music*]. In more recent years, scholars such as the late (and dearly beloved) Keith Aoki, Madhavi Sunder, and Olufunmilayo Arewa, have explored race and identity in legal scholarship, while scholars such as Ann Bartow and Rebecca Tushnet have explored the dynamics between gender and IP.

2. *See* K.J. Greene, *What the Treatment of African American Artists Can Teach About Copyright Law*, *in* 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 385 (Peter K. Yu ed., 2007) [hereinafter Greene, *African American Artists*].

3. *Id.*

4. *Id.*

5. *Id.* at 387.

6. *See* K.J. Greene, *Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship*, 58 SYRACUSE L. REV. 431, 433 (2008) [hereinafter Greene, *Racial Subordination*].

thankfully the age of blatant racial stereotyping has eclipsed, scattered vestiges of the era of racial stereotyping continue in the form of marks such as "Redskins" for football—and the occasional Cadbury ad referencing chocolate and Naomi Campbell.[7]

In this essay, I will sketch out the impact of right of publicity law on black cultural production. More concretely, I will consider the implications of publicity law for black artists, and what help, if any, publicity rights offer to the problem of under protection of performance rights. The right of publicity protects against unauthorized appropriation of a person's name, likeness, portrait, picture, voice and other indicia of identity or persona.[8] This essay focuses on the issue of performance rights, or lack thereof, for artists generally and black artists in particular. Like other Intellectual Property Rights (IPR), the right of publicity has the potential to shrink both the public domain and the marketplace of ideas, thus preventing the dissemination of informational and creative works.[9] Standard practice when writing an article about the right of publicity is to note the intense criticism the right engenders in the academic literature.[10] Not wishing to miss "the fun," this is my third article on publicity rights—after vowing publicly never to write in the area. As is common among IP scholars, I argued elsewhere that IPRs have expanded, and targeted the right of publicity for particularly harsh treatment.[11]

Using the metaphor of "beef"—urban slang from the world of rap music for sharp personal conflicts—in a previous article on the right of publicity, I sketched out the raging academic debate between those who seek more IP protection ("expansionists") and those who seek to curtail expansive IP rights ("restrictors").[12] An example of an IP expansionist, or if you will "maximalist," would be the lobbyists

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7. In 2011, Cadbury ran an advertisement with tagline: "Move Over Naomi—There's a New Diva in Town," referring to supermodel Naomi Campbell, a black woman. Cadbury quickly removed the ad after an uproar from minority groups in the United Kingdom. *See* Hilary Moss, *Naomi Campbell: Cadbury Ad 'Insulting and Hurtful,'* HUFFINGTON POST (May 31, 2011, 8:12 AM), http://www.huffingtonpost.com/2011/04/32/naomi-campbell-cadbury-ad_n_868909.html.

8. *See* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1162 (2006).

9. *See id.* at 1184-86.

10. *See* K.J. Greene, *Intellectual Property Expansion: The Good, the Bad, and the Right of Publicity*, 11 CHAP. L. REV. 521, 521 (2008) [hereinafter Greene, *IP Expansion*].

11. *See, e.g.*, Dogan & Lemley, *supra* note 8; Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 127 (1993).

12. Greene, *IP Expansion*, *supra* note 10, at 522.

for the film and music industries, whom Professor Terhanian noted, "have bemoaned the Internet's potential to transform any teenager with a computer into a grand larcenist."[13]

Notwithstanding my own "beef" with publicity rights as a larger phenomenon of IP expansion, I argued elsewhere that "the radical alternative [of eliminating publicity rights, or curtailing their scope] has troubling implications for those at the bottom of the IP/entertainment eco-system, whether racial minorities, unsung retired athletes," or new entrants in the entertainment industry.[14] I agree somewhat with Professor McKenna, who argued that, "critics of the right of publicity have gone too far in suggesting that celebrities should have no control over their identities."[15] Professor McKenna argues persuasively that courts erred in looking at the right of publicity claims exclusively through the lens of the "economic value of a celebrity's identity."[16]

The lessons drawn from the treatment of black artists validate the notion, set forth by scholars such as Professor Kwall, that creative artists seeking redress for appropriation and injury to personality rather than economic injury may present especially strong claims for redress in the right of publicity context.[17] As I argued in other contexts, intellectual property can facilitate dynamics of inequality in society, but an artist-centered, bottom-focused approach to IP can foster equality of treatment rather than existing power dynamics of wealth, gender and race privilege.[18] Case law on performance rights leaves a gap in IP protection that is puzzling in light of the importance of performance in artistic endeavors.

However, unlike other IPRs, particularly trademark rights, which have been overprotected,[19] the right of publicity is arguably unprotected in at least one dimension—protection of non-celebrities.

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13. John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 538 (2007).

14. *See* K.J. Greene, *The Right of Publicity: Is the Rent "Too Damn High"?*, 2 COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 279, 281 (2011) [hereinafter Greene, *"Too Damn High"*].

15. Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 231 (2005).

16. *Id.* at 226.

17. *See* Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 158 (2001).

18. *See* Greene, *"Too Damn High"*, *supra* note 14, at 291.

19. *See generally* Sandra Rierson, *IP Remedies After eBay: Assessing the Impact on Trademark Law*, 2 AKRON INTELL. PROP. J. 163 (2008).

The under-protection of non-celebrities illustrates both the fallacy of purely economic-based approaches to IPRs, and their politicized nature. In echoing the IPR interest theory of Professor Litman, huge corporations get the benefit of legislation expanding their respective IPRs, while less-powerful non-celebrities enjoy less protection.[20] Further, an obsessive interest in economic rights to IPRs disadvantages non-elites in society.[21] These threads run throughout American IP law and lead to inequality of treatment, according less respect for the rule of law.

WHAT BOTHERS US ABOUT THE RIGHT OF PUBLICITY?

Most academics, even when "rock stars" in the classroom, are far removed from the world of Hollywood celebrity. Perhaps we academics are merely "haters,"[22] envious of the lavish lifestyles of celebrities. Putting that aside, what is it that bothers us academics about the right of publicity? Scholars from Madow to Dogan and Lemley set forth a litany of analytical woes plaguing publicity right law.[23] The incentive theory underlining patent and copyright law has come under harsh attack in the publicity context. Professor Liu echoes a common concern in noting the difficulty of providing incentives through publicity rights: "[c]elebrities and athletes already have strong incentives to become famous or to work hard to win."[24] A valid retort may well be that merely criticizing the right of publicity does not make these scholars haters—they "don't hate the play[ers (celebrities)—just] [sic] the game."[25]

Complain as we may, the right of publicity just gets bigger—

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20. *See* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 7 (2010) (noting that copyright legislation results in "copyright laws that enrich[] established copyright industries at the expense of both creators and the general public").

21. *See id.* at 27-28.

22. According to that definitive source, the Urban Dictionary, a hater is someone who "feels anger and/or jealousy for someone who has succeeded in something they have worked hard for." *Hater*, URBAN DICTIONARY.COM, http://www.urbandictionary.com/define.php?term=Hater (last visited Aug. 15, 2011).

23. *See, e.g.*, Dogan & Lemley, *supra* note 8; Madow, *supra* note 11.

24. Joseph P. Liu, *Sports Merchandising, Publicity Rights, and the Missing Role of the Sports Fan*, 52 B.C. L. REV. 493, 503 (2011).

25. The Urban Dictionary unpacks the popular phrase, which, like most "hip" phrases, has its origins in the black community thusly: "Do not fault the successful participant in a flawed system; try instead to discern and rebuke that aspect of its organization which allows or encourages the behavior that has provoked your displeasure." *Don't Hate the Playa/Playette, Hate the Game*, URBAN DICTIONARY.COM, http://www.urbandictionary.com/define.php?term=Don't+Hate+The+Playa%2FPlayette+Hate+The+Game (last visited Aug. 15, 2011).

Professor Leaffer laments that since the 1950's, publicity rights "have expanded to encompass not only name and likeness, but also anything that vaguely relates to identity."[26] Or, as I put in a previous article, the right of publicity is "expand[ing] faster than Steven Segal's waistline."[27] Proposals for a federal right of publicity have been floated for a long time, and alas, such a statute seems inevitable at some point.[28]

Publicity rights no doubt enrich the fortunes of celebrities, a category expanding with the rise of reality television to create new celebrities such as Snooki and the The Situation from the hit show "Jersey Shore." Whether publicity rights do much at all besides making rich celebrities richer, including talentless reality stars is debatable. Law professors posit that publicity rights "should be strictly limited if recognized at all" on policy grounds.[29] As my good colleague, Professor Semeraro, argues, publicity rights "are unnecessary to stimulate the pursuit of fame, unneeded to manage the value of publicity, and undeserved in any recognized moral sense."[30] Rail as we may, it would seem that no one is listening to the professors, as publicity rights have become big business, and the public's obsession with celebrities seems to know no limits.

The importance of publicity rights has only increased as society has embraced the era of "the brand." As Professor Kaytal explains, "brands permeate the fabric of our lives—they help construct our identities, our expressions, our desires, and our language."[31] Corporations seek to "become definable personalit[ies]" to combat the "public perception of a corporation as a cold impenetrable entity. . . ."[32] Professor Perzanowski notes that corporations "take branding seriously" as we might expect they would given the billions expended and the cumulative $2 trillion value of the top one hundred global

26. Marshall Leaffer, *The Right of Publicity: A Comparative Perspective*, 70 ALB. L. REV. 1357, 1362 (2007).

27. Greene, *IP Expansion*, *supra* note 10, at 521.

28. *See* Board Resolution, Int'l Trademark Ass'n, Bd. Resolutions U.S. Fed. Right of Publicity (Mar. 3, 1998), *available at* http://www.inta.org/Advocacy/Pages/USFederalRightofPublicity.aspx.

29. SHUBHA GHOSH ET AL., INTELLECTUAL PROPERTY: PRIVATE RIGHTS, THE PUBLIC INTEREST, AND THE REGULATION OF CREATIVE ACTIVITY 631 (2d ed. 2011).

30. Steven Semeraro, *Property's End: Why Competition Policy Should Limit the Right of Publicity*, 43 CONN. L. REV. 753, 755 (2011).

31. Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 796-97 (2010).

32. *Id.* at 802.

brands.[33]

Following that trend, individuals—stars—have now become brands in and of themselves. Professor Tan notes that a consensus exists "amongst cultural studies scholars that celebrities are semiotic signs, as much as they are commodities possessing intrinsic economic value."[34] Viewing identity and indicia of identity such as football player numbers, sport and entertainment stars now aggressively pursue transgressors in the same way trademark owners of famous marks do. Whether there is true social benefit accruing back to "we the people" to any of this conduct under color of law is quite another question.

The "branding" of personality also begs the question—if celebrities really are "brands," why do we need a right of publicity? Trademark law, after all, fully protects—some would say overprotects—brands, and virtually every celebrity right of publicity case is also a trademark infringement case. When Kim Kardashian recently sued Old Navy for use of a Kardashian "look-a-like" in an Old Navy ad, her complaint stressed not that her likeness was appropriated, but that the Old Navy ad "falsely represents that Kim Kardashian sponsors, endorses or is associated with [Gap Inc.]."[35]

What is the harm to Kardashian? That she lost an opportunity to reap the financial benefit of an Old Navy endorsement? That the Old Navy ad would undermine her other ventures, including her endorsement deal with Sears?[36] According to a Kardashian "insider," plaintiff brought suit because "she's a businesswoman who has to protect her brand."[37] Brand protection, though, is not a cause of

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33. Aaron Perzanowski, *Unbranding, Confusion, and Deception*, 24 HARV. J.L. & TECH. 1, 1-2 (2010) (citing MILLWARD BROWN OPTIMOR, BRANDZ TOP 100 MOST VALUABLE GLOBAL BRANDS 8 (2009), *available at* http://www.wpp.com/NR/rdonlyres/2E0D97E5-1B32-4E63-B90C-576CCA55002A/0/BrandZ2009report.pdf).

34. David Tan, *Affective Transfer and the Appropriation of Commercial Value: A Cultural Analysis of the Right of Publicity*, 9 VA. SPORTS & ENT. L.J. 272, 292 (2010).

35. Complaint at 6, Kardashian v. Gap Inc., No. 2:11-cv-05960 (C.D. Cal. Aug. 10, 2011). Ms. Kardashian is seeking between $15 and 20 million, an odd figure it would seem "given that it would equal between 23 to 30 percent of the $65 million that the Kardashian family collectively earned in 2010." *See* Robyn Hagan Cain, *Kim Kardashian Sues Old Navy in Right of Publicity Claim*, CALIFORNIA CASE LAW (July 26, 2011, 12:04 PM), http://blogs.findlaw.com/california_case_law/2011/07/kim-kardashian-sues-old-navy-in-right-of-publicity-claim.html.

36. Media reports indicate that initially, "Kardashian did not have a problem with the look-alike but Sears did." *See* Timothy Mangan, *Kim Kardashian's Old Navy Lawsuit Thickens*, ORANGE COUNTY REGISTER (July 25, 2011, 4:55 PM), http://www.ocregister.com/articles/thickens-309571-kardashian-kim.html.

37. *Pal: Why Kim Kardashian Sued Old Navy Over Lookalike Ad*, US WEEKLY

action. It has clearly become a business strategy, using likeness appropriation and trademark infringement as a guise.

Recent cases involving publicity rights pit Lindsay Lohan against an advertiser that used a "milkaholic baby" named "Lindsay."[38] Merely mentioning the name "Lindsay" can now trigger right of publicity violation jeopardy. Jennifer Lopez and Mark Anthony filed suit alleging appropriation of likeness against a baby carriage maker that used a photo of the formerly happy couple on its website to promote sales.[39] "The Naked Cowboy," that guy who sings in Time Square in his underwear, sued Mars Corporation, maker of M&M's, for right of publicity misappropriation because Mars depicted a blue cartoon M&M in drawers with a guitar in an advertisement.[40] Less recent cases pit Tiger Woods against a painter for depicting Tiger's image in a painting,[41] and my old client, Spike Lee, going after Viacom for its use of "Spike TV."[42]

What bothers us in many of these cases is that the celebrity seems to overreach by claiming property in identity that causes neither economic harm nor harm to personality. As Professors Ochoa and Welkowitz cogently demonstrate, publicity rights "create difficult problems for freedom of expression."[43] Whether it is J. Lo, Lindsay or

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MAGAZINE (July 21, 2011, 9:30 AM), http://www.usmagazine.com/moviestvmusic/news/pal-why-kim-kardashian-sued-old-navy-over-lookalike-ad-2011217.

38. *See* Amy Andrews, *Lindsay Lohan Sues E-Trade for $100M Over Milkaholic Boyfriend-Stealing Baby Ad*, ABC NEWS (Mar. 9, 2010), http://abcnews.go.com/Entertainment/lindsay-lohan-sues-trade-100m-milkaholic-boyfriend-stealing/story?id=10051692.

39. *See* Greene, "*Too Damn High*", *supra* note 14, at 285 (citing Lopez v. Silver Cross (UK) Ltd., 2:09-CV-01345-AHM (C.D. Cal. 2009)). The high-flying superstar couple actually loved the carriage, and had posed their twins in the carriage for a magazine photo-shoot.

40. *See* Burck v. Mars, Inc., 571 F. Supp. 2d 446, 453 (S.D.N.Y. 2008) (dismissing Burck's right of publicity claim under the New York statute, holding that the right to privacy under Sections 50 and 51 "does not extend to fictitious characters adopted or created by celebrities").

41. *See* ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 938 (6th Cir. 2003) (Woods lost the right of publicity suit on First Amendment grounds).

42. *See* Lee v. Viacom, Inc., No. 110080/2003, 2003 WL 22319071 (N.Y. Sup. Ct. 2003) (Lee prevailed on a motion for a preliminary injunction under New York's statutory right of publicity). The court initially required a $500,000 injunction bond, which Viacom convinced the court to increase to $2.5 million, whereupon the case promptly settled on undisclosed terms. *See* Lily Oei, *Viacom and Lee Settle Spike Spat*, VARIETY (Jul. 7, 2003, 3:58 PM), http://www.variety.com/article/VR1117888940?refCatId=10.

43. David S. Welkowitz & Tyler T. Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech*, 45 SANTA CLARA L. REV. 651, 670 (2005) (contending that publicity rights claims are often no more than "a stealth alternative to defamation claims" designed to get around First Amendment limitations).

Spike, it looks like celebrities are attempting to cash in on a shakedown. In the domain name context, celebrity figures do not necessarily seek compensation, but rather the right "to prevent others from profiting from their name online."[44] Celebrity representatives (and yes, I was one, once upon a time) see things differently, defining the right of publicity in essence as protection "against other people making money off you without your permission."[45]

As attorney Stan Lee notes, in a society that so values celebrity, the "question is who should be able to make money off that celebrity. . . the individual or his or her family?"[46] Attorney Lee concludes that whether it is, "a small entrepreneur selling T-shirts or a multibillion conglomerate. . . [i]t ought to be the individual."[47]

Perhaps Attorney Lee has a point—at least when a big corporation appropriates an individual's direct likeness and it is used for crass commercial purposes. I have argued in the trademark context that the "hallmark of abusive [trademark] litigation is the overreaching assertion of trademark rights, typically by a large corporate entity against a smaller entity."[48] So when Donna Douglas, who played the iconic "Elly May" on the original television show "The Beverly Hillbillies" sues Mattel Corporation over use of an "Elly May" Barbie doll, we feel sympathetic to her.[49] Indeed, it is hard to feel any sympathy when Mattel, the company that used trademark law to try to suppress use of its mark in the silly "Barbie Girl" song by Aqua, and has pursued artists over almost any depiction of "Barbie", is sued for IP infringement.[50] I refer to this elsewhere as the law of "IP karma."[51]

In a different vein concerning dolls, Kim Kardashian's legal

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44. *See* Jacqueline D. Lipton, *Celebrity in Cyberspace: A Personality Rights Paradigm for Personal Domain Name Disputes*, 65 WASH. & LEE L. REV. 1445, 1459 (2008).

45. *See* Drake Bennett, *Star Power: Celebrities Have a Legal Right to Prevent the Commercial Use of Their Images Without Permission. But Are They Silencing Artists and Satirists as Well?*, BOSTON.COM (June 4, 2006), http://www.boston.com/news/globe/ideas/articles/2006/06/04/star_power/.

46. *Id.*

47. *Id.*

48. *See* K.J. Greene, *Abusive Trademark Litigation and the Incredible Shrinking Confusion Doctrine—Trademark Abuse in the Context of Entertainment Media and Cyberspace*, 27 HARV. J.L. & PUB. POL'Y 609, 632 (2004) [hereinafter Greene, *TM Abuse*].

49. Liz Goodwin, *'Beverly Hillbillies' Actress Sues Mattel over Barbie Image*, YAHOO! NEWS (May 5, 2011), http://news.yahoo.com/blogs/lookout/beverly-hillbillies-actress-sues-mattel-over-barbie-image-194151863.html.

50. *See* Mattel, Inc. v. MCA Records, 296 F.3d 894 (9th Cir. 2002).

51. Greene, *TM Abuse*, *supra* note 48, at 642.

representatives threatened suit against the maker of a doll called the "Kinky Kim Filthy Love Doll" that appears to mimic Ms. Kardashian's identity.[52] The doll manufacturer, a company called Pipedream Products, Inc., has apparently created other "blow-up" sex dolls modeled after celebrities, including Lady Gaga.[53] Here, the defendant could expect little sympathy due to the coarse nature of its clearly commercial product. If ever there were a case where moral rights should trump expression, this would be it.

Similarly, it is hard to feel sympathy for a company like Activision when it gets haled into court for overreaching a contract and using avatars to manipulate songs from artists like No Doubt or Maroon 5 lead singer Adam Levine beyond the scope of the license.[54] Same for Electronic Arts' use in a video game for a "muscular African American player wearing the number 32 on the All Browns team."[55] There is a rather delicious irony in these cases, where now it is the Mattel's and the Activision's asserting First Amendment defenses—the same ones they fight tooth and nail when they sue for copyright and trademark infringement.

The question is where it ends, particularly in the cases that do not contain direct use of likeness, but merely an invocation of celebrity likeness, such as "Lindsay" in connection with a "milkaholic" baby. When Woody Allen settled his case against American Apparel, he pointedly noted that he likely could have gotten more money at trial, but "this [lawsuit] is not how I make my

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52. *See Kim Kardashian Blows Up Over 'Filthy' Sex Doll*, TMZ (Sept. 17, 2010, 4:20 AM), http://www.tmz.com/2010/09/17/kim-kardashian-sex-doll-pipedream-productions-toy-adult-xxx-porn-cease-and-desist-shawn-chapman-holley/.

53. *See Lady GaGa Sues Blow up Doll Makers*, MTV UK (Sept. 17, 2010, 11:04 AM), http://www.mtv.co.uk/news/lady-gaga/237784-lady-gaga-sues-blow-up-doll-makers.

54. *See* No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397, 400 (Cal. Ct. App. 2011). Activision's defense failed in the No Doubt case, but it succeeded in defeating claims for trademark infringement and right of publicity violations brought by the group the Romantics of "What I Like About You" fame in 2008. *See* Romantics v. Activision Publ'g, Inc., 532 F. Supp. 2d 884, 886 (E.D. Mich. 2008). The *Romantics* court held that use of the plaintiffs' voices was not a commercial exploitation under Michigan law, and in any event the First Amendment right of defendant would trump it. For a pithy analysis of the case, see Rebecca Tushnet, *All the Things the Romantics Don't Wanna Hear: Guitar Hero Prevails*, REBECCA TUSHNET'S 43(B)LOG (Sept. 7, 2008, 11:31 PM), http://tushnet.blogspot.com/2008/09/all-things-romantics-dont-wanna-hear.html. *See* Philiana Ng & Matthew Belloni, *'The Voice's' Adam Levine Sues Activision*, THE HOLLYWOOD REPORTER (Aug. 5, 2011, 5:41 PM), http://www.hollywoodreporter.com/thr-esq/voices-adam-levine-sues-activision-219938.

55. Complaint at 8, Brown v. Sony USA, Inc., No. 08110412 (N.Y. Sup. Ct. July 30 2008). Both Sony and Electronic Arts were named plaintiffs in Brown's initial complaint. *Id.* Brown voluntarily dismissed the case and refiled in federal court in California. Brown v. Elec. Arts, Inc., 722 F. Supp. 2d 1148 (C.D. Cal. 2010).

living."[56] The same cannot be said, it would seem, for Ms. Lohan, whose film career has languished as she struggles with drug abuse and jail time.

The Naked Cowboy seems a little better. Not only did he sue Mars (M&M's), but he has since sued CBS for using a character wearing boots, drawers and cowboy hat in a soap opera, Clear Channel for a radio promotion featuring a naked cowboy impersonator, and a guitar cowgirl in a bikini known as the "Naked Cowgirl."[57] At this point, it seems the Naked Cowboy and his ilk can join the ranks of "non-producing entities," also known as trolls.[58] When celebrities with dubious claims to any real performance can make more money from suing—or extracting licensing fees, we have reached the age of the "Right of Publicity Troll," joining the ranks of patent trolls, and as identified by Professor Wu, copyright trolls."[59]

I referred to this kind of grasping, socially opportunistic conduct occurring in the world of corporations and their trademarks as abusive trademarks.[60] The headlines featuring Lindsay Lohan and J. Lo show that abusive right of publicity (ROP) litigation exists as well. Celebrities seem to feel they are entitled to compensation whenever and however their identities are used. In this sense, they are no different from trademark owners who sue when there is not economic harm at issue, or copyright owners who sue or threaten to sue to protect product or company image, too often at the expense of artistic expression.

DOES THE RIGHT OF PUBLICITY DETRACT FROM TRUE "COPYRIGHT" CREATIVITY?

Celebrities today, particularly in the music industry, are inextricably entwined with endorsements, merchandising, and advertising, as "advertising not only uses celebrities, it also helps their

56. *See* C.J. Hughes, *For $5 Million, Woody Allen Agrees to Drop Lawsuit*, N.Y. TIMES, May 19, 2009, at A21, *available at* http://www.nytimes.com/2009/05/19/nyregion/19allen.htm.

57. *See* Richard R. Bergovoy, *There Are 8 Million Lawsuits in the Naked Cowboy*, THE LICENSING LAW BLOG (Feb. 23, 2011, 2:29 PM), http://thelicensinglawblog.com/2011/02/there-are-8-million-lawsuits-in-the-naked-cowboy/.

58. *See* Emily Tyson, *The Patent Wars: Litigate or Innovate?* THE ONLINE ECONOMY: STRATEGY AND ENTREPRENEURSHIP (Oct. 1, 2011), http://www.onlineeconomy.org/the-patent-wars-litigate-or-innovate.

59. Tim Wu, *Jay-Z Versus the Sample Troll*, SLATE (Nov. 16, 2006, 1:50 PM), http://www.slate.com/id/2153961/.

60. Greene, *TM Abuse*, *supra* note 48, at 631-35.

careers and publicity."[61] There was a time when celebrities—rock stars and movie stars—did not wish to be involved in advertising. For example, when watchmaker Tutima, Inc., used shots from the film "Righteous Kill" showing stars Robert DeNiro and Al Pacino wearing Tutima watches in print advertisements, both iconic stars filed right of publicity suits, noting that Mr. Pacino, "over the course of his lengthy career, has never commercially endorsed any product or service in the United States."[62] Few music artists today take that stance—a rare exception is the British soul singer Adele, who reportedly refuses to 'sell out' by signing up for 'shameful' endorsement deals."[63] A foundational case on liability for "sound-alikes" under California right of publicity began when singer Bette Midler refused an offer from Ford Motor Company to sing in a television commercial.[64] After being spurned by Midler, Ford went out and hired a back-up singer from Midler's band to sing Midler's hit "Do You Want to Dance" in the same style as Midler.

Today, it seems far more likely the Ke$ha's and Katie Perry's and Usher's of the music world would jump at such an opportunity, and given the obscene money stars make from hawking everything from vitaminwater (50 Cent), to credit cards (Usher), to cell phones (Beyoncé), perhaps we should not blame them. The hit song "Fly Like a G6" was hardly off the air before the band, Far East Nation, sold the song to a candy company for use in a Reese's candy commercial, a car company for use in a Pontiac commercial, and also in an insurance company commercial.[65] No doubt, we would do the same too if we could, but the market for law professor endorsements seems rather thin.

In contrast to most law professors, Justin Bieber earned an estimated $100 million in 2010. The Hollywood Reporter documents Bieber's rise as a "cottage industry . . . that includes sales of his music. . . merchandise (singing dolls, jigsaw puzzles, watches, 30 t-

61. David Tan, *Much Ado about Evocation: A Cultural Analysis of Well-Knownness and the Right of Publicity*, 28 CARDOZO ARTS & ENT. L.J. 317, 345 (2010).

62. Complaint at 4, DeNiro v. Overture Films, LLC, No. 1:09-cv-01988-LLS (S.D.N.Y. Mar. 4, 2009). *See also* Larry Neumeister, *De Niro, Pacino Sue Distributor for Unauthorized Ad*, USA TODAY (Mar. 4, 2009), http://www.usatoday.com/life/people/2009-03-04-actors-sue_N.htm.

63. *See* Wenn, *Adele Refuses to Sell Out*, MSN MUSIC NEWS (May 24, 2011, 3:42 PM), http://music.msn.com/music/article.aspx?news=649154.

64. Midler v. Ford Motor Co., 849 F.2d 460, 461 (9th Cir. 1988).

65. *See Far East Movement Reese's Commercial*, CHANNELAPA (Nov. 30, 2010), http://www.channelapa.com/2010/11/far-east-movement-reeses-commercial.html.

shirt designs, paper products . . . and concert tickets."[66] The article makes clear that "Bieber fever" is not based on musical longevity, but rather is "all about taking advantage of the present, which means working every angle."[67] Music executive L.A. Reid, in recognizing that Bieber struggled for radio acceptance shrugged off such problems, noting that "Justin doesn't just sell music, he sells everything: concert tickets, dolls, books, fragrances, even nail polish."[68] The right of publicity facilitates artists cashing in on merchandising and endorsement value, but is this what we wish to impose social costs to incent? Professor Lemley notes that in the United States, IP protection "has always been about incentives to create."[69] It seems the right of publicity today is really more about incentive to sell cheesy products from t-shirts to nail polish. Perhaps not coincidentally, Bieber placed second in a 2010 poll of the most overexposed celebrities (Lady Gaga placed first).[70]

Bieber is "exhibit A" in demonstrating that in the era of "360" record deals, the value of endorsement often exceeds the value of the performance of music. Unlike the traditional record deal of old, which focused on the sale of sound recordings, in a 360 record deal, a record label "may also participate in additional aspects of an artist's career, like her merchandising, publishing, endorsements and touring."[71] Under traditional deals, artists retained ownership from outside sources, but "360" deals require artists to share from 15-30 percent of endorsement revenue and 20-50 percent of merchandising revenue.[72] Bieber's "360" deal with his label stands to make the label millions in endorsement and merchandising revenue.

One wonders though, whether the mad rush for musicians to "cash in" via celebrity endorsement deals is merely coincidental with

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66. Shirley Halperin, *Justin Bieber Cover: The Team and Strategy Behind Making Him a Star*, THE HOLLYWOOD REPORTER (Feb. 9, 2011, 8:40 AM), http://www.hollywoodreporter.com/news/justin-bieber-cover-team-strategy-97658.

67. *Id.*

68. *Id.*

69. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031 (2005).

70. Castina, *Justin Bieber Lady Gaga Top Poll of "Most Overexposed Celebrities"*, POPCRUNCH (July 21, 2010), http://www.popcrunch.com/justin-bieber-lady-gaga-top-poll-of-most-overexposed-celebrities/.

71. Sara Karubian, *360° Deals: An Industry Reaction to the Devaluation of Recorded Music*, 18 S. CAL. INTERDISC. L.J. 395, 399 (2009).

72. Wendy Day, *Do You Really Want a "Record Deal"? (360 Deals)*, GIFTEDHOODS.COM (Apr. 22, 2011, 4:16 AM), http://giftedhoods.com/2011/04/22/do-you-really-want-a-record-deal-360-deals (no longer available).

the widely recognized decline in artist creativity in the music world.[73] In a sense, the right of publicity's monetization of fame encourages, to quote the rapper 50 Cent, a "get rich or die trying"[74] mentality—music artists' careers today are notoriously short, and so, it makes sense for pop artists to grab the advertising dollars and run. The goal of today's music artist is likely not a long career of multi-platinum albums (which do not sell anymore).[75] Rather it is to make a few hit records, license the songs out as commercials, get a movie deal and start a fragrance line.

This seems in sharp contrast to the artist from the old school, who eschewed commercialism—can one imagine Jimmy Hendrix hawking credit cards? One wonders that maybe, just maybe, if the music industry actually paid artists for creating music, and not just manufactured "Gaga" personas, if the music might be a bit better. The other aspect of this is that if the real game is monetizing fame, and not creativity, one shudders to think of what would happen today to say, an artist like Aretha Franklin, a stout woman not likely to dazzle on the red carpet.

One could argue these trends have always been present somewhat even in connection with music artists, and certainly super groups, such as the Rolling Stones, have made as much if not more money from merchandizing fame than album sales.[76] As the case of Bieber illustrates, we are long past that point, and the artist as brand is more important than the performance.

PROBLEMATIC AND NON-PROBLEMATIC RIGHT OF PUBLICITY CASES

Despite the animus from academics toward publicity rights, we might think twice about abolishing them if we, as philosopher-kings, could. African-Americans have gotten the short end of the stick under just about every aspect of American law, and publicity rights are no exception.[77] I wrote previously, in the trademark context about the

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73. Karubian, *supra* note 71, at 422 ("10 years ago, companies wanted to make records . . . and see if they sold. But panic has set in, and now its no longer about making music, it's all about how to sell music.") (citing Lynn Hirschberg, *The Music Man*, N.Y. TIMES, Sept. 2, 2007, at MM26, *available at* http://www.nytimes.com/2007/09/02/magazine/02rubin.t.html?pagewanted=all).

74. 50 CENT, GET RICH OR DIE TRYIN' (Aftermath Entertainment, Shady Records, Interscope Records 2003).

75. *See* Karubian, *supra* note 71, at 397 (noting the decline in CD album sales).

76. *See* Alycia de Mesa, *Oops, I Merchandized It Again*, BRANDCHANNEL (Jun. 6 2005), http://www.brandchannel.com/features_effect.asp?pf_id=266.

77. *See* Greene, *Racial Subordination*, *supra* note 6, at 433-34.

unsavory history of black personas used to sell products, such as Aunt Jemima syrup, Uncle Ben's rice, and old Rastus, the Cream of Wheat chef.[78] The idea that we can just take people's images, use them to sell products and not compensate or undercompensate the subject strikes a reasonable person as unjust.

The history of African-American exploitation under IP regimes, including copyright and trademark law, provides fodder for the lonely few academics that advance theoretical rationales for publicity rights. Prominent among these was Professor Haemmerli, who contends that publicity rights "can also be viewed as a property right grounded in human autonomy."[79] The benefit of the autonomy view is that it recognizes some rights of publicity "violations" are more problematic than others. Professor Haemmerli provided a stout defense of publicity rights, and yet recognized that commercial artistic products do not deserve moral rights protection.[80]

Similarly, Professors Cotter and Dmitrieva divide right of publicity cases into two broad categories—commercial and non-commercial.[81] Or, put another way, artistic and non-artistic. Purely commercial uses—such as American Apparel's use of Woody Allen's image on a billboard to sell its products surely do not merit judicial protection.[82] American Apparel weakly claimed that it was doing some kind of parody in pasting Woody's mug on a billboard ad in Times Square.[83] They had to know that if the parody defense failed in the Vanna White case,[84] there is no way it could succeed in this one. Similarly in the Taster's Choice case, Nestle used a model's picture to sell thousands of jars of coffee.[85] The only question there was whether the model was entitled to compensation for every jar sold.[86]

At the other end of the spectrum are the purely artistic cases, such as Polydoros, where a filmmaker created a fictional character "Squints Palledorous" resembling his childhood friend Michael

78. *Id.* at 435-36, 443.

79. Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 385 (1999).

80. *See id.* at 391 n.24.

81. Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165, 169 (2010) (contending that most right of publicity protection is constitutional under the First Amendment in the commercial context and unconstitutional in the non-commercial context).

82. *See* Hughes, *supra* note 56.

83. *See id.*

84. White v. Samsung Elecs. Am. Inc., 971 F.2d 1395, 1401 (9th Cir. 1992).

85. Christoff v. Nestle USA, Inc., 47 Cal. 4th 468 (Cal. 2009).

86. *See id.*

Polydoros.[87] Polydoros lost.[88] However, in other pure artistic cases, the outcome is not so certain, such as the infamous Rosa Parks case, where the court held that the OutKast song "Rosa Parks" violated the civil rights icon's right of publicity.[89] Nonsense!

The Rosa Parks Case exposes the dark side of basing publicity rights on theories akin to moral rights or "personality harms." We might by sympathetic to a civil rights icon's distress at her name being used for a single title where the song is "vulgar"[90] and contains the "N-word."[91] Yet, if the outcome is the suppression of a creative work, that seems a harm not worth validating.

A recent case pitted an African-American maid, Ablene Cooper, against the author of the book, "The Help," which spawned a hit motion picture with the same title.[92] According to the lawsuit, Ms. Cooper alleged that the character in the book and film, "Aibileen Clark" was "an unauthorized appropriation of [Cooper's] name and image."[93] In *Polydoros*, the California Supreme Court made clear that merely using memories of a childhood friend to craft a film character would not violate the right of publicity.[94] In "The Help" case, the connection seems much closer—Ms. Cooper worked for the author's brother, and the character "Aibileen Clark" says vile things that would upset her real life counterpart, such as comparing her skin color to that of a cockroach.[95] The film has grossed over $35 million in its opening week.[96]

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87. Polydoros v. Twentieth Century Fox Film Corp., 79 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997).

88. *See id.*

89. Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003).

90. Plaintiff-Appellant's Corrected Final Brief at 7, Parks v. LaFace Records, No. 99-2495 (6th Cir. June 29, 2002), 2002 WL 33956077.

91. *See* OUTKAST, *Rosa Parks*, *on* AQUEMINI (LaFace Records 1998).

92. Campbell Robertson, *Family Maid Files Suit Against Author of 'The Help'*, N.Y. TIMES (Feb. 17, 2011, 2:14 PM), http://artsbeat.blogs.nytimes.com/2011/02/17/family-maid-files-suit-against-author-of-the-help/. The Mississippi court subsequently dismissed the suit on statute of limitations grounds. *See* Jen Chaney, *'The Help' Lawsuit Against Kathryn Stockett Is Dismissed*, WASHINGTON POST (Aug. 16, 2011, 5:55 PM), http://www.washingtonpost.com/blogs/celebritology/post/the-help-lawsuit-against-kathryn-stockett-dismissed/2011/08/16/gIQAiCWqJJ_blog.html.

93. Robertson, *supra* note 92.

94. *See* Polydoros v. Twentieth Century Fox Film Corp., 79 Cal. Rptr. 2d 206 (Cal. 1998).

95. Complaint at 4, Cooper v. Stockett, No. 251-11-134CIV (Miss. Feb. 9, 2011).

96. Christopher Rosen, *Weekend Receipts: Apes Holds Off The Help in Close Battle; Glee Flops*, MOVIELINE (Aug. 14, 2011, 12:30 PM), http://www.movieline.com/2011/08/14/weekend-receipts-apes-holds-off-the-help-in-close-battle-glee-flops/.

Economic theory does not help a plaintiff in a case like this, or Rosa Parks in the *LaFace* case.[97] The use is not commercial but artistic, even though profitable. As Professor Lemley notes, the free-riding/unjust enrichment rationale is overextended in such cases—"the assumption that intellectual property owners should be entitled to the full social surplus of their invention runs counter to our economic intuitions in every other segment of the economy."[98]

The personality or moral rights implications in contrast are much more troubling in cases where a non-celebrity's persona is exploited in a creative work. The outcome to expression is clearly burdened, because if the harm truly is personal, and not economic, the remedy would be an injunction.

GAPS IN IP PROTECTION FOR PERFORMANCES

Performances are immensely valuable and often innovative. Performances are also closely tied to identity in creative endeavors, whether it is a James Brown scream or the "duckwalk" made famous by the great rock pioneer Chuck Berry. I demonstrated elsewhere that copyright law provides less protection to pure innovators, like James Brown, than to less creative imitators.[99] Copyright law protects performances, but only to the extent they are embodied in copyrightable medium and fixed in tangible medium.[100] Even then, copyright will not protect all aspects of a performance. An example here would be Little Richard, who in songs like "Tutti Frutti" and "Long Tall Sally" emitted a soulful "woo!"[101] The Beatles, who like most British rockers, revered the pioneering black artists, used that same "woo!" in songs such as "She Loves You."[102] However, short phrases such as "woo!" are not copyrightable.[103] The Beatles could not copy Little Richard's sound recording with the phrase, but are not prohibited from using it in their own recordings.

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97. Parks v. LaFace Records, 329 F.3d 437, 446 (6th Cir. 2003).

98. Lemley, *supra* note 69, at 1046.

99. *See* K.J. Greene, *Papa's Got a Brand New Bag: James Brown, Innovation, and Copyright Law*, *in* AFRICAN AMERICAN CULTURE AND LEGAL DISCOURSE 177, 181-83 (Lovalerie King & Richard Schur eds., 2009).

100. 17 U.S.C. § 102 (2006) (subject matter requirements for copyright protection).

101. LITTLE RICHARD, *Long Tall Sally*, *on* HERE'S LITTLE RICHARD (Specialty Records, Inc. 1957).

102. THE BEATLES, *She Loves You*, *on* SHE LOVES YOU/I'LL GET YOU (EMI Studios 1963).

103. *See* 37 C.F.R. § 202.1(a) (2005) (listing "short words and phrases" as materials not subject to copyright).

The Supreme Court's lone foray into right of publicity—*Zacchini v. Scripps-Howard Broadcasting, Inc.*,[104] focused on two aspects—performance rights and economic incentives. The performance in *Zacchini* was a human cannonball.[105] The court held that a news station's television transmission of the entire performance was not defensible under First Amendment principles.[106] The Court's rationale focused on the disincentives such conduct would cause to a performer.[107]

Because *Zacchini* is such a weird case on a strange set of particularized facts, it is rarely cited for anything beyond the notion that the Supreme Court endorses an economic incentive theory for publicity rights, stating that, "[publicity right protection] provides an economic incentive for [plaintiff] to make the investment required to produce a performance of interest to the public."[108] Analysts note that "performance-value" cases "are relatively sparse in comparison to cases involving appropriation of celebrity images for advertising purposes."[109] Most seem to involve musical artists whose voices are appropriated in advertising.

However, in its focus on performance, maybe the Supreme Court was on to something.[110] What is rather striking about the modern right of publicity is how often performance has nothing to do with anything. We have Naked Cowboys, and The Situation, and Kardashians, and "milk-a-holic" Lindsay Lohan—folks who "lack the talents that traditionally lead to superstardom and, some believe, partly because of it."[111] The Naked Cowboy—has anyone actually heard him sing? All the reality TV stars, the Snookis and The Situations—do they have a performance besides getting drunk and acting lewd and rude? What is Paris Hilton's performance (do not answer)? How about Fabio?

Right of publicity cases that actually do involve a performance by someone with discernible talent are dismissed under copyright preemption doctrine, or for some other reason. In one such case, *Laws*

104. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

105. *Id.* at 563.

106. *See id.* at 578-79.

107. *See id.* at 576.

108. *Id.*

109. Haemmerli, *supra* note 79, at 392.

110. *See* Zacchini, 433 U.S. at 575-76.

111. Harriet Ryan & Adam Tschorn, *The Kardashian Phenomenon*, L.A. TIMES (Feb. 19, 2010), http://articles.latimes.com/2010/feb/19/entertainment/la-et-kardashian19-2010feb19.

v. Sony Music Entertainment, Inc.,[112] a singer of a hit song found that song used in a Jennifer Lopez recording. Ironically, this is the same Jennifer Lopez, who, with her husband Marc Anthony, filed suit alleging appropriation of likeness against a baby carriage maker that used a photo of the formerly happy couple on its website to promote sales.[113] Debra Laws had assigned rights in her performance to the record company, and therefore had no control of its use—or ability to profit from the re-recording, as she had no copyright ownership in the song.[114] The court dismissed her right of publicity claim, finding that it was preempted because Ms. Laws was, in essence, challenging the sound recording.[115] The outcome is the original performer, Ms. Laws, has no rights to her voice or control over how it might be used in a composition.[116] Similarly, Astrud Oliveira, who recorded under the name Astrud Gilberto, was upset when Frito-Lay used the iconic song, "The Girl from Ipanema" with a Miss Piggy voice-over in a commercial for potato chips.[117] As in *Laws*, Astrud had no copyright interest in the composition, and Frito-Lay duly obtained licenses from both the composer and the sound recording owner to use the song.[118] Oliveira sued for trademark infringement, asserting that use of song falsely implied her endorsement, and for right of publicity violations under New York law.[119] The court rejected her Lanham Act claims, holding that while music can serve as a trademark, a "signature" song cannot be a trademark for itself.[120] It remanded her publicity rights claims because the trial court had made erroneous factual assumptions.[121] Although Oliveira was so closely associated with the song as to be inseparable,[122] her lack of status as copyright owner foreclosed any rights to control use of the song.[123]

Kierin Kirby was better known as Lady Miss Kier, the singer with fabulous dance moves behind the hit song "Groove Is In the Heart" by the 1990's group Deee-Lite.[124] As Eric Farber notes, Lady

112. Laws v. Sony Music Entm't Inc., 448 F.3d 1134 (9th Cir. 2005).
113. *See* Greene, *"Too Damn High"*, *supra* note 14, at 285.
114. *Laws*, 448 F.3d at 1136.
115. *Id.* at 1145-46.
116. *Id.* at 1144.
117. *See* Oliveira v. Frito-Lay, Inc., 251 F.3d 56, 57-58 (2nd Cir. 2001).
118. *Id.* at 58.
119. *Id.* at 57-58.
120. *Id.* at 62.
121. *Id.* at 64-65.
122. *Id.* at 61.
123. *Id.* at 62.
124. *See* Eric Farber, U-La-La, *What's Happened to Our California Right of Publicity?*, 11

Miss Kier "had a distinctive style . . . combining retro and futuristic looks with signature platform shoes, knee-socks, unitards, short pleated skirts . . . and sporting a bare midriff and backpack."[125] Her signature phrase in the hit song was a sexy "Ooh-la-la."[126] Sega, the Japanese computer game maker, developed a game called Space Channel 5 with a similar character. The "main character was Ulala, a female reporter . . . . outfitted with several different costumes . . . but was primarily [wearing] a miniskirt, elbow-length gloves . . . [and] knee-high platform boots . . . ."[127] Having viewed the game, and having grown up listening to Deee-Lite, what struck me was the similarity between the Sega "Ulala" character and the dance moves of Lady Miss Kier.

When Sega imported the game into the U.S., it asked Kirby for a license, which she refused to grant.[128] She later sued for Lanham Act and right of publicity violations.[129] The court conceded similarities between Kirby and the "Ulala" character in the video game, but concluded that since Kirby did not have a "singular identity" there was likely no common law publicity claim.[130] In any event, the court found the Sega character was sufficiently transformative to dismiss the case.[131] To add insult to injury, Kirby was also tagged with hundreds of thousands of dollars in legal fees for bringing the suit.[132] Rather than identity, Kirby more closely resembles a performance case.

There is a long history of aspects of black musical performance being appropriated; some said that Elvis, for instance, learned most of his performance style from black artists in honky-tonks around Memphis.[133] However, copyright does not and never has protected pure "style" whether in music, dance or literature.[134] Style is, in essence, in the repository of the public domain, freely usable by

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CHAP. L. REV. 449, 458 (2008).

125. *Id.*

126. Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d 607, 609 (Cal. Ct. App. 2006).

127. Farber, *supra* note 124.

128. *Kirby*, 50 Cal. Rptr. 3d at 610.

129. *Id.* at 610-11.

130. *Id.* at 613.

131. *Id.* at 616.

132. *See "Lady Miss Kier" Hammered with Opponent's Attorney's Fees*, THE LEGAL READER (Sept. 25, 2006, 1:16 PM), http://www.legalreader.com/blog/2006/9/25/lady-miss-kier-hammered-with-opponents-attorneys-fees.html.

133. *See* Christopher John Farley, *Elvis Rocks. But He's Not the First*, TIME ENTERTAINMENT (July 6, 2004), http://www.time.com/time/arts/article/0,8599,661084,00.html.

134. *See* Greene, *African American Artists*, *supra* note 2, at 390.

anyone. This generally seems like a good thing in the context of promoting creativity—no doubt, the world is better off for both the musical contributions of Elvis and the Beatles. The back story of the shoddy treatment under the law of black artists tarnishes the rosy picture of cross-cultural collaboration though, perhaps a tad. As Professors Chander and Sunder note, an automatic presumption that an unfettered public domain promotes liberty can "turn[] a blind eye to the fact that for centuries the public domain has been a source for exploiting the labor and bodies of the disempowered—namely, people of color, the poor, women, and people from the global South."[135]

CONSTRUCTED PERSONALITIES—FROM MADONNA TO GAGA

Protection of celebrity image, like trademark protection, has moved from its traditional moorings. In the case of trademarks, the rationale of confusion—once the raison d'être of trademark law has moved closer to property theories that stress the colossal value of trademarks, as reflected in the claim of trademark dilution.[136] As Professor LaFrance notes, dilution law treats trademarks "as a form of property rather than simply as a signaling device that enables consumers to distinguish one vendor from another."[137] Similarly, under the modern right of publicity, "the commercial use of a person's identity is now treated more as a conversion of property than as an injury to the person."[138]

In the case of publicity rights, which began as a privacy rationale, the focus is similarly on the value of celebrity image. Analysts note the problematic nature of focusing on the labor and investment of celebrities in that the dynamics of constructed personalities often lie outside the labor of celebrities.[139] Indeed, some analysts, citing Professor McCarthy for support, have flat out asserted that unlike patent and copyright law, "the right of publicity protects an inherent right, and does not incentivize the creation of some new

135. Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1335 (2004). African-American blues artists demonstrate a concrete example of Sunder and Chander's concerns—as I have said elsewhere, that in regards to "blues artists particularly, it was almost as if their work—some of the most innovative, original and imaginative artistic work ever produced in America—was, to use a legal term of art, 'in the public domain', *i.e.*, freely usable by anyone." Greene, *Black Music*, *supra* note 1, at 368.

136. *See* Mary LaFrance & Gail H. Cline, *Identical Cousins?: On the Road with Dilution and the Right of Publicity*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 641, 642 (2008).

137. *Id.* at 643.

138. *Id.*

139. *See* Michael A. Cooper, Note, *Publicity Rights, False Endorsement, and the Effective Protection of Private Property*, 33 HARV. J.L. & PUB. POL'Y 841, 842 (2010).

intellectual property."[140] A recent law review note decried a court's decision suggesting "wealthy celebrities—are less deserving of such property rights [in image] than the often poorer individuals who attempt to trade on their names and images."[141] The note complained that this position "ignores the reality that many [celebrities] likely generated much of that wealth through the savvy development of an endorsement persona . . . ."[142]

Perhaps some celebrities are savvy marketers who invested heavily in building a talent pool, although incentives to becoming famous are many. On closer examination, however, we can pick any number of celebrities whose personas are "constructed," to borrow from Professor Kwall, on the labor of others.[143] Madonna is a prime example (and yes, the author is a huge fan of the Material Girl). The website of an artist known as Aisha, who appears to be a "cyber-griper" that has personally sued Madonna for copyright violations, documents the many elements Madonna drew upon to craft her image, including Jean Harlow, Jane Mansfield, Ginger Rogers, Gina Lollobrigida and most of all, Marilyn Monroe.[144] In reviewing the many sources from which Madonna "borrowed" (charitably) to craft her image, one that she constantly "reinvented," it is hard to say there is anything original.[145] Besides giving a "shout-out" to these icons of Hollywood in her hit song "Vogue,"[146] they received nothing, and yet could take credit for crafting her image as much as Madonna herself. Ironically, there is a new kid in town named Lady Gaga who seems to borrow heavily from the Madonna playbook, both in terms of style and lyrics.[147] Taken to its limit, the aggressive approach to likeness

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140. Rachel A. Purcell, Note, *Is That Really Me?: Social Networking and the Right of Publicity*, 12 VAND. J. ENT. & TECH. L. 611, 631 (2010).

141. *See* Cooper, *supra* note 139, at 842.

142. *Id.*

143. *See* Kwall, *supra* note 17, at 151.

144. *See* Aisha, *Material ~~Girl~~ Thief—The Many Artists Madonna Has Stolen from for Her Albums and Reinventions—A 25 Year Career that Is a Fraud*, AISHA http://www.aishamusic.com/lawsuit_many_artists_madonna_stole_from.htm (last visited Aug. 21, 2011).

145. *See id.*

146. MADONNA, *Vogue*, *on* I'M BREATHLESS (Sire Records 1990) (mentioning in the lyrics "Greta Garbo, and Monroe, Dietrich and DiMaggio, Marlon Brando, Jimmy Dean, . . . Grace Kelly, Harlow, Jean, . . . Gene Kelly, Fred Astaire, Ginger Rogers, danced on air, They had style, they had grace, Rita Hayworth gave good face, Lauren, Katherine, Lana too, Bette Davis, we love you.").

147. *See* Aly Semigran, *Does Lady Gaga's 'Born This Way' Owe Debt to Madonna?*, MTV (Feb. 11, 2011, 7:17 PM), http://www.mtv.com/news/articles/1657803/lady-gaga-born-this-way-madonna.jhtml.

appropriation would require Lady Gaga to pay publicity license fees to Madonna.

"COPYNORMS," FREE INFORMATION AND THE REMIX CULTURE CLASH

One of the negative effects of over-aggressive assertion of publicity rights is the creation of a general disrespect for IPRs in the community of consumers. The backlash to overreaching IP enforcement is one that IPR holders disregard at their peril, particularly in the on-rushing age of remix culture, as what is left of what used to be the music industry has learned. Remix culture is based on the notion that cultural "borrowing" is central to creativity in the Internet age.[148] As Professor Lessig notes, in the age of remix, where downloading and manipulating music, film and images is as easy as a mouse click, we will need new "moral platforms" to sustain our kids.[149] We need look no further than the music industry to see the devastating effects of shifting "copynorms" arising from remix culture.[150] Even that moribund industry is changing with the times and in response to remix culture—companies such as Warner Music Group and Sony Music are partnering up with YouTube to embrace "creative interpretation of existing videos."[151]

I argue elsewhere, in the context of music copyright, that a major part of the music industry's inability to stop the tsunami of digital file-sharing is traceable to public distrust of the industry, given its long and dark history of ripping off music artists—especially African-American artists at the dawn of blues—and sound recordings.[152] The music industry's claims that digital downloading was hurting "poor" artists rang hollow, if not false, in light of that history.[153] The industry's over-response—mass litigation against digital file-sharers—has likely done more to instill contempt by youth for IP laws

148. *See generally* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2009).

149. *Id.* at xvii.

150. *Id.* at 109-10 (noting consistent year-to-year decline in CD album sales after the popularization of peer-to-peer filesharing).

151. *See* Andy Jordan, *Tech Diary: Video Mashups-a New Kind of Art*, WALL ST. J., (August 4, 2011, 11:00 AM), http://blogs.wsj.com/digits/2011/08/04/tech-diary-video-mashups-a-new-kind-of-art/.

152. *See* K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1181 (2008).

153. *See* Joshua P. Friedlander, *Nobody Stole The Pie*, RIAA (Mar. 3, 2010), http://www.riaa.com/blog.php?content_selector=riaa-news-blog&blog_selector=Nobody_Stole_Pie.

than to stem the tide of downloading.

Publicity rights holders would do well to note this tale. The demographics teach that young people do not respect IP law and do not think they should have to follow it.[154] Given that publicity rights stand on much shakier analytical ground than copyright, rights holders in the publicity context should be worried. Remix culture depends heavily on the use (and distortion of) images of pop stars, movie stars and athletes. Bogus and over-reaching right of publicity claims, as in other IP contexts, lead to negative perceptions of IP law, and disrespect for it. Remix culture may be appropriative and illegal under current IP law, but it is nothing if not creative.[155] It is no accident that the "standout records of [hip-hop's] golden age" occurred before copyright law heavily restricted the use of remix digital sound sampling.[156] IP overprotection of distribution results in under protection for the most creative and entrepreneurial segment of the IP industries, and opportunism that infects the entire system, leading to erosion of norms against infringement. In the case of right of publicity rights holders, over-aggressive enforcement of bogus claims will no doubt encourage a backlash in the vast underground domain of remix.

154. *See* LESSIG, *supra* note 148, at xvii.

155. *Id.* at 56-57.

156. *See* KEMBREW MCLEOD & PETER DICOLA, CREATVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 20 (2011).