

The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity

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Vanna White is a celebrity. However, parodies of Ms. White are prohibited—at least, commercial parodies of Ms. White are prohibited. This was the decision of the Ninth Circuit Court of Appeals in a recent case involving Ms. White and a magazine advertisement for Samsung video cassette recorders.¹ Ms. White sued Samsung for infringing on her right of publicity because Samsung parodied Ms. White in an advertisement; the ad featured a robot dressed in a wig, gown, and jewelry posed next to a Wheel of Fortune game board. The caption read: “Longest-running game show. 2012 A.D.”² The advertisement implied that a Samsung video cassette recorder purchased today would still be in use even after a robot had replaced White on Wheel of Fortune.³

White claimed that Samsung infringed on her right of publicity by appropriating her identity and using her likeness.⁴ The Ninth Circuit Court of Appeal held (over a strong dissent) that, under the California common law right of publicity, Samsung had appropriated White’s “identity.”⁵ The court declined to recognize a

¹ *White v. Samsung Elecs. Am.*, 971 F.2d 1395 (9th Cir. 1992), *reh’g denied*, 989 F.2d 1512 (9th Cir. 1993), *cert. denied*, 113 S. Ct. 2443 (1993).

² 971 F.2d at 1396.

³ *Id.* Samsung ran a series of ads with the same theme. For example, one showed “a raw steak with the caption: ‘Revealed to be health food. 2010 A.D.’” Another depicted irreverent ‘news’-show host Morton Downey Jr., in front of an American flag with the caption: ‘Presidential candidate. 2008 A.D.’” *Id.* These ads were meant to convey the message that Samsung products purchased today would still be in use in the twenty-first century. *Id.*

⁴ *Id.* White sued Samsung Electronics America and David Deutsch Associates, the advertising agency that had prepared the commercial for Samsung, in federal district court under: (1) California Civil Code § 3344 (California’s statutory right of publicity); (2) the California common law right of publicity; and (3) § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1988).

The California common law right of publicity has been interpreted more broadly than Civil Code § 3344. The common law right encompasses claims relating to the use of “identity.” See *White*, 971 F.2d at 1399.

⁵ *White*, 971 F.2d at 1399. The majority also held that the robot was not White’s “likeness” under California Civil Code § 3344, but that a “likeness” was not required under the common law right to publicity cause of action, which is broader than the statutory claim. *White*, 971 F.2d at 1399. The United States District Court for the Central District of California had originally granted summary judgment against White on each of her claims. *Id.* at 1396-97.

The dissent argued that the concept of identity is too vague. In the decision not to rehear the case, *White v. Samsung Elecs. Am.*, 989 F.2d 1512 (9th Cir. 1993) (Kozinski, O’Scannlain & Kleinfeld, JJ., dissenting), the dissent noted that:

parody exception to the right of publicity, stressing the commercial nature of Samsung's parody.⁶

The Vanna White decision seems to create a new cause of action against those who parody celebrities. This decision has already caused uncertainty and concern to impressionists, satirists, and comedy writers.⁷ These entertainers and commentators question whether any imitation of a celebrity could result in a lawsuit.⁸ If interpreted broadly, the Vanna White decision might allow right of publicity claims against all celebrity impersonators, comic impressionists, satirists, and other parodists.⁹

Instead of well-defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of "appropriation of identity," claims often made by people with a wholly exaggerated sense of their own fame and significance. . . . Future Vanna Whites might not get the chance to create their personae, because their employers may fear some celebrity will claim the persona is too similar to her own.

989 F.2d at 1516. Thus, the dissent chided the decision for actually protecting what an individual did for a living, rather than the person's identity, and noted that the majority had created a new and much broader property right. *Id.* at 1515. The dissent asserted, "Instead of having an exclusive right in her name, likeness, signature or voice, every famous person now has an exclusive right to *anything that reminds the viewer of her.*" *Id.*

⁶ *White v. Samsung*, 971 F.2d at 1401; *see also infra* notes 106-10 and accompanying text.

⁷ Greg Braxton, *Vanna White Ruling Has Impressionists Spinning*, L.A. TIMES, June 4, 1993, at F2.

⁸ *Id.* For example, Cal Worthington, a television car salesman who wears cowboy hats and frolics around with chimpanzees, has inquired about his right to sue the makers of the movie "Made in America," which stars Ted Danson as a car dealer who wears cowboy hats and acts with a chimpanzee in commercials. *Id.* Jim Bailey, who impersonates such women as Barbra Streisand and Judy Garland, plans to be more careful in choosing the women he impersonates. *Id.* As a result of the *White v. Samsung* ruling, he may change his plans to impersonate Vanna White in an upcoming skit. *Id.* For these reasons, the White decision surprised many in the legal and business communities, who have sharply criticized the decision. *See, e.g.*, Stephen R. Barnett, *Wheel of Misfortune for Advertisers: Ninth Circuit Misreads the Law to Protect Vanna White's Image*, L.A. DAILY J., Oct. 5, 1992, at 6; Stephen R. Barnett, *In Hollywood's Wheel of Fortune, Free Speech Loses a Turn*, WALL ST. J., Sept. 28, 1992, at A12; Felix H. Kent, *California Court Expands Celebrities' Rights*, N.Y. L.J., Oct. 30, 1992, at 3.

⁹ Although such claims seem distinguishable, the *White* opinion leaves the door open to such actions. As a result of this perceived potential for liability, entertainers and parodists may stop doing their parodies or may decide not to go forward with a planned parody. *See supra* note 8.

This Article argues that the Vanna White decision was improper in failing to recognize a parody exception to the right of publicity tort. This Article advocates a parody exception to the right of publicity similar to the parody exceptions to copyright and trademark infringement. A parody exception will encourage the creative exchange of ideas and commentary; it is consistent with the purpose of the right of publicity; it is consistent with existing laws governing intellectual property; and it is in harmony with First Amendment values and ideals.

Part One of this Article discusses the desirability of allowing parodists to benefit from their labor in creating parodies, even though parodies, by their very nature, require some imitation. Part Two discusses the need to allow some imitation of existing intellectual property to foster creativity and progress. Part Two also discusses the existing "parody exception" to intellectual property rights in copyright and trademark, and the benefits of parody as a form of expression and social commentary. Part Three argues that allowing parodies of celebrities is consistent with First Amendment values because we use celebrities as symbols to communicate. Thus, parodies of celebrities are useful in expressing our views about the ideas the celebrities symbolize. Part Four proposes that we adopt a parody exception to the right of publicity similar to the parody exceptions to the federal copyright and trademark laws.

I. ALLOWING PARODIES OF CELEBRITIES IS CONSISTENT WITH THE UNDERLYING PURPOSE OF THE RIGHT OF PUBLICITY

The right of publicity began as a type of privacy right.¹⁰ In the early cases, the courts focused on protecting the complainant's hurt feelings and the right to be left alone.¹¹ The courts were not, how-

¹⁰ One of the first references to the right of publicity is found in Samuel D. Warren and Louis D. Brandeis' 1890 article proposing a right of privacy. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-96 (1890); see Michael Madow, *Private Ownership and Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 147-78 (1993) (including comprehensive history of right of publicity); see also J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* 1-26 to 1-45 (1993).

¹¹ See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 78 (Ga. 1905); *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 443 (N.Y. 1902). In both *Pavesich* and *Roberson*, the plaintiffs were private individuals seeking relief for emotional harm stemming from the infringement of their "right to be let alone."

ever, particularly sympathetic to celebrities' claims.¹² The courts reasoned that celebrities, who generally sought publicity, should not complain when they receive it.¹³

However, in 1954, Melville Nimmer published a very persuasive article advocating the rights of celebrities to profit from their fame.¹⁴ Nimmer's article urged the recognition of an independent property right of publicity and briefly outlined a cause of action for its infringement.¹⁵ Nimmer, who was then legal counsel to Paramount Pictures, stressed the "needs of Broadway and Hollywood" in his article.¹⁶

Nimmer's primary justification for recognizing a right of publicity related to the "labor" of the celebrities.¹⁷ Nimmer asserted that fame was the result of the celebrities' labor, and in keeping with Anglo-American tradition, celebrities should receive the fruits of their labor.¹⁸ Nimmer argued that "the use of a prominent person's name, photograph or likeness (i.e., his publicity values) in advertising a product or in attracting an audience is of great pecuniary value," and "in most instances a person achieves publicity values of substantial pecuniary worth only after he has expended

¹² See, e.g., *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 169 (5th Cir. 1941); *Pallas v. Crowley-Milner & Co.*, 54 N.W.2d 595, 597 (Mich. 1952); *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 489 (N.Y. 1952).

¹³ As one court stated in rejecting the claim of a famous football player: "[T]he publicity he got was only that which he had been constantly seeking and receiving." *O'Brien v. Pabst*, 124 F.2d at 170.

¹⁴ Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

¹⁵ *Id.* at 215-16. Melville B. Nimmer's 1954 proposal received favorable early notices in the law reviews, yet the courts were initially reluctant to embrace the new right of publicity. Madow, *supra* note 10, at 176; see Nimmer, *supra* note 14, at 203. Gradually, however, the right began to win widespread judicial and scholarly acceptance. "In the last decade or two, as the 'celebrity industry' has grown in power, organization, and sophistication, and as the costs involved in celebrity production have soared, the pressure for legal commodification of personas has intensified. . . . The result has been a steady stream of judicial decisions and statutes recognizing a property-like right of publicity and expanding its scope." Madow, *supra* note 10, at 177 (footnotes omitted).

¹⁶ *Id.* Professor Michael Madow, the author of a provocative article questioning the validity and breadth of the right of publicity, describes Nimmer's article as "a high-class form of special interest pleading for the star image industry." Madow, *supra* note 10, at 174.

¹⁷ Nimmer, *supra* note 14, at 216.

¹⁸ *Id.*

considerable time, effort, skill, and even money.”¹⁹ Thus, such a person should be “entitled to the fruit of his labors.”²⁰

Today, courts and commentators treat the right of publicity in a manner consistent with Nimmer’s characterization of publicity rights. Fame is property—a marketable commodity that the celebrity may sell to the highest bidder.²¹ Courts and commentators have also adopted Nimmer’s labor theory as the basis for awarding celebrities a property right in their fame.

The suggestion that fame is truly the result of labor is, of course, subject to valid criticism. Many commentators dispute the premise

¹⁹ *Id.* at 215-16.

²⁰ *Id.* at 216. Professor Madow describes Nimmer’s article as “John Locke goes to Hollywood.” Madow, *supra* note 10, at 174. John Locke first elaborated a philosophical argument for private property based on individual labor. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 100 (Peter Laslett ed., 2d ed. 1967) (3d ed. 1698); Madow, *supra* note 10, at 175. The concept that labor provides a foundation for property relates back to Locke’s theory of natural law. “Locke’s work influenced the framers of our Constitution and continues to influence contemporary courts.” Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993). One commentator argues, “Lockean natural law gives all persons, whether or not in distress, a liberty to take from the earth a portion of that which all own in common.” *Id.* at 1555.

²¹ See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988); *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1541 (11th Cir. 1983); *Factors, Etc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 825 (9th Cir. 1974); *Cepeda v. Swift & Co.*, 415 F.2d 1205, 1206 (8th Cir. 1969); *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 489 (3d Cir. 1956), *cert. denied*, 351 U.S. 926 (1956); *Nossen v. Hoy*, 750 F. Supp. 740, 743 (E.D. Va. 1990); *Bi-Rite Enters. v. Button Master*, 555 F. Supp. 1188, 1199 (S.D.N.Y. 1983); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1355 (D.N.J. 1981); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978); *Uhlaender v. Henrickson*, 316 F. Supp. 1277, 1282-83 (D. Minn. 1970); *Sharman v. C. Schmidt & Sons*, 216 F. Supp. 401, 407 (E.D. Pa. 1963); *Cabaniss v. Hipsley*, 151 S.E.2d 496, 504 (Ga. Ct. App. 1966); *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62, 76 (N.J. Super. 1967); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S.2d 661, 664 (1977); *Rosemont Enters. v. Urban Sys.*, 340 N.Y.S.2d 144, 146 (Sup. Ct. 1973), *modified*, 42 A.D.2d 544, 345 N.Y.S.2d 17 (1973); *Tennessee ex rel. Presley v. Crowell*, 733 S.W.2d 89, 94 (Tenn. Ct. App. 1987); *Lavery v. Automation Mgmt. Consultants*, 360 S.E.2d 336, 340 (Va. 1987); *Hirsch v. S.C. Johnson & Son*, 280 N.W.2d 129, 132 (Wis. 1979); RESTATEMENT (SECOND) OF TORTS § 652C cmt. a, § 652I cmt. a; MCCARTHY, *supra* note 10, at 10-7 to 10-8; *accord*, *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (Cal. 1979); *Price v. Hal Roach Studios*, 400 F. Supp. 836, 844 (S.D.N.Y. 1975).

that celebrities always labor for their fame or that they deserve a property right in their fame.²² Nevertheless, courts and commentators consistently emphasize the celebrity's right to "the fruits of his labor"²³ and the unjust enrichment that would result from allowing

²² See, e.g., Madow, *supra* note 10, at 179; Gordon, *supra* note 20, at 1556-58. Professor Madow argues, "Fame, after all, is no sure test of merit. Whatever may once have been the case, plenty of people become famous nowadays through sheer luck, through involvement in public scandal, or through criminal or grossly immoral conduct. Even commercially marketable fame can be achieved in this fashion." Madow, *supra* note 10, at 179 (footnote omitted) (quoting Thomas Carlyle). For example, the marketer of No Excuses jeans took advantage of the publicity surrounding the Donna Rice-Gary Hart scandal in 1987 by using Ms. Rice in its advertisements. *Id.*; GEORGE E. BELCH & MICHAEL A. BELCH, INTRODUCTION TO ADVERTISING AND PROMOTION MANAGEMENT 591-92 (1990). Memorex hired the singing (or rather not singing) duo, Milli Vanilli, after it became known that they were not the ones singing on their Grammy award winning record.

Using one's face or name to endorse a product is not necessarily a noble enterprise. Such a practice may even be dishonest. Many celebrities sell their name and likeness to endorse products which they do not use or even respect. Bruce Horowitz, *Marketing Bruce Horowitz: It May Be Hard to Swallow Some Endorsements*, L.A. TIMES, Feb. 11, 1992, at D1. Michael Jackson, for example, does not drink Pepsi. *Id.* One writer has observed, "[T]hese days, many celebrities simply auction themselves to the highest bidder. Most of them don't care if they're hoisting cans of Coke or Pepsi—or strapping on Nikes or Reeboks. What matters is endorsement money. What doesn't matter is integrity." *Id.*

²³ *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1282 (D. Minn. 1970); see, e.g., *White v. Samsung Elecs. Am.*, 971 F.2d 1395 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1993), *cert. denied*, 113 S. Ct. 2443 (1993); *Factors, Etc. v. Pro Arts, Inc.*, 652 F.2d 278, 287 (2d Cir. 1981) (Mansfield, J., dissenting), *cert. denied*, 456 U.S. 927 (1982); *McFarland v. E & K Corp.*, 18 U.S.P.Q.2d (BNA) 1246, 1247 (D. Minn. 1991); *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1355 (D.N.J. 1981); *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979); *Palmer v. Schonhorn Enters.*, 232 A.2d 458, 462 (N.J. Super. Ct. 1967); MCCARTHY, *supra* note 10, at 2-8; Douglas G. Baird, *Common Law Intellectual Property And The Legacy Of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 413-15 (1983); J. Stephen Bingman, *A Descendible Right of Publicity: Has The Time Finally Come For A National Standard?*, 17 PEPP. L. REV. 933, 967-68 (1990); Katherine L. Blanck, *Restricting The Use of "Sound-Alikes" in Commercial Speech by Amending the Right of Publicity Statute in California*, 26 SAN DIEGO L. REV. 911, 928-29 (1989); Joseph Bodine, Jr., *A Picture is Worth \$775.00: The Right of Publicity, An Analysis and Proposed Test*, 17 CAP. U. L. REV. 411, 414-15 (1988); Addison E. Dewey, *The Evolving Doctrine of Right of Publicity: Judicial Protection of Celebrity's Pecuniary Interest from Commercial Exploitation of His or Her Identity And Theatrical Style*, 22 CREIGHTON L. REV. 39, 65 (1988); Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1250 (1986); Wendy J. Gordon, *On Owning*

others to “reap where they have not sown.”²⁴ Courts sympathetically describe right of publicity plaintiffs as “carefully ‘cultivating’ their talents, slowly ‘building’ their images, judiciously and patiently ‘nurturing’ their publicity values—as working long and hard to make themselves famous, popular, respected, beloved.”²⁵ Law review writers, too, generally view a commercially valuable public image as “something a star attains largely on her own, through

Information: Intellectual Property and the Restitutory Impulse, 78 VA. L. REV. 149, 150-53 (1992); Madow, *supra* note 10, at 181; Kevin S. Marks, *An Assessment Of The Copyright Model In Right Of Publicity Cases*, 70 CAL. L. REV. 786, 787 (1982); J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1711 (1987); Vicky Gerl Neumeyer, *The Right of Publicity and Its Descendibility*, 7 U. MIAMI ENT. & SPORTS L. REV. 287, 289 (1990); Eileen R. Rielly, *The Right of Publicity for Political Figures: Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products*, 46 U. PITT. L. REV. 1161, 1168 n.37 (1985); James M. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 647 (1973); Warren J. Ludlow, Note, *Zacchini v. Scripps-Howard Broadcasting Company: Media Appropriation, the First Amendment and State Regulation*, 1977 UTAH L. REV. 817, 818-819 (1977).

²⁴ See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983); *Factors, Etc. v. Pro Arts, Inc.*, 579 F.2d 215, 220 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Bi-Rite Enters. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983), *supplemental opinion*, 578 F. Supp. 59 (S.D.N.Y. 1983); *Lugosi v. Universal Pictures*, 603 P.2d 425, 438 (Cal. 1979) (Bird, C.J. dissenting); *Martin Luther King, Jr., Center for Social Change v. American Heritage Prod.*, 296 S.E.2d 697, 702 (Ga. 1982) (J. Weltner, concurring); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 134-35 (Wis. 1979); MCCARTHY, *supra* note 10, at 2-3; Richard Ausness, *The Right of Publicity: A “Haystack in a Hurricane,”* 55 TEMPLE L.Q. 977, 991 (1982); Madow, *supra* note 10, at 181 & n.269.

Professor McCarthy has expressed his view on the nature of publicity rights:

[S]omething which is created through personal work should be the property of the creator, regardless of personal motivation. This reflects the popular view that what I create is mine. While one person may build a home, and another knit a sweater so also may a third create a valuable personality, and all three should be recognized by the law as “property” protected against trespass and theft. This could be called a “natural rights” rationale in that it starts with the premise that what I create and that which identifies me is mine, unless there is some strong public policy to the contrary.

MCCARTHY, *supra* note 10, at 2-8.

²⁵ Madow, *supra* note 10, at 182; see *supra* notes 21-22. In contrast, courts and commentators often describe right-of publicity defendants as “poachers,” “parasites,” “pirates,” or “free riders,” denouncing them for “reaping where others have sown.” Madow, *supra* note 10, at 196 & n.339.

some combination of talent, effort, intelligence, luck, and grit."²⁶ Hollywood has promoted this perception that film stars labor for their fame. The studios promoted the myth of hard and often anxious work: whatever the stars had, they earned. As one author notes, "However luxuriously they might disport themselves in the Sunday rotogravure, however carefree they might look in the snaps from *Ciro's* and the *Mocambo*, it was constantly put about that, for all the ostensible glamour of their occupations, the stars worked farmers' hours in factory-like conditions."²⁷

The degree to which celebrities labor to create their fame is debatable, and surely variable, depending on the particular celebrity. What is important to this discussion, however, is that celebrities are given the right of publicity largely because of the view that celebrities labor for their fame. Courts and commentators generally agree that laboring to make something should result in a property right for the laborer.²⁸

²⁶ Madow, *supra* note 10, at 183; *see supra* notes 22-23.

²⁷ RICHARD SCHICKEL, *INTIMATE STRANGERS, THE CULTURE OF CELEBRITY, WHERE WE CAME IN 77* (1985).

²⁸ This view is consistent with the teachings of John Locke and is an important part of this country's legal system and culture. *See supra* note 20 (describing Locke's philosophy). However, not all commentators agree that labor should automatically give rise to a property right. *See, e.g.*, Gordon, *supra* note 20, at 1538. Professor Baird has noted that an individual's right to reap what he has sown is far from self-evident even in the setting of tangible property. Baird, *supra* note 23, at 413. Professor Baird argues, "We cannot talk intelligibly about an individual's rights until we have established a set of entitlements. We typically can reap only the wheat we sow on our own land, and how land becomes private property in the first place remains a mystery." *Id.*

This Article does not attempt to discuss the merits of the "fruits of their labor" theory. However, this theory, as the basis of a celebrity's right to receive the financial benefits of her fame, should probably be reexamined for several reasons. First, celebrities do not always labor for their fame. Sometimes fame is a result of sheer dumb luck or fate. Second, a celebrity may labor at something while having no interest in the resulting fame. Thus, they do not labor for fame; they labor for something else. Third, as Professor Gordon notes, giving individuals a property right in everything created by their labor is not a rule which should be followed in all situations. Gordon, *supra* note 20, at 1539. The merits of this premise should be considered in each specific context. Fourth, awarding intellectual property rights to an individual solely to reward the individual for her labor is inconsistent with the underlying premise of our intellectual property rights in patents, trademarks and copyrights. *See infra* notes 53-58 and accompanying text.

If the labor of the celebrity justifies her right of publicity, then the parodist who labors to create parodies should also have property rights in her parodies.²⁹ After all, parodists, like celebrities, carefully cultivate their talents, slowly build their parodies, and judiciously and patiently nurture their ideas, messages, and methods of expression. Parodists work long and hard to make their parodies meaningful, comical, thought provoking, and insightful. Parody is an art. Parody is designed to entertain and amuse, and it is often a relevant commentary on our society.³⁰

Parodists make a valuable contribution to our society. Those who support the celebrity's right to receive the financial benefits of her

²⁹ Parody is a form of expression that dates back to ancient civilizations. D.V.L. Mastrullo, Comment, *Trademark Parody Litigation and The Lanham Act: Fitting a Square Peg in a Round Hole*, 54 U. CIN. L. REV. 1311 (1986). Parody includes "writings, literary style, and forms or situations that imitate the work of another to some degree but exaggerate or distort in order to accomplish a humorous effect or to ridicule." *Id.*

³⁰ Courts, politicians and the general public recognize the value of parody and have demonstrated their appreciation of this ancient art. As one commentator noted in writing about political cartoonists, perhaps the most obviously important genre of parodists: political cartoonists have "infinite feeling and sincerity." Raymond Moley, *Perspective: The Little Man's Friends*, NEWSWEEK, Sept. 3, 1962, at 76. These parodists "are the ones who see that the king is naked, that the man-made image is really an image, that the political figure may be a charlatan, that the issues of which politicians prate are not issues at all in the broad constituency of the nation, and that the remedies proposed are nostrums compounded in quackery." *Id.*

As the Supreme Court noted in *Hustler Magazine v. Falwell*, 485 U.S. 46, 54-55 (1988), the political cartoon has been and is a potent editorial weapon. "The political cartoon is a weapon of attack, of scorn and ridicule and satire. [This editorial weapon] is usually as welcome as a bee sting and is always controversial in some quarters." *Id.* at 54 (quoting Scott Long, *The Political Cartoon: Journalism's Strongest Weapon*, THE QUILL, Nov. 1962, at 56, 57). Long wrote about his profession:

We [political cartoonists] are not so much interested in objective facts as we are interested in interpreting the facts. We are trying to distinguish good from bad, right from wrong. We are seeking the broader truths that lie behind the simple facts. . . . By exaggerating and by taking liberties with the literal truth, by stretching facts to a point beyond belief, by reaching for the ridiculous, [the political cartoonist] tries to tell a real truth that may have been obscured by the simple, dull, objective facts of a situation. . . . For the good cartoon epitomizes the honest debate and the courageous expression of opinion on controversial matters that genuine democracy demands.

Long, *supra*, at 57-59.

fame because of our society's interest in preventing people from getting something for nothing (or "reaping what they did not sow") cannot persuasively use this rationale to deny the parodist. The parodist is not getting something for nothing. The advertising person who creates a parody of a celebrity to draw attention to a particular product is doing something—and we cannot say that what the parodist is doing is less important, or less creative, or less meaningful than what that celebrity did to become famous.

Not only does the parodist not get something for nothing, allowing a parodist to benefit from her efforts does not result in an unfair loss to the celebrity. The celebrity alone did not create her publicity value. Fame is never simply the result of a celebrity's labor. Fame, unlike other products or property (even intellectual property), is a "relational" phenomenon—something that is conferred by others.³¹ A person can, alone, make a chair or build a house. A person can, alone, write a book or design a machine. But a person cannot, alone, make herself famous.³² Fame always depends on the public's participation.³³

The celebrity who is allowed to receive all the benefit from her fame would be receiving income from something that was (at least in part) created by the general public. She would be reaping what she did not sow.³⁴ Since the public contributed to create a celeb-

³¹ Madow, *supra* note 10, at 188.

³² *Id.*

³³ *Memphis Dev. Found. v. Factors, Etc.*, 616 F.2d 956, 959 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); *see also* Emanuel Levy, *The Democratic Elite: America's Movie Stars*, 12(1) *QUALITATIVE SOC.* 29, 50 (Spring 1989). Movie stars are ultimately chosen by the vast lay public:

Sponsorship by film studios has been helpful, but not a requirement, for becoming a star. There have been many failed attempts by producers to make movie stars out of their contract players. Movie stars are genuinely "the people's choice," because by attending the movies of particular players, and not others, movie-goers determine the composition of the screen elite.

Id. The audience also contributes to making the star's image. Another writer comments, "Audiences cannot make media images mean anything they want to, but they can select from the complexity of the image the meanings and feelings, the variations, inflections and contradictions, that work for them." RICHARD DYER, *HEAVENLY BODIES: FILMSTARS AND SOCIETY* 5 (1987).

³⁴ It cannot even be said that it is "fair" or "just" to allow celebrities to profit from their fame at all. Fame does not always come to those who deserve recognition. *See* Madow, *supra* note 10, at 188-89 (noting that fame is often given or withheld on grounds other than "merit"). Fame does not always come to those who have done great deeds worthy of respect. *See id.* And

riety's fame, the fame (at least in part) should be in the public domain. Members of the general public should be entitled to use some of the celebrity's fame for their own endeavors.³⁵

Since, under the labor theory, the celebrity is not entitled to all the benefits of her fame, a celebrity suffers no unfair loss if others also benefit from her fame.³⁶ To take this a step further, a celebrity may actually suffer no economic loss at all, fair or unfair, by becom-

celebrities who generally benefit from publicity rights commonly receive very large incomes already. In other words, the right of publicity often results in making the rich even richer. This is not necessarily bad, but awarding the celebrity all financial benefits in her fame cannot be justified simply because it is "fair" or "just." *See id.* at 189. Great disparities in fame exist and are "usually accompanied by equally great . . . disparities in income. 'Superstar' athletes, musicians, and screen actors command huge incomes, while performers of only slightly less talent, may barely eke out a living." *Id.*; *see Levy, supra* note 33, at 31 (discussing grossly uneven distribution of wealth among screen actors); Sherwin Rosen, *The Economics of Superstars*, 71 *AM. ECON. REV.* 845, 845-46 (1981); *see also supra* note 22 (regarding celebrities' lack of integrity in decisions to endorse products); *see generally* Rosemary J. Coombe, *Intellectual Property and the Construction Authorship Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 *CARDOZO ARTS & ENT. L.J.* 365 (1992).

³⁵ Professor Gordon argues that, in keeping with Lockean natural law, the public's claims should prevail when the public's claims conflict with a laborer's. Gordon, *supra* note 20, at 1538; *see* JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, 287-88 (Peter Laslett ed., 2d ed. 1967) (3d ed. 1698); *see also supra* note 28. Gordon states that "[t]he priority of the public's over the laborer's claims is reflected in the requirement of the Lockean proviso that 'enough, and as good' must be left in common for others when a laborer wishes to appropriate a portion of the common through her labor." Gordon, *supra* note 20, at 1538; *see also* Lee Goldman, *Elvis is Alive, But He Shouldn't Be: The Right of Publicity Revisited*, 1992 *B.Y.U. L. REV.* 597 (1992) (questioning entire basis for a right of publicity).

³⁶ The courts have recognized that celebrities are not the only ones who should be allowed to benefit from celebrities' fame. The media may financially benefit from the stars' fame. Some magazines, television shows and even entire networks exist solely to disclose information about the private and professional lives of celebrities. The courts have recognized that plays or movies about celebrities are allowed, presumably because they are news and thus protected by the First Amendment. *See, e.g., Joplin Enters. v. Allen*, 795 F. Supp. 349, 351 (W.D. Wash. 1992) (allowing biographical play of Janis Joplin). In any event, the courts have not required the media to pay the celebrities in these instances. *But cf. Eastwood v. Superior Court*, 198 Cal. Rptr. 345, 347 (Ct. App. 1983) (suggesting that National Enquirer should pay Clint Eastwood for using his photo on cover to promote sales of magazine).

ing the subject of a parody.³⁷ A parody in an advertisement, for example, should not give the impression that the celebrity is endorsing the product. If it does, then it is a poor parody and the parodist could be legally liable under a false advertising or misrepresentation theory.³⁸ Since the parody is supposed to be an obvious and humorous imitation of the original,³⁹ the parody will not serve the same function as the celebrity and will not take the place of the celebrity. Parody should not detract from the celebrity's ability to sell her name or likeness as an endorser of other products.⁴⁰ In fact, a parody may actually help the celebrity by giving her additional publicity.⁴¹

³⁷ In determining whether the celebrity will be harmed, one should probably look at the celebrity's purpose in laboring. The laborer's purpose is probably the most important aspect of the laborer's claim to compensation. See Gordon, *supra* note 20, at 1547. "A stranger's taking of another's property is likely to merit legal intervention only if the taking interferes with a goal or project to which the laborer has purposely directed her effort. . . . The scope of the laborer's purpose will help to define the scope of the rights she can assert." *Id.* at 1547-48. For example, copying someone's music can harm the creator if the creator created the music not only for the sake of listening to it herself, but also for the purpose of selling the royalties to the piece. *Id.* at 1548. If, however, the creator wrote the music only in order to listen to it herself, she would not be harmed if another copied the piece since it would not interfere with the creator's intended use. *Id.*

³⁸ See Lanham Act § 43(a), 15 U.S.C. § 1125(a) (1988); see, e.g., CBS v. Springboard Inter. Records, 429 F. Supp. 563 (S.D.N.Y. 1976) (claim for false advertising); *Fellows v. National Enquirer*, 721 P.2d 97 (Cal. 1986) (false light claim).

³⁹ See *infra* notes 59-68 and accompanying text.

⁴⁰ A parody could perhaps hurt the celebrity's feelings, but hurt feelings are generally irrelevant to the concept of the right of publicity as property. See *infra* notes 124-26 and accompanying text. Courts have, generally but not always, rejected claims of hurt feelings by celebrity plaintiffs in right of publicity cases. See *infra* notes 127-30 and accompanying text; *contra*, *Waits v. Frito Lay*, 978 F.2d 1093, 1103 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993). Courts have also rejected such claims in cases involving right of privacy, defamation and other torts. Even if a parody hurt the celebrity's marketability, the celebrity should probably not have a cause of action against the parodist for the same reasons the courts have limited public figures' claims of privacy invasion and defamation. See *infra* notes 97-101 and accompanying text. A public figure, by virtue of her public nature, must expect to be the subject of commentary. The commentary may be sometimes cruel or vulgar, but it must be permitted in accordance with the First Amendment. See *infra* notes 72-77 and accompanying text.

⁴¹ "Anything that makes a well-known name still better known automatically raises its status as a celebrity." DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 58 (1972).

II. ALLOWING PARODIES OF CELEBRITIES IS CONSISTENT WITH OTHER INTELLECTUAL PROPERTY LAWS

A. *Intellectual Property Laws Recognize the Need to Imitate in Order to Progress*

One could argue that, since the celebrity is the basis of the parody, she deserves the commercial benefit from the parody. After all, there could be no parody without someone or something to parody. The parodist had to borrow from, or build or base the parody on, the celebrity. However, as Professor Madow put it, “[I]t is a fairly safe bet that the celebrity plaintiff has done some ‘borrowing’ himself.”⁴² How much does Madonna borrow from Marilyn? How much did the Flintstones borrow from the Honeymooners? How much do all rock and roll singers borrow from Elvis, and how much did Elvis borrow from the 1950’s black rhythm and blues singers?⁴³ How much do the personas of famous actors borrow from the roles that the actors have played, and how much of their roles did the actors actually create themselves?⁴⁴

But borrowing, within limits, is not a bad thing.⁴⁵ “All creators draw in part on the work of those who came before them, referring

⁴² Madow, *supra* note 10, at 196.

⁴³ “In a pervasive media culture, there will always be some ‘seepage’—some ideas and some images will impinge on one’s consciousness whether or not one has sought them out. . . . When someone agrees to expose herself to a new cultural artifact, she cannot know how it will affect her in advance.” Gordon, *supra* note 20, at 1569 (footnote omitted).

⁴⁴ Madow, *supra* note 10, at 200; *see also* *Lugosi v. Universal Pictures*, 603 P.2d 425, 432 (Cal. 1979) (Mosk, J., concurring) (actors have no property interest in roles they play). One writer explains, “A star image consists both of what we normally refer to as his or her ‘image’, made up of screen roles and obviously stage-managed public appearances, and also of images of the manufacture of that ‘image’ and of the real person who is the site or occasion of it.” DYER, *supra* note 33, at 7-8.

⁴⁵ Professor Gordon argues:

New creators inevitably and usefully build on predecessors. In her invention of techniques, discoveries, ideas, or themes, the new creator speaks out of a history, and the very value of her contribution will depend upon her advancing upon what has come before. The inventor of the automobile builds on one predecessor’s invention of metal-smelting processes, another predecessor’s invention of gears, another predecessor’s invention of the wheel, and ultimately on the efforts of some Promethean cave-dweller who, in discovering how to make fire, laid the groundwork for the internal combustion engine. The pattern is not limited to the technological culture. Artists learn from

to it, building on it and, sometimes, poking fun at it.”⁴⁶ Professor Benjamin Kaplan noted, “Education, after all, proceeds from a kind of mimicry, and ‘progress,’ if it is not entirely an illusion, depends on generous indulgence of copying.”⁴⁷ Professor Kaplan also recognizes our right to imitate others and “to reap where we have not sown.”⁴⁸

Because the courts and legislatures recognize the need to build on the work of others, our intellectual property laws⁴⁹ carefully balance the rights given the creator and the rights left in the public domain.⁵⁰ We can see the limits on intellectual property rights in the relatively short life of patents; the limited life of copyrights; copyright’s idea-expression dichotomy; the fair use doctrine; the compulsory license of television broadcasts and musical compositions; federal preemption of overbroad state intellectual property laws; and the nominative use doctrine in trademark law.⁵¹ These laws limit an intellectual property owner’s rights. They permit the

predecessors the laws of perspective, the uses of oils, acrylics, and watercolors, and the very traditions that give meaning to their productions. As for music, it is often argued that there is a limited vocabulary available for musical composition, and that composers will inevitably and necessarily work in a received tradition, as well as re-use prior themes. Communication depends on a common language and common experience. Labor itself is guided and organized by anterior ideas.

Gordon, *supra* note 20, at 1556-58 (footnotes omitted).

⁴⁶ *White v. Samsung Elecs. Am.*, 989 F.2d 1512, 1515 (9th Cir. 1993) (Kozinski, O’Scannlain & Kleinfeld, JJ., dissenting) (decision denying rehearing).

⁴⁷ BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2 (1967).

⁴⁸ *Id.*

⁴⁹ Intellectual property laws, such as patent, copyright and trademark laws, confer property rights in certain forms of information. ROBERT P. BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS 2 (1987). Right of publicity is considered an intellectual property right. *See supra* note 23. “From their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.” *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 146 (1988).

⁵⁰ *See White v. Samsung*, 989 F.2d at 1516 n.20 (Kozinski, O’Scannlain & Kleinfeld, JJ., dissenting) (decision denying rehearing).

⁵¹ *White v. Samsung Elecs. Am.*, 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, O’Scannlain & Kleinfeld, JJ., dissenting) (decision denying rehearing); *see also id.* at 1516 n.20 (citing statutes and case law limiting intellectual property rights).

public to use something created by someone else. However, "all are necessary to maintain a free environment in which creative genius can flourish."⁵²

The purpose of our intellectual property laws is to ensure progress for the benefit of the general public. Our intellectual property laws give creators a limited property right in their creations, not so much because the courts believe that the creators are morally deserving or that they deserve to receive the fruits of their labor, but because the courts believe that providing them with such a right is necessary to induce them to generate the creation in the first place.⁵³ The Supreme Court has said, "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"⁵⁴ Indeed, the Supreme Court has stated that "[t]he sole interest of the United States, and the primary object in conferring the monopoly, . . . lie in the general benefits derived by the public from the labors of authors."⁵⁵

⁵² *Id.* at 1516.

⁵³ Baird, *supra* note 23, at 415-16. The courts have, however, noted that compensating the creator for her efforts is important, even though not the primary goal of the intellectual property laws. In *Twentieth Century Music Corp. v. Aiken*, the Court stated, "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." 422 U.S. 151, 156 (1975). The Court further explained:

"[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.

Id. at 156 n.6 (quoting *Cary v. Longman*, 102 Eng. Rep. 138, 140 n.(b) (1801) (attributed to Lord Mansfield in *Sayre v. Moore*)). "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Id.* at 156.

⁵⁴ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

⁵⁵ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)); *see Kendall v. Winsor*, 62 U.S. (21 How.) 322, 327-328 (1858); *Grant v. Raymond*, 31 U.S. (6 Pet.) 218, 241-242 (1832). In *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918), the Supreme Court stated:

The right of publicity, like all other intellectual property rights, requires a balance between the interest in protecting the originator and in allowing others to build on the originator's work.⁵⁶ Allowing others to build and borrow on the work of another without compensation "is not some unforeseen by-product of our intellectual property system; it is the system's very essence. . . . This result is neither unfair nor unfortunate: It is the means by which intellectual property law advances the progress of science and art."⁵⁷ Thus, the right to legal protection for our creations and our identities must be balanced against the fact that much of the vibrancy of our culture also depends on the existence of other intangible rights: "[t]he right to draw ideas from a rich and varied public domain, and the right to mock, for profit as well as fun, the cultural icons of our time."⁵⁸

The traditional presumption in favor of free appropriability of intangibles rests in part on the widespread sense that progress in all spheres of human activity—science, business, art—depends on imitation, and thus requires that people be largely left free to reap where others have sown. The general American rule has long been that absent some special and compelling need for protection—such as the need to prevent consumer deception, or the need to provide adequate incentives for creation and innovation—intangible products, once voluntarily placed in the market, are as "free as the air to common use."

Professor Wendy Gordon states the need for free access to original creators' work as follows:

[A] person who wishes to contribute to [her culture] usually is required to use the tools of that culture. Giving first creators ownership over any aspect of the culture, even if that aspect is newly created, may make a later creator less well off than he or she would have been without the new creation. Intellectual products, once they are made public in an interdependent world, change that world. To deal with those changes, users may have need of a freedom inconsistent with first creators' property rights.

Gordon, *supra* note 20, at 1570.

⁵⁶ Courts and commentators consistently refer to the right of publicity as an intellectual property right. See, e.g., MCCARTHY, *supra* note 10, at 10-7 to 10-8.

⁵⁷ *White v. Samsung Elecs. Am.*, 989 F.2d 1512, 1517 (9th Cir. 1993) (Kozinski, O'Scannlain & Kleinfeld, JJ., dissenting) (decision denying rehearing) (citing *Feist Publications v. Rural Telephone Serv. Co.*, 499 U.S. 340, 111 S. Ct. 1282, 1289-90 (1991)); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589 (1985) (Brennan, J., dissenting).

⁵⁸ *White v. Samsung*, 989 F.2d at 1521.

B. Parodies of Intellectual Property Are Generally Permitted

The keystone of parody is imitation.⁵⁹ Parodies need to evoke the original work in order to be effective. A parody is humorous and meaningful only if the audience is aware of the target of the parody.⁶⁰ Therefore, conflict between the intellectual property creator and the parodist is inevitable. The courts recognize this conflict and have allowed parodies of intellectual property such as trademarks and copyrighted works even though the parodies did, of course, imitate the original. In allowing such parodies, the courts note the need to permit individuals to build on the work created by others in order to create something new.⁶¹ The courts have also been quick to point out that parody is a form of artistic expression, protected by the First Amendment.⁶² The courts have often stated the general proposition that parody and satire deserve substantial

⁵⁹ As Professor Gordon observes, "On the one hand the art form of parody would have been unavailable to someone who lacked predecessors. On the other hand, there probably always have been people who mocked the dominant culture and persons in authority." Gordon, *supra* note 20, at 1602.

Parody, by its very nature, must imitate to some degree. "[A] parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point." *Elsmere Music v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir. 1980) (citing *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 354 (S.D. Cal. 1955)).

In *Elsmere Music*, the copyright infringement suit concerned a skit performed on the television program "Saturday Night Live," poking fun at New York City's public relations campaign and its theme song. In the four-minute skit, the town fathers of Sodom discuss a plan to improve their city's image. The satire ends with the singing of "I Love Sodom" to the tune of "I Love New York." The Second Circuit rejected appellant's claim of copyright infringement, concluding that the parody was protected fair use while emphasizing the value of humor in today's world. *Id.* at 253. The court also noted that a "parody is entitled at least to 'conjure up' the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." *Id.* at 253 n.1.

⁶⁰ "Nothing is more unfunny than listening to someone making fun of someone or something you have never heard of." MCCARTHY, *supra* note 10, at 8-101. A parody is not, however, a mere imitation of something or someone. It must be clearly unique.

⁶¹ See, e.g., *White v. Samsung*, 989 F.2d at 1515.

⁶² *Cliffs Notes v. Bantam Doubleday Dell Publishing Group*, 886 F.2d 490, 495 (2d Cir. 1989); see also *Groucho Marx Prod. v. Day and Night Co.*, 689 F.2d 317, 319 n.2 (2d Cir. 1982) (recognizing "the broad scope permitted parody in First Amendment law").

freedom as entertainment and as a form of social and literary criticism.⁶³

Courts also recognize and appreciate the value of humor in parody. In recognizing a parody exception to copyright, one court noted that “in today’s world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody.”⁶⁴ Commentators too appreciate the value of humor—not only as entertainment but also as a release for suppressed hostility, which may serve as a substitute for more aggressive and socially harmful outlets.⁶⁵

Perhaps even more important than the humor in parody is the value of parody as a particularly poignant kind of social and political commentary.⁶⁶ Parody serves an extremely useful function in learning and truth. Robert P. Falk has expressed this view, observing that a parody will, more often than not, expose “with wit and deftness what is generally agreed to be second-class.”⁶⁷ The parodist serves a useful function by seizing “upon sham and pretense in

⁶³ *Cliffs Notes*, 886 F.2d at 493 (citing *Berlin v. E.C. Publications*, 329 F.2d 541, 545 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964)); *L.L. Bean, Inc. v. Drake Publishers*, 811 F.2d 26, 33 (1st Cir. 1987) (quoting *Berlin*, 329 F.2d at 545), *cert. denied*, 483 U.S. 1013 (1987); *see generally*, Robert J. Shaughnessy, Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079 (1986).

⁶⁴ *Elsmere Music v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir. 1980).

⁶⁵ Victor S. Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. CAL. L. REV. 225, 227 (1962). As one commentator wrote, years before the courts had officially recognized a parody defense:

My thesis is simply that, with proper weight accorded to the considerations noted above, the law of copyright and the law of torts ought to afford a larger measure of freedom to the parodist, the mimic and the humorous commentator than would be afforded to other users of copyrighted works and those personality indicia of others which invite parody, mimicry and humorous criticism. In short, regardless of the protection afforded to names, likenesses, performances, writings, etc., that protection should, within the limits herein suggested remain subject to a “good humor” defense.

Id.

⁶⁶ *Hustler Magazine v. Falwell*, 485 U.S. 46, 53-55 (1988); *see also* *Acuff-Rose Music v. Campbell*, 972 F.2d 1429, 1446 (6th Cir. 1992) (Nelson, J., dissenting), *cert. granted*, 113 S. Ct. 1642 (1993).

⁶⁷ ROBERT P. FALK, *AMERICAN LITERATURE IN PARODY* 14 (1955).

the literary world and point[ing] out the difference between originality and flim-flam."⁶⁸

Although courts often hesitate to invoke the First Amendment in deciding intellectual property cases,⁶⁹ courts have recognized that parodies generally further First Amendment values in some way. Parody is, after all, an ancient form of social commentary and literary criticism.⁷⁰ Parody commonly ridicules sacred verities and prevailing mores.⁷¹ A parody, by its very nature, must send a message

⁶⁸ *Id.*

⁶⁹ "Legions of commentators have deplored these developments. Lawyers, law professors, and even judges are on record pleading for the law to subject intellectual property to the same free speech principles that limit other assertions of governmental power." Gordon, *supra* note 20, at 1537. "Some argue for recognizing an independent First Amendment defense to copyright, right of publicity, and trademark actions, while others marshal free speech principles to argue for strengthening the doctrines within intellectual property, such as fair use in copyright." *Id.* (citing Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 988-90 (1970); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1130-35 (1990); Pierre N. Leval, *Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture*, 36 J. COPYRIGHT SOC'Y U.S.A. 167, 171 (1989); Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836 (1983); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work "Total Concept and Feel"*, 38 EMORY L.J. 393 (1989)).

⁷⁰ *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 28 (1st Cir. 1987) (citing D. MACDONALD, *PARODIES: AN ANTHOLOGY FROM CHAUCER TO BEERBOHM—AND AFTER* 562 (1960) (quoting I. D'ISRAELI, *CURIOSITIES OF LITERATURE*)), *cert. denied*, 483 U.S. 1013, (1987). "The Oxford English Dictionary defines parody as '[a] composition in which the characteristic turns of thought and phrase of an author are mimicked to appear ridiculous, especially by applying them to ludicrously inappropriate subjects.' Chaucer, Shakespeare, Pope, Voltaire, Fielding, Hemingway and Faulkner are among the myriad of authors who have written parodies." *L.L. Bean*, 811 F.2d at 28.

⁷¹ *L.L. Bean*, 811 F.2d at 33 (citing *Berlin v. E.C. Publications*, 329 F.2d 541 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964)); *Fisher v. Dees*, 794 F.2d 432, 437-38 (9th Cir. 1986); *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982) (defendants' bawdy "spoof" and "ridicule" of Miss America pageant entitled to full range of first amendment protection), *cert. denied*, 462 U.S. 1132 (1982); *Groucho Marx Prods. v. Day and Night Co.*, 689 F.2d 317, 319 n.2 (2d Cir. 1982) (noting "the broad scope permitted parody in First

about someone or something. It is a statement—humorous, political, satirical.

III. ALLOWING CELEBRITY PARODIES IS CONSISTENT WITH FIRST AMENDMENT VALUES

One of the primary purposes of the First Amendment is to facilitate enlightenment and truth—to benefit the public through the free exchange of ideas, to check the abuse of power by public officials, and to function as a safety valve.⁷² Because parodies often serve these purposes, they are worthy of First Amendment protection. Parodies of celebrities are especially worthy of First Amendment protection because of the role celebrities play in today's society. Celebrities are symbols that powerfully influence us as individuals and our society as a whole.⁷³ Permitting commentaries about, or parodies of, celebrities is consistent with First Amendment values.⁷⁴

Amendment law"); *Elsmere Music v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980)).

⁷² See JOHN NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 939-41 (4th ed. 1991); see generally *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail"); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (truth of any idea can only be determined in marketplace of competing ideas).

⁷³ A great demand exists for information about celebrities. For example, as of August 1990, the weekly circulation of *People* was 3.2 million; of the *National Enquirer*, 4 million; and of *Us*, 1.3 million. Madow, *supra* note 10, at 129 n.9 (citing *Consumer Magazine Circulation*, *ADVERTISING AGE*, Aug. 20, 1990, at 42).

⁷⁴ Professor Thomas McCarthy supports First Amendment protection for information about celebrities. He notes that this information, which some would call gossip, fulfills a societal need. MCCARTHY, *supra* note 10, at 8-51. Judge, and former professor, Richard A. Posner clearly articulates this view:

Gossip columns recount the personal lives of wealthy and successful people whose tastes and habits offer models—that is, yield information—to the ordinary person in making consumption, career and other decisions. The models are not always positive. The story of Howard Hughes, for example, is usually told as a morality play, warning of the pitfalls of success. . . . Gossip columns open people's eyes to opportunities and dangers; they are genuinely informational.

The expression "idle curiosity" is misleading. People are not given to random, undifferentiated curiosity. Why is there less

Celebrities “symbolize individual aspirations, group identities, and cultural values.”⁷⁵ Celebrities are “common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and a collective memory.”⁷⁶ We use

curiosity about the lives of the poor (as measured, for example, by the frequency with which poor people figure as central characters in novels) than about those of the rich? The reason is that the lives of the poor do not provide as much useful information in patterning our own lives. What interest there is in the poor is focused on people who are (or were) like us but who became poor rather than on those who were always poor; again the cautionary function of such information should be evident.

Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 395-96 (1978); see also Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 333-34 (1983).

⁷⁵ Madow, *supra* note 10, at 128 (emphasis omitted). Today's movie stars, for example, embody, in their screen roles and personal images, the values that current movie-goers support. As one writer notes, “Film stars function as icons in American popular culture, defining and symbolizing for the rest of society roles and behaviors that are normatively appropriate at a given historical time.” Levy, *supra* note 33, at 30. Movie stars are “a reflection in which the public studies and adjusts its own image of itself.” *Id.* (quoting RICHARD DYER, STARS 6 (1982)).

⁷⁶ JOHN B. THOMPSON, IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION 163 (1990). The media “establishes certain personalities on a new plane of existence. These personalities exist not so much in themselves but as types of collective life felt and perceived through a mass medium. [They] become points of collective awareness and communication for an entire society.” Marshall McLuhan, *Sight, Sound, and the Fury*, in MASS CULTURE: THE POPULAR ARTS IN AMERICA 495 (Bernard Rosenberg & David M. White eds., 1957).

Richard Schickel explains that “taken together the lives of the celebrities create a sort of psychic energy field that surrounds us and penetrates us, binding our universe together.” SCHICKEL, *supra* note 27, at 275. Schickel's description is a close paraphrase of the definition of “the Force” offered by Alec Guinness as Obi-Wan Kenobi in the film, “Star Wars.” Schickel continues the analogy:

Socially and psychologically celebrity power has come more and more to function in our real world as the Force does in the mythic world of George Lucas's invention. It is everywhere, we do internalize it in ways that are not entirely explicable through rational means, and it does bind our universe together, offering some sense of community—common idols, if not common ideals—in a world where the traditional communitarian forms have lost much of their hold on many of us, are honored more in the nostalgic breach than in living lives. Above all, more and more

celebrities as symbols to express ourselves and to communicate with one another. They are "the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation."⁷⁷

We use famous people as symbols for certain ideas, or they become famous for being symbols of certain ideas.⁷⁸ Thus, news media use celebrities to stand for groups, institutions, political values and programs. For example, Ted Kennedy represents liberals, Jesse Helms represents the radical right, and Gloria Steinem represents the feminist movement.⁷⁹ Persons symbolize the impersonal in the news. "In the 'mass-mediated version of reality,' . . . almost everything of importance—social and political movements, organizations, scientific breakthroughs—must be 'reduced to personifications.'"⁸⁰

Author Richard Schickel discusses the public's use of celebrities as symbols and a means of communication. He notes that, in the last century, the proliferation of information has created a need for simplifying symbols to represent and personify an issue or ideal.⁸¹ Schickel believes that the public cannot now grasp abstract concepts unless they are in some manner personified ("the spokesperson as human diagram").⁸² Borrowing from George Orwell,

of us seek to join the sacred circle of the adepts, to be, in effect, the Luke Skywalker of this brave new universe of ours.

Id.

⁷⁷ Madow, *supra* note 10, at 128.

⁷⁸ SCHICKEL, *supra* note 27, at 29; *see generally* DYER, *supra* note 33, at 194 (discussing celebrity symbols such as Judy Garland).

⁷⁹ Leon V. Sigal, *Sources Make the News*, in *READING THE NEWS: A PANTHEON GUIDE TO POPULAR CULTURE* 9, 13-14 (Robert K. Manoff & Michael Schudson eds., 1986). Politics personified is a staple of the news diet. Sigal argues:

The press typically reduces politics to a clash of personalities, pitting Ronald Reagan against Tip O'Neill, Caspar Weinberger against George Shultz, or Lyndon Johnson against Ho Chin Minh. . . . As people become surrogates for institutions in the minds of journalists, it is reflected in news-gathering practices and press coverage. The press often treats Tip O'Neill and Robert Dole as if they were the Congress, its committees and subcommittees.

Id.

⁸⁰ Madow, *supra* note 10, at 190 (quoting TODD GITLIN, *THE WHOLE WORLD IS WATCHING* 146 (1980)).

⁸¹ SCHICKEL, *supra* note 27, at 28.

⁸² *Id.* at 289. Schickel states that we are the prisoners now of crude narrative:

Schickel refers to the public's use of the celebrity symbol to communicate as "Newspeak."⁸³

Although celebrities may not mean exactly the same thing to everyone, they do have meaning.⁸⁴ Celebrities' power to 'sell' commodities with which they are associated proves that their images mean something to consumers. "Their economic value (their 'associative' or 'publicity' value. . .) derives from their 'semiotic' power . . . to carry and provoke meanings."⁸⁵ A celebrity persona can enhance the marketability of the commodities with which it is

It had better be fast-moving, action-packed, suspenseful and full of instantly apprehensible sensation. Above all it must be peopled with characters we understand as quickly and as fully as we understand the full meaning of a nice frosty bottle of Coke, and can drain to their dregs as sweetly and as refreshingly as we can suck up eight ounces of empty calories.

Id. at 289-90.

⁸³ "Newspeak" was the term coined by George Orwell in his book, "1984," to refer to a purposefully simplified form of language, "a language robbed of all metaphor, all resonance, thus a language that denied its speaker all subject possibilities." SCHICKEL, *supra* note 27 at 287.

⁸⁴ Celebrities, such as Vanna White, are symbols—even though they may not symbolize exactly the same thing to everyone. For example, one commentator believes that Vanna White is our symbol of heart and home, and describes her as "a sweet thing. She's a harbinger of the re-emergence of traditional feminine behavior. She's mute, obliging and servile. She's also busty, which is important." Dan Hurley, *Of Fame and Vanna White: The End of Celebrity*, *PSYCHOL. TODAY*, Dec. 1988, at 50 (writing on Vanna White's celebrity status). Hurley suggests that Vanna White's "lack of real achievement is a symbol of the emptiness of our culture." *Id.* at 53. Another commentator refers to her as the "High Priestess of Consumption," noting that "in the modern age, there could hardly be a more important symbolic figure." Jib Fowles, *The Truth About Vanna*, 23 *TELEVISION QUARTERLY*, no. 3, 1988, at 69, 71. To others, Vanna's fame is a symbol of our democracy. Hurley, *supra*, at 53. As one author observed, the fact that Vanna White is a celebrity today is a key to seeing our society today. *Id.* Still another commentator observed that "[s]tars often lead us into new social trends. We select them to resolve our needs." *Id.*; see generally Richard Dyer, *Charisma*, in *STARDOM: INDUSTRY OF DESIRE* 57, 59 (Christine Gledhill ed., 1991); DYER, *supra* note 33, at 141-42 (1986).

⁸⁵ Madow, *supra* note 10, at 185; see also THOMPSON, *supra* note 76, at 157, 163. John Wayne, for example, had a certain image. A picture of John Wayne makes us think of certain value system, a value system quite different than that conjured up by a picture of Madonna. One of the most important considerations in attempting to use a celebrity to sell products is making sure that the image of the product and characteristics of the target market are carefully matched with the personality of the celebrity. Examples of successful matching of celebrities with products include Joe Namath as a spokesperson

associated only if the celebrity already means something to the public.⁸⁶ Even when viewing commercials in which a celebrity appears personally, the public probably does not see the celebrity as a person. Moreover, the advertiser did not really buy the time of the celebrity as a person. Instead, what the advertiser wanted and what the public sees is the celebrity's public "image"—what the celebrity means or symbolizes to the public.⁸⁷

for Brut cologne, Bill Cosby for Jell-O and numerous retired athletes for Miller Lite beer. BELCH & BELCH, *supra* note 22, at 171.

⁸⁶ Madow, *supra* note 10, at 184 (emphasis omitted); JUDITH WILLIAMSON, *DECODING ADVERTISEMENTS: IDEOLOGY AND MEANING IN ADVERTISING* 25-26 (1984). Williamson discusses the importance of the celebrity's image in selling products. She uses as an example an advertisement for Chanel No. 5 featuring Catherine Deneuve:

Catherine Deneuve's face and the Chanel bottle are not linked by any narrative, simply by juxtaposition: but there is not supposed to be any *need* to link them directly, they are as it were in apposition in the grammar of the ad, placed together in terms of an assumption that they have the same meaning, although the connection is really a random one. For the face and the bottle are not inherently connected: there is no link between Catherine Deneuve in herself and Chanel No. 5: but the link is in terms of what Catherine Deneuve's face means to us, for this is what Chanel No. 5 is trying to mean to us, too. . . . So what Catherine Deneuve's face means to us in the world of magazines and films, Chanel No. 5 seeks to mean and comes to mean in the world of consumer goods. . . . If she were not a film star and famous for her chic type of French beauty, if she did not *mean* something to us, the link made between her face and the perfume would be meaningless. So it is not her face as such, but its position in a system of signs where it signifies flawless French beauty, which makes it useful as a piece of linguistic currency to sell Chanel.

Id. at 25-26.

⁸⁷ Madow, *supra* note 10, at 199. Madow writes, "For example, when American Express sought to emphasize the hazards of travelling with cash, 'they looked for a spokesman perceived by the public as an authority on crime.' [They turned to] Karl Malden, 'not because he is Karl Malden, but because he was once Lt. Mike Stone in [the television series] "The Streets of San Francisco."' " *Id.* at 199 n.350 (quoting MICHAEL SCHUDSON, *ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS IMPACT ON AMERICAN SOCIETY* 212-13 (1984)). Celebrities "function in the market like 'brands', serving to order demand and stabilise [sic] sales patterns, allowing the corporations of culture to engage in a degree of planning." BILL RYAN, *MAKING CAPITAL FROM CULTURE, THE CORPORATE FORM OF CAPITALIST CULTURAL PRODUCTION* 185 (1992). Ryan cites the packaging of Bruce Springsteen as an example.

[Springsteen's] image is founded on "authenticity," He has been made to stand for "the core values of rock and roll" in a manner

Because celebrities are important symbols in our culture, they are, like trademarks, books, and songs, an indispensable part of the public vocabulary, and therefore, rules restricting the use of celebrities may restrict the communication of ideas.⁸⁸ Celebrities are powerful images that mean something to us. Parodists need access to images that mean something to our society in order to criticize or expose the truth about our society.⁸⁹ A parody of a celebrity usually exposes the weakness or falseness of a particular idea or value that the celebrity symbolizes.

Movie stars, professional athletes, and other unelected celebrities are not only symbols. They are also powerful forces in our society. Some commentators believe that celebrities are “the chief agents of moral change in the United States.”⁹⁰ As Daniel Boorstin observes in his book *The Image*:

Our age has produced a new kind of eminence. This is as characteristic of our culture and our century as was the divinity of Greek gods in the sixth century B.C. or the chivalry of knights and courtly lovers in the middle ages. It has not yet driven heroism, sainthood, or martyrdom completely out of our consciousness. But with every decade it overshadows them more. All older forms of

which “most convincingly creates (and depends on) a sense of community”. . . . [T]he singer and his songs [incorporate] the notion of “the street,” a populist ethos which permeates rock and which Springsteen is seen to personify. [This ethos] is the centre of every representation of the artist. . . . What “Springsteen” means, his identity and value, is constantly reaffirmed in the same terms. A central signifier . . . is that he is “a millionaire who dresses like a worker,” always seen in worn jeans, singlets, and a head band: “these are working clothes and it is an important part of Springsteen’s appeal that we do see him, as an entertainer, working for his living. His popularity is based on his live shows and more particularly, on their spectacular energy. . . . He makes music physically, as a manual worker.”

Id. at 202 (quoting S. FRITH, MUSIC FOR PLEASURE: ESSAYS IN THE SOCIOLOGY OF POP 94-101 (1988)).

⁸⁸ See *L.L. Bean, Inc. v. Drake Publishers*, 811 F.2d 26, 34 (1st Cir. 1987), cert. denied, 483 U.S. 1013 (1987); see also *infra* notes 97-101 and accompanying text.

⁸⁹ See Gordon, *supra* note 20, at 1605.

⁹⁰ “[C]elebrities can put over general styles, manners of being and behaving. There being a point at which manners become a form of moral action, the celebrities have become, in recent decades, the chief agents of moral change in the United States.” SCHICKEL, *supra* note 27, at 29.

greatness now survive only in the shadow of this new form. This new kind of eminence is "celebrity."⁹¹

The public admires its celebrity heroes and will adopt their opinions and emulate their behavior and appearance. Thus, celebrities, especially film and television stars, have access to significant political power.⁹² Many celebrities actively and publicly participate in political activities.⁹³ In fact, some celebrity movie stars and athletes become so associated with a particular political position that they become political figures.⁹⁴ More subtly, celebrities function as role

⁹¹ BOORSTIN, *supra* note 42, at 57. In *THE IMAGE*, Daniel Boorstin defines "celebrity," as follows:

For us, . . . "celebrity" means primarily a person—"a person of celebrity." This usage of the word significantly dates from the early years of the Graphic Revolution, the first example being about 1850. Emerson spoke of "the celebrities of wealth and fashion" (1848). Now American dictionaries define a celebrity as "a famous or well-publicized person."

The celebrity in the distinctive modern sense could not have existed in any earlier age, or in America before the Graphic Revolution. The celebrity is a person who is known for his well-knownness.

His qualities—or rather his lack of qualities—illustrate our peculiar problems. He is neither good nor bad, great nor petty. He is the human pseudo-event.

Id. "As other pseudo-events in our day tend to overshadow spontaneous events, so celebrities (who are human pseudo-events) tend to overshadow heroes. They are more up-to-date, more nationally advertised, and more apt to have press agents. And there are far more of them." *Id.* at 66.

⁹² See Levy, *supra* note 33, at 50. "Because of their nature of work (actual role-playing) and the immense media coverage of their lives, on and off screen, movie stars have the potential of functioning as a strategic rather than segmental elite. The influence of segmental elites is confined to the domains of their specialized expertise." *Id.* (citation omitted). One writer explains:

[B]y contrast, the influence of movie stars can go beyond the specialized domain of the film industry and beyond the work of filmmaking. Movie stars can become members of a strategic elite through the transformation of their influence within the film industry to other areas of social life, such as fashion, consumerism, and life-style.

Id.

⁹³ Levy, *supra* note 33, at 50.

⁹⁴ For example, the public probably cares more about saving the rain forest because of Sting's efforts; the public probably cares more about the AIDS epidemic because of Magic Johnson and the efforts of Elizabeth Taylor; and the public probably cares more about the plight of the American farmer because of the efforts of Willie Nelson and John Mellencamp. See Howard Rosenberg, *Celebrity Advocates: Is It Their Role?*, L.A. TIMES, Nov. 5, 1990, at F1

models whose influence can be pervasive, particularly on the younger generation of frequent movie-goers.⁹⁵ Today, celebrities are indirectly and directly influential in almost every sphere of consciousness—from fashion to sexual morality to politics.⁹⁶ In recognizing a parody exception to the trademark laws, the First Circuit in *L.L. Bean, Inc. v. Drake Publishers*,⁹⁷ invoked the First Amendment to allow a parody of the L.L. Bean catalog.⁹⁸ In so holding, the court stated:

The central role which trademarks occupy in public discourse (a role eagerly encouraged by trademark owners), makes them a natural target of parodists. Trademark parodies, even when offensive, do convey a message. The message may be simply that business and product images need not always be taken too seriously; a trademark parody reminds us that we are free to laugh at the images and associations linked with the mark. The message also may be a simple form of entertainment conveyed by juxtaposing

(describing the way television ads, for causes as well as products, merge the celebrity and his or her dramatic role); see generally *Curtis Publishing v. Butts*, 388 U.S. 130, 162-64 (1967) (Warren, C.J., concurring).

⁹⁵ See Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 *FORDHAM L. REV.* 453, 495 (1981) (“[I]t is arguable that any generation’s choice of heroes and villains is a statement of political significance as well as commentary about the times”); see also *MCCARTHY*, *supra* note 10, at 8-51 (discussing celebrity as news figure). Our most ordinary television shows and their stars carry significant social messages and are symbols of social trends. Hurley, *supra* note 84, at 53.

⁹⁶ See *supra* note 73 regarding the American public’s desire for information about celebrities. One writer asserts that “each new development in communications has increased our illusion of intimacy with the celebrated. Not only do we think we know them, we think we know what makes them tick, which makes us want to tick as they do.” *SCHICKEL*, *supra* note 27, at 29. A 1985 *U.S. News & World Report* survey revealed Clint Eastwood, Eddie Murphy, and Ronald Reagan as the top three heroes of young Americans. Hurley, *supra* note 84, at 52.

⁹⁷ 811 F.2d 26 (1st Cir. 1987), *cert. denied*, 483 U.S. 1013 (1987). L.L. Bean sued the publisher of a monthly magazine featuring adult erotic entertainment, claiming trademark infringement. The magazine had published an article entitled *L.L. Bean’s Back To School Sex Catalog*. The article was a parody of L.L. Bean’s popular catalog featuring outdoor clothing and equipment. The parody closely resembled an L.L. Bean catalog and featured nude models using Bean-like equipment modified to serve as sexual paraphernalia. *Id.*

⁹⁸ *L.L. Bean*, 811 F.2d at 29. The federal district court had previously held the magazine liable for trademark dilution of the L.L. Bean trademark, reasoning that the mark was distinctive and the parody was likely to tarnish the L.L. Bean trademark by detracting from its reputation and goodwill. *L.L. Bean v. Drake Publishing*, 625 F. Supp. 1531, 1536-37 (D. Me. 1986).

the irreverent representation of the trademark with the idealized image created by the mark's owner. . . .⁹⁹

The court concluded, "Denying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression."¹⁰⁰

The *L.L. Bean* court's reasons for granting First Amendment protection to trademark parody applies with equal force to celebrity parody. Like trademarks, celebrities are a natural target of parodists because of their important role in public discourse. Celebrity parodies convey a message that relates to the values with which the celebrity is associated rather than a personal message that is relevant only to the individual celebrity.¹⁰¹ Parodies are a useful avenue of expression because parodists who poke fun at a celebrity are often poking fun at a particular idea or commenting on society.

A. *Commercial Parodies Should Receive First Amendment Protection*

Because celebrities are public figures and as such have great influence and symbolic meaning to us, permitting parodies of celebrities would be consistent with First Amendment values. The question is then whether such parodies should be protected even when they are portrayed in a commercial context.

In the *White* case, the Ninth Circuit acknowledged that the robot in Samsung's advertisement was a parody of Vanna White. How-

⁹⁹ *L.L. Bean*, 811 F.2d at 34 (citing Shaughnessy, Note, *supra* note 63, at 1109).

¹⁰⁰ *L.L. Bean*, 811 F.2d at 34.

¹⁰¹ Even if the parody is not obviously a political or social commentary, but appears to be mere entertainment, the parody is protected by the First Amendment. The Supreme Court has often remarked that "entertainment" is entitled to First Amendment protection, and the line between informing and entertaining is too elusive in the context of determining First Amendment protection. *Winters v. New York*, 333 U.S. 507, 510 (1948). As Justice Reed stated: "What is one man's amusement, teaches another's doctrine." *Id.* Protected speech includes discussion of "public issues," which the Supreme Court has broadly defined as those "about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). This broad definition of "public issues" is necessary to ensure informed political decisions. Justice Brennan has argued, "The choices we make when we step into the voting booth may well be the products of what we have learned from the myriad of daily economic and social phenomenon that surround us." *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 788 (1985) (Brennan, J., dissenting).

ever, the court refused to uphold the district court's grant of summary judgment in Samsung's favor. Samsung had argued that the court should adopt a parody exception to the right of publicity and cited two other intellectual property cases dealing with parody, *Hustler Magazine v. Falwell* (an intentional infliction of emotional distress case involving a parody of a liquor advertisement and Jerry Falwell)¹⁰² and *L.L. Bean, Inc. v. Drake Publishers* (a trademark dilution case involving a parody of the L.L. Bean catalog).¹⁰³ The *White* court stated that the purposes of the *Hustler* and *L.L. Bean* parodies were to poke fun at Jerry Falwell and L.L. Bean respectively.¹⁰⁴ The court noted that the Samsung commercial involved a true advertisement, the purpose of which was to sell Samsung VCRs. The court stated that the "ad's spoof of Vanna White and Wheel of Fortune is subservient and only tangentially related to the ad's primary message: 'buy Samsung VCRS.'"¹⁰⁵

¹⁰² Jerry Falwell is the leader of the religious group known as the Moral Majority. See *infra* notes 131-36 and accompanying text (discussing *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)).

¹⁰³ *L.L. Bean, Inc. v. Drake Publishers*, 811 F.2d 26 (1st Cir. 1987). The *L.L. Bean* court did make a point of stating that its decision was based on its identification of the parody as noncommercial. The court stated:

Appellant's parody constitutes an editorial or artistic, rather than a commercial, use of plaintiff's mark. The article was labelled as "humor" and "parody" in the magazine's table of contents section; it took up two pages in a one-hundred page issue; neither the article nor appellant's trademark was featured on the front or back cover of the magazine. Drake did not use Bean's mark to identify or promote goods or services to consumers; it never intended to market the "products" displayed in the parody.

Id. at 32.

¹⁰⁴ *White v. Samsung Elecs. Am.*, 971 F.2d 1395, 1401 (9th Cir. 1992), *reh'g denied*, 989 F.2d 1512 (9th Cir. 1993), *cert. denied*, 113 S. Ct. 2443 (1993).

¹⁰⁵ *Id.* In the *L.L. Bean* case, the First Circuit held that the *L.L. Bean* parody was used in an editorial or artistic context, was therefore not considered commercial speech, and was thus granted greater constitutional protection. *L.L. Bean*, 811 F.2d at 32-34. The Court noted that in such situations, the parodist usually intends a statement using the trademark, rather than competition with the trademark owner for business. *Id.* The court acknowledged that such parodies often express an idea or point of view, and as such are protected by the First Amendment. *Id.* at 32. The court attempted to differentiate between the use of a trademark to make an editorial or artistic statement, and the use of a trademark, in a parody or otherwise, for purely business reasons. *Id.* However, as one commentator noted, the court did not address "the fact that even a parody done solely to make a statement will most likely be offered for sale." Mark A. Dagitz, Comment, *Trademark Parodies and Free Speech*, 73 IOWA L. REV. 961, 971 (1988). Thus, "a parody with an editorial

The *White* dissent pointed out that allowable parodies in previous cases such as *Hustler* and *L.L. Bean* were also for the purely commercial purpose of selling soft-core pornographic magazines and thus were not distinguishable. The *Hustler* and *L.L. Bean* parodies, like Samsung's parody of Vanna White, related to the commercial sale of a product.¹⁰⁶ The *Hustler* and *L.L. Bean* parodies were the actual products *for sale* (both were articles in magazines for sale). While the *L.L. Bean* and *Hustler* parodists created the parodies *to sell them and get money*, these parodies and the *White* parody also had significant noncommercial aspects. Indeed, virtually all parodies have noncommercial aspects that warrant First Amendment protection, even if they also have some commercial aspects.¹⁰⁷ Even commer-

or artistic message may also have a commercial aspect." *Id.* As noted by Professor Netterville:

[I]t is absolutely necessary to the carrying on of the humorist's art that the person who is the subject of the humor be identified and to some degree exaggerated and fictionalized. At the same time, aside from occasional philanthropic performances at the behest of local and national charities, the humorist is benefitting personally from that use and in the case of radio, television, the night-club circuit and motion pictures, someone with a profit motive lurks in the background.

Victor S. Netterville, *supra* note 65, at 273.

¹⁰⁶ *White v. Samsung*, 971 F.2d at 1407 (Alarcon, J., dissenting).

¹⁰⁷ "[T]he latitude permitted the humorist who . . . engages in commentary whose sole purpose is to entertain and amuse, may be narrower than that allowed the so-called 'critic' who utilizes humor in his commentary on persons and events." This result seems wrong. See Netterville, *supra* note 65, at 265. Suppose, for example, that a widely known humorist and entertainer appears on a television news program as a panelist. She expresses her critique of a particular celebrity symbol, Madonna for example, in humorous jibes, ridicule and commentary. Because of the context of the remarks, she would have great freedom in expressing her opinion—as much as any other news reporter employed by a newspaper or magazine. Now move the humorist from the news panel to a television show, or to a nightclub, or to an infomercial or television commercial. She ridicules or parodies the same famous personality, partly to amuse her audience and partly to criticize the celebrity symbol. Is she any less a critic and any less entitled to the wide latitude afforded the critics on news programs? Maybe not. But, because of the *Vanna White* decision, she may be liable to the celebrity for infringing the celebrity's right of publicity.

Professor Netterville uses a similar example and concludes that "it may well be said that as a result of such humorous ridicule, the true worth of an underlying work or personality may be more vividly brought into focus and communicated to the public than could be accomplished by a thousand critical reviews written in a serious vein." *Id.* at 266.

cial parody usually conveys social commentary of some type.¹⁰⁸ And commercial speech is protected by the First Amendment.¹⁰⁹ Even advertising is entitled to First Amendment protection.¹¹⁰

¹⁰⁸ *Id.* at 238. “We are probably faced with the fact that where the parody of the copyrighted work is simply art-for-art’s sake, the parodist will enjoy far more freedom than where his work is tainted with a patently commercial enterprise.” *Id.* Quoting one commentator, Professor Netterville has stated:

The trouble with this commercial-noncommercial distinction is that both commercial and artistic elements are involved in almost every use. Television, movies, and the legitimate stage, although clearly commercial, are among the major media for artistic expression in our culture. Similarly, a number of learned books on scholarly subjects have recently enjoyed great popularity. . . . Their authors, while academic scholars, also may be fairly labeled academic entrepreneurs, exploiting for commercial gain the fruits of their intellectual labors. . . . Noncommercial uses should be more liberally permitted, since they are unlikely to cause direct competitive damage to the borrowed work. The converse of this proposition, i.e., that if a work is commercial it is in direct competition, is not always true and hence should not often be used to destroy a claim of fair use.

Id. (quoting Rossett, *Burlesque as Copyright Infringement*, 9 ASCAP COPYRIGHT LAW SYMPOSIUM 1, 18-19 (1958)).

¹⁰⁹ Although the Supreme Court did not recognize First Amendment coverage of commercial speech until relatively recently, commercial speech now has extensive First Amendment protection. *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557 (1980). In defining commercial speech, the test is not whether the speech is made for profit but whether it proposes a commercial transaction. If it does, it is commercial speech. *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989).

¹¹⁰ In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976), the Supreme Court held that ordinary advertising of commercial products or services is as deserving of First Amendment protection as is political speech or writing. *See also* *Central Hudson v. Public Serv. Comm’n*, 447 U.S. at 571-72. In a very recent case, *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505 (1993), the Supreme Court reaffirmed its commitment to provide First Amendment protection for advertising. The *Discovery* Court stated:

It is clear, . . . that speech does not lose its First Amendment protection because money is spent to project it, as in paid advertisement of one form or another. . . . Justice Blackmun writing for the Court in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 43 L. Ed. 2d 810 (1977), summarized the reasons for extending First Amendment protection to “core” commercial speech: “The listener’s interest [in commercial speech] is substantial: the consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests

It also seems inconsistent, and thus rather unfair, to prohibit parodists from reaping the benefits of their creative efforts. Allowing persons to profit from their labor is the basis of the right of publicity and an important by-product of our intellectual property laws.¹¹¹ This premise has influenced our Constitution, our legal system, and our moral and ethical beliefs.¹¹² The parodist who labors to make a meaningful parody should be allowed to profit—to receive the fruit of her labor, to reap what she has sown.

are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. See *Bigelow v. Virginia*, 421 U.S. 809 (1975). And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-04 (1967) (Harlan, J. concurring). In short, such speech serves individual and societal interests in assuring informed and reliable decision making.” *Id.*, 433 U.S. at 364. Of course, we were not the first to recognize the value of commercial speech:

“[Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.” D. Boorstin, *The Americans: The Colonial Experience* 328, 415 (1948), quoting I Thomas, *History of Printing in America with a Biography of Printers, and an Account of Newspapers* (2d ed. 1810).

Discovery, 113 S. Ct. at 1512 & n.17. The Supreme Court’s statements regarding the significance of advertising may herald a change in the law which would allow advertisers more freedom. However, the courts have not generally looked upon advertising favorably. As Daniel Boorstin, author of *The Image*, noted:

Our frenetic earnestness to attack advertising, our fear of advertising, and our inability to fit advertising into old-time familiar cubbyholes of our experience—all these prevent us from seeing its all-encompassing significance as a touchstone of our changing concept of knowledge and of reality. Our attitude toward advertising is comparable to the eighteenth-century English and American attitude toward insanity and mental disorders.

BOORSTIN, *supra* note 41, at 211.

¹¹¹ See *supra* notes 17-24 and accompanying text.

¹¹² See *supra* notes 21-26 and accompanying text.

IV. THE RIGHT OF PUBLICITY SHOULD ALLOW A PARODY
EXCEPTION LIKE THAT RECOGNIZED IN FEDERAL
COPYRIGHT AND TRADEMARK LAWS

Prior to the *Vanna White* decision, neither courts nor commentators recognized that creating a parody of a celebrity would give rise to a cause of action against the parodist.¹¹³ Professor McCarthy,

¹¹³ See, e.g., *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 460 (Cal. 1979). In *Guglielmi*, the heirs of deceased screen actor Rudolph Valentino, sued a movie studio that was planning to release a movie about Valentino's life. In holding that a deceased person has no right of publicity, the California Supreme Court stated that "[t]he right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment." *Id.* at 460. "For example, Garry Trudeau, creator of the satiric cartoon strip 'Doonesbury,' regularly fictionalizes events and dialogue involving prominent political figures. It cannot be seriously maintained that one such satirized notable could successfully pursue an action for an infringement on his right of publicity based on such use." *Id.* at n.12; see also Madow, *supra* note 10, at 200. Professor Madow uses actor Robert Young as an example, stating that if Young can capitalize on the fact that his face has a particular meaning to the public, "he cannot very convincingly cry foul when someone markets a T-shirt emblazoned with his smiling benign face and the slogan 'Father Knows Nothing'—provided, of course, it is clear to consumers that Young himself has neither approved nor sponsored the product." *Id.* at 200.

In deciding *L.L. Bean*, the First Circuit noted that "[i]t would be anomalous to diminish the protection afforded parody solely because a parodist chooses a famous trade name, rather than a famous personality, author or creative work, as its object." *L.L. Bean, Inc. v. Drake Publishers*, 811 F.2d 26, 33 (1987). This suggests that the First Circuit did not suppose that a parody of a celebrity would be prohibited.

Professor Netterville, in an article written before *L.L. Bean*, states that case law "would appear to support fully the proposition that mimicry and imitation of another, per se, are not actionable." He writes:

[Mimicry and imitation] are not involved with the commercial exploitation of the talents of another, but with the talents of the mimic. Just as the author of the most original of novels must draw upon life around him, upon history and upon his insight into life and history, so must the mimic draw upon what has gone before. To hold that good faith mimicry is tortious would be to withdraw from the entertainment sphere one of its most necessary and valuable sources of material.

Netterville, *supra* note 65, at 250. In the same article, Netterville also stated:

Certainly some of the great names in show business began and others continued their careers in comedy of this particular genre [parody, mimicry and lampooning]. Aside from an occasional resort to self-help, those mimi[c]ked or lampooned appear to have been content to settle for what little solace there may be in the

who wrote a prominent treatise on the right of publicity and who generally is a staunch supporter of a celebrity's right to the financial benefits of her fame, offers two reasons for this position: (1) parody and satire are traditional literary, entertainment, and art forms protected under the First Amendment; and (2) traditional parody and satire do not have the effect of fulfilling the demand for the original.¹¹⁴ McCarthy notes that the mimic's audience does not have its demand for the original sated by seeing the mimic, and in fact, the original's publicity value may even be increased.¹¹⁵

adage that acknowledged imitation (even when badly done) is the sincerest form of flattery. The reported cases do not abound in examples of litigation over such comedy acts and discussions with many attorneys representing the victims of the comedians have revealed that practically no litigation has resulted. . . . It is probably not much more ridiculous to hold that the right to mimic and lampoon himself belongs to the performer than it is to say . . . that the right to burlesque a copyrighted work belongs to the copyright proprietor. That one probably cannot and the other will not exercise the right so that the public is effectively deprived of that kind of comedy may or may not influence the course of the law.

Id. at 247.

In addition to the First Circuit, other courts have also suggested that a celebrity would have no right of publicity claim against a parodist who parodied her. *See, e.g.*, *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1359 n.21 (D.N.J. 1981); *Groucho Marx Prod. v. Day & Night Co.*, 523 F. Supp 485, 492-93 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982); *see also Frank v. National Broadcasting Co.*, 506 N.Y.S.2d 869 (N.Y. App. Div. 1986). Even Professor McCarthy seemed to believe that a parody would not infringe on a celebrity's right of publicity. MCCARTHY, *supra* note 10, at 8-101.

¹¹⁴ MCCARTHY, *supra* note 10, at 8-101 (citing *Berlin v. E.C. Publications*, 329 F.2d 541, 545 (2d Cir. 1964)).

¹¹⁵ MCCARTHY, *supra* note 10 at 8-101 (citing *Moreno v. Time*, 11 Media L. Rptr. 2196 (N.Y. Supp. 1985)). In *Moreno*, the court held that a comic-ventriloquist was not liable for a satirical impersonation. The court noted that the plaintiff generally considered impersonations to be free publicity, but he objected to the one at issue on the ground that it was not a funny parody or impersonation. *Id.* at 8-101 n.24. McCarthy states:

[Mimicry] may well refresh the audience's recollection of the target person, increasing the demand for the original. And, as to those who don't get the joke, the fact of everyone around them laughing may well stimulate their interest in finding out about the target. Traditional entertainment mimicry has as much or more potential to increase the publicity value of the target person as to decrease it. As the Supreme Court has stated in the context of the copyright fair use defense: "But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work

McCarthy's rationale for denying right of publicity protection against parodies is similar to the rationale with which courts deny copyright protection against parodies.¹¹⁶ In cases involving parodies of copyrighted works, courts analyze whether the parody is a fair use of the original.¹¹⁷ If the parody is a fair use of the copyrighted material, there is no infringement. Courts reason that the copyright laws protect parodists' and original copyright holders' creativity equally, as long as parodists successfully distinguish their works from the originals.¹¹⁸

need not be prohibited in order to protect the author's incentive to create."

Id. at 8-101 to 8-102 (quoting *Sony Corp. v Universal City Studios*, 464 U.S. 417, 450, (1984)).

¹¹⁶ Professor McCarthy argues that "[t]he analogy between assertion of the Right of Publicity and copyright law in the context of parody and satire seems particularly apt." MCCARTHY, *supra* note 10, at 8-102.

McCarthy also notes that "[s]everal commentators have suggested that First Amendment policies could be accommodated within the framework of the Right of Publicity by borrowing from copyright law the 'fair use' defense." *Id.* at 8-35 (citing Richard Ausness, *The Right of Publicity: A "Haystack in a Hurricane"*, 55 TEMP. L.Q. 977, 1048 (1982); Steven J. Hoffman, *Limitations on the Right of Publicity*, 128 BULL. COPYRIGHT SOC'Y 111, 140 (1980); Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191, 232 (1983); Samuelson, *supra* note 69, at 915; Douglas G. Baird, Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard*, 30 STAN. L. REV. 1185, 1206 (1978)).

¹¹⁷ *Tin Pan Apple v. Miller Brewing Co.*, 737 F. Supp. 826, 828 (S.D.N.Y. 1990). Congress intended § 107 of the Copyright Act of 1976, which articulates the concept of fair use, to codify preexisting law. *M.C.A., Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); *see* 17 U.S.C. § 107 (Supp. 1981). Section 107 provides that "the fair use of a copyrighted work . . . for purposes such as criticism . . . [or] comment . . . is not an infringement of copyright." The House Committee on the Judiciary reporting on this statute observed that the act gives express statutory recognition for the first time to the judicial doctrine of fair use, "one of the most important and well-established limitations on the exclusive right of copyright owners." *Tin Pan Apple*, 737 F. Supp. at 829. A list of examples of fair use which the Committee derived from the Register's 1961 Report includes "use in a parody of some of the content of the work parodied." *Id.*; *see also* *Warner Bros. v. American Broadcasting*, 720 F.2d 231, 242 (2d Cir. 1983). Under the "fair use" doctrine, codified in 17 U.S.C. § 107 (Supp. 1981), courts have allowed imitation when adapted for use as commentary or parody. *See, e.g.*, *Elsmere Music v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) (*per curiam*); *Berlin v. E.C. Publications*, 329 F.2d 541 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964); *Tin Pan Apple*, 737 F. Supp. at 829.

¹¹⁸ *Tin Pan Apple*, 737 F. Supp. at 829 (quoting *Warner Bros.*, 720 F.2d at 242).

A. *The Parody Exception to Copyright Protection and Its Application in Right of Publicity Cases*

1. Copyright's Fair Use Doctrine

When determining whether a parody constitutes fair use of a copyrighted work, courts examine whether the parody "takes the place of" the original.¹¹⁹ In the process, courts ignore the economic impact on the value of the original work that is caused by the parody's critical nature (even if the parody destroys the market for the original), and instead focus on whether the parody *fulfills the demand* for the original in its own market.¹²⁰ As one court noted, "Biting criticism suppresses demand; copyright infringement usurps it. Thus, infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable."¹²¹

Courts should employ copyright's fair use doctrine when analyzing parodies in right of publicity cases. If the parody does not fulfill the demand for the celebrity, then it should be allowed. A successful parody of a celebrity—even in advertising—would not take away

¹¹⁹ *Fisher v. Dees*, 794 F.2d 432, 437-38 (9th Cir. 1986)

¹²⁰ *Id.*

¹²¹ *Id.* (citing *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Berlin v. E.C. Publications*, 329 F.2d 541, 545 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964); Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax* [hereafter *Parody Defense*], 97 HARV. L. REV. 1395, 1409-11 (1984)).

The *Fisher* court stated, "In assessing the economic effect of the parody, the parody's critical impact must be excluded." *Fisher v. Dees*, 794 F.2d at 437. However, as one commentator explained: "we must accept the harsh truth that parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically." KAPLAN, *supra* note 47, at 69.

In determining whether to allow a parody in a copyright case, courts generally focus on whether the parody replaces the original so as to rob the original of all commercial value. *Fisher v. Dees*, 794 F.2d at 437. A finding that a parody is commercial tends to weigh against a finding of fair use because "every commercial use of copyrighted materials is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 451 (1984). However, this finding "need not be fatal to the defendant's cause. The defendant can rebut this presumption by convincing the court that the parody does not unfairly diminish the economic value of the original." *Fisher v. Dees*, 794 F.2d at 437; *see also* *Hustler v. Moral Majority*, 796 F.2d 1148, 1156 (9th Cir. 1986); *Pillsbury Co. v. Milky Way Prod.*, 215 (BNA) U.S.P.Q. 124, 131 n.9 (N.D. Ga. 1981).

the celebrity's right or ability to sell her face or name to endorse a product of her choosing because the public will not believe that the celebrity endorses the product.¹²² If it does, then the parody is poor or not a parody at all, and the celebrity will have a cause of action for false advertising or misrepresentation.¹²³ Samsung's parody of Vanna White is a good example. No consumer would believe that Vanna White was endorsing Samsung videocassette recorders because of Samsung's robot parody. Thus, Samsung's parody cannot detract from Vanna White's ability to endorse any product including videocassette recorders.

2. Copyright-Like Protection Should Not Protect a Celebrity's Ego in Right of Publicity Cases

A parody could damage a celebrity's ego. The courts have not, however, considered this kind of harm important enough in copyright cases to justify eliminating the parody exception. As the Ninth Circuit has noted, intellectual property laws are not designed to stifle critics: "'Destructive' parodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author."¹²⁴ Parodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to grant permission to parody, even in exchange for a fee.¹²⁵ The parody defense to copyright

¹²² See *supra* notes 36-41 and accompanying text.

¹²³ Most celebrities complain of implied endorsement when they complain about unauthorized use of their identity in advertising. One commentator explains that "[t]he celebrity's primary interest rests both on the law's traditional concern with protecting an individual's interest in the value of his services and on the desirability of preventing abuses of names and likenesses that can mislead consumers." Treece, *supra* note 23, at 647; see also McCARTHY, *supra* note 10, at 4-8.

¹²⁴ Fisher v. Dees, 794 F.2d 432, 437-38 (9th Cir. 1986) (quoting *Parody Defense*, *supra* note 121, at 1411).

¹²⁵ *Id.* at 436-37 (quoting *Parody Defense*, *supra* note 121, at 1397 n.12). In *Fisher*, the composers of "When Sunny Gets Blue" brought a copyright infringement action and an unfair competition action against the composers of "When Sonny Sniffs Glue" and others. The court held: (1) the parody was fair use of the original; (2) the parody was not immoral or obscene so as to deprive it of fair use protection; (3) the defendants did not engage in unfair competition; and (4) the parody could not reasonably have a defamatory or disparaging meaning to those who heard it.

infringement exists to make possible a use that generally cannot be bought.¹²⁶

As discussed above in Part One, courts are generally unwilling to recognize celebrities' right of publicity claims for hurt feelings or bruised egos. As the California Supreme Court observed, "The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment."¹²⁷ Also, in infringement cases involving rights other than right of publicity, courts have generally refused to allow celebrities to recover for claims of hurt feelings.¹²⁸ This result is probably because the courts recognize the importance of public figures in our society. Thus, the courts have allowed the public a great deal of freedom in expressing opinions about celebrities.¹²⁹ Such freedom is evidenced in the more stringent require-

¹²⁶ Fisher v. Dees, 794 F.2d at 437 (citing Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1633 & n.177 (1982)).

¹²⁷ Gugliemi v. Spelling-Goldberg Prod., 603 P.2d 454, 460 (Cal. 1979); MCCARTHY, *supra* note 10, at 8-102.

¹²⁸ See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); see also *infra* notes 141-44 and accompanying text. In *Hustler*, the Supreme Court noted the need to protect political cartoonists and satirists whose work did not falsely defame their subject. The Court recognized the value of parody even though it acknowledged that the "appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events—an exploitation often calculated to injure the feelings of the subject of the portrayal." *Hustler*, 485 U.S. at 54. The Court noted that the art of the political parodist is often not reasoned or evenhanded, but slashing and one-sided: "The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters." *Id.* at 53-54 (quoting Long, *supra* note 30, at 57).

¹²⁹ Public figures are those who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Curtis Publishing v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring), *mandate conformed*, 418 S.W.2d 379 (Tex. Civ. App. 1967), *cert. denied*, 391 U.S. 966 (1968) (no majority opinion). In a later case, the Court explained:

For the most part [public figures] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

ments for public figures' claims of libel, privacy, and emotional distress.¹³⁰

In *Hustler Magazine v. Falwell*,¹³¹ for example, the Supreme Court decided that a public figure could not recover damages for emotional distress caused by the publication of an offensive ad parody.¹³² In so holding, the Court observed:

Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974), *appeal after remand*, 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983).

¹³⁰ For example, in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court established that a parody about a public figure would not give rise to a claim for emotional distress absent a showing of "actual malice." The celebrity is of sufficient public interest to remain fair game for the humorist. The law of privacy does not seal off such celebrities from the parodist, imitator or humorous commentator. The public interest in humor requires relative freedom for the expression of both favorable and unfavorable comments on its idols. *See also* *Cohen v. Marx*, 211 P.2d 320 (Cal. App. 1949) (noting that public figures have more limited right to privacy than do private individuals).

¹³¹ 485 U.S. 46 (1988).

¹³² *Id.* According to the Court:

Hustler Magazine featured a "parody" of an advertisement for Campari Liqueur . . . entitled "Jerry Falwell talks about his first time." This parody was modeled after actual Campari ads that included interviews with various celebrities about their "first times." Although it was apparent by the end of each Campari interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." Copying the form and layout of these Campari ads, . . . [Hustler] drafted an alleged "interview" with [Falwell] in which he states that his "first time" was during a drunken incestuous rendezvous with his mother in an outhouse.

Id. at 48.

Falwell sued Hustler Magazine, Inc., Larry C. Flynt, and Flynt Distributing Co., Inc., in the United States District Court for the Western District of Virginia, claiming that the ad parody in Hustler entitled him to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to trial. At the close of the evidence, the district court granted a directed verdict for the defendants on the invasion of privacy claim. The jury then found against Falwell on the libel claim, specifically finding that the ad parody could not "reasonably be understood as describing actual facts about Falwell or actual events in which he participated." However, the jury ruled for Falwell on the intentional infliction of emotional distress claim. Defendants' motion for judgment notwithstanding the verdict was denied.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the judgment against defendants. *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986). The court rejected the defendants' argument that the "actual malice" standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), must be met before Falwell could recover for emotional distress. The court agreed that

[T]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.¹³³

The Court also noted that one of the prerogatives of American citizenship is the right to criticize public men and measures.¹³⁴ The Court stated, "Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to vehement, caustic, and sometimes unpleasantly sharp attacks."¹³⁵ As one commentator observed: "Prodigious success and its responsibilities and failures draws parody. That's how a culture defends itself."¹³⁶

because Falwell is concededly a public figure, defendants are "entitled to the same level of [F]irst [A]mendment protection in an action for intentional infliction of emotional distress that they would receive in an action for libel." *Falwell v. Flynt*, 797 F.2d at 1274. However, the court said that this did not mean that "a literal application of the actual malice rule is appropriate in the context of an emotional distress claim." *Hustler v. Falwell*, 485 U.S. at 48-49. On further appeal, the Supreme Court reversed the judgment against the defendants and held that a state's interest in protecting public figures from emotional distress was not sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figures involved.

¹³³ *Hustler v. Falwell*, 485 U.S. at 51. The Supreme Court also stated, "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Id.* at 50. Elsewhere the Court has explained that "the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 503-04 (1984). The Supreme Court, therefore, has "been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions." *Hustler v. Falwell*, 485 U.S. at 51.

¹³⁴ *Hustler v. Falwell*, 485 U.S. at 51 (quoting *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944)).

¹³⁵ *Id.* (citing *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

¹³⁶ Stewart Brand, *Dan O'Neill Defies U.S. Supreme Court: A Really Truly Silly Moment in American Law*, *COEVOLUTION Q.*, Spring 1979, at 41.

B. The Parody Exception to Trademark Protection and Its Application to Right of Publicity

1. Trademark Infringement

While some commentators have suggested that trademark law should adopt copyright law's parody analysis,¹³⁷ courts use a test that is rather different from that used in copyright cases. Courts deciding trademark parody cases use a likelihood of confusion test incorporated in the Lanham Act, the federal trademark statute.¹³⁸ Under this test, a court focuses on the consumer's perception and examines whether consumers believe that the parody is sponsored by, or associated with, the original trademark owner or product.¹³⁹ The confusion theory prohibits the use of a trademark if that use is likely to confuse consumers as to the origin of the product or service.¹⁴⁰

The trademark parodist usually prevails under the likelihood-of-confusion analysis because parody's goal is to make a statement by changing certain parts of the original.¹⁴¹ "Given that the parodist's version typically differs from the original in ridiculous or grotesque ways, the average consumer is unlikely to believe that the parody originates with or is sponsored by the trademark owner."¹⁴²

If the likelihood of confusion test were applied to an advertisement involving a celebrity parody, the question would be whether the parody led consumers to believe the celebrity endorsed, or was somehow associated with, the product. If the answer were yes, then the celebrity would have a cause of action against the parodist. If the answer were no, then the celebrity would have no cause of action. As stated above, a successful parody would not cause anyone to believe that the celebrity is endorsing a product.¹⁴³ Thus, this test would generally allow parodies of celebrities but it would

¹³⁷ See Shaughnessy, Note, *supra* note 63, at 1101-04 (discussing aspects of copyright's fair use doctrine that may apply to trademark parodies); Mastrullo, Comment, *supra* note 29, at 1326-27.

¹³⁸ Lanham Act § 32(1)(a), 15 U.S.C. § 1114(1)(a) (1988).

¹³⁹ See generally Shaughnessy, Note, *supra* note 63, at 1092-93 (describing traditional confusion analysis); Mastrullo, Comment, *supra* note 29, at 1326-27.

¹⁴⁰ See Dagitz, Comment, *supra* note 105, at 966.

¹⁴¹ *Id.*; see also Charles C. Goetsch, *Parody As Free Speech: The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39, 40 (1980).

¹⁴² Shaughnessy, Note, *supra* note 63, at 1093.

¹⁴³ See *supra* note 38 and accompanying text.

probably protect the celebrities' interests just as well as the "fulfill the demand" test employed in copyright cases.

2. Trademark Dilution

In some cases involving trademark parodies, plaintiffs assert trademark dilution based on state law along with, or instead of, trademark infringement based on federal law.¹⁴⁴ The trademark owner proves dilution by proving that the "unauthorized use is likely to injure the owner's business reputation or diminish the mark's distinctiveness."¹⁴⁵ Anti-dilution statutes protect trademarks more broadly than the Lanham Act because the trademark owner need not prove that consumers are likely to be confused to succeed in proving trademark dilution.¹⁴⁶

Courts analyze whether the First Amendment precludes trademark owners from using anti-dilution statutes to squelch criticism of their trademarks, the values embodied in them, or the company itself.¹⁴⁷ The First Circuit Court of Appeals directly addressed this issue in *L.L. Bean, Inc. v. Drake Publishers*.¹⁴⁸ In determining that a pornographic magazine's parody of the L.L. Bean catalog was not an infringement of L.L. Bean's trademark, the First Circuit held that infringement may not be shown simply because the unauthorized use of the trademark placed the trademark in a negative light. The court also held that anti-dilution statutes can violate the First Amendment rights of trademark parodists.¹⁴⁹ As one commentator has noted:

¹⁴⁴ See, e.g., *Pillsbury Co. v. Milky Way Prods.*, 215 U.S.P.Q. (BNA) 124, 135 (N.D. Ga. 1981) (holding that off-color parodies of Pillsbury doughboy constituted infringement under state anti-dilution statute); see also *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp. 1112, 1123 (S.D.N.Y. 1980) (holding that poster using five-ring symbol of Olympic Games was not infringement of United States Olympic Committee's trademark rights because tarnishment of trademark was insufficient); *Coca-Cola v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1191 (E.D.N.Y. 1972) (stating in dictum that real issue was dilution of plaintiff's Coca-Cola trademark by defendant who distributed poster with logo similar to plaintiff's reading "Enjoy Cocaine").

¹⁴⁵ Dagitz, Comment, *supra* note 105, at 967-68; see also Shaughnessy, Note, *supra* note 63, at 1087.

¹⁴⁶ See *supra* note 144. Those cases found no infringement under the likelihood of confusion test, but did find infringement under the dilution test.

¹⁴⁷ See *supra* notes 97-101 and accompanying text.

¹⁴⁸ 811 F.2d 26, 31 (1st Cir. 1987), *cert. denied*, 483 U.S. 1013 (1987).

¹⁴⁹ *L.L. Bean*, 811 F.2d at 31. The court did, however, limit their holding to noncommercial parodies. See *id.* at 32-33.

The constitutional implications of extending the misappropriation or tarnishment rationales to such cases, however, may often be intolerable. Since a trademark may frequently be the most effective means of focusing attention on the trademark owner or its product, the recognition of exclusive rights encompassing such use would permit the stifling of unwelcome discussion.¹⁵⁰

Even without the *L.L. Bean* precedent, dilution-like protection would still be inappropriate in celebrity parody cases. The courts have consistently held that a celebrity has no right of publicity cause of action—or any other cause of action—simply because someone has said something unflattering about her. As discussed above, the courts recognize the right of the public to criticize public figures. How the courts will protect trademarks from dilution in future parody cases is unclear. However, the theory is clearly not appropriate for right of publicity.

CONCLUSION

An intellectual property right, such as the right of publicity, is not free. It is awarded at the expense of future creators and the public.¹⁵¹ If the law had given every author and celebrity the power to stop people from mocking them or their work, the world would be poorer, not richer, culturally as well as economically.¹⁵² Celebrities are an important part of our culture. They affect our lives, and we use them as symbols to communicate with each other. Parodies of celebrities are not just something that should be permitted. They should be encouraged, and parodists should be rewarded. We need the commentary. We need the laughter.

¹⁵⁰ Robert C. Denicola, *Trademarks As Speech: Constitutional Implications of the Emerging Rationales for the Protections of Trade Symbols*, 1982 Wis. L. Rev. 158, 196-97, quoted in *L.L. Bean*, 811 F.2d at 31.

¹⁵¹ *White v. Samsung Elecs. Am.*, 989 F.2d 1512, 1516 (Kozinski, O'Scannlain & Kleinfeld, JJ., dissenting) (decision denying rehearing).

¹⁵² *Id.*