A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification, and Redescription

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> *Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person cannot be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.*[1]

INTRODUCTION

MarCus, a fictitious black man, wants to be the proprietor of himself as property. Specifically, he wishes to become the first federally registered human trademark. This is no small irony for the descendent of slaves. Yet, trends toward commodification in the law of intellectual property, particularly trademark and publicity rights, suggest the wish may not be unattainable. A critical theoretical interpretation of Lanham Act[2] boundaries and the culture of mass marketing suggest that the day may not be far off when a human persona may prove sufficiently distinctive in interstate commerce to qualify as a protectable signifier. Troubling as that sounds, the further irony explored in this Article is that, at least in MarCus's mind, the 1947 Act could do more to redescribe a degraded racial identity than the Fourteenth Amendment, the Reconstruction statutes, and the Civil Rights Acts of 1964 and 1965. MarCus believes, however, that if the application were to have any chance of succeeding with the Patent and Trademark Office, MarCus's mark must explicitly claim to be colorblind, disclaiming blackness in favor of a nonracial identity.

By human trademark, MarCus means all the combined commercial manifestations of his personality that are projected for public

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[1] Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1893 n.161 (1987) (citing IMMANUEL KANT, LECTURES ON ETHICS 165 (Louis Infield trans., J. Macmurray rev. ed. 1930)).

[2] 15 U.S.C. §§ 1051-1127 (2000).

consumption through advertising. The mark itself, therefore, would consolidate into one signifier all the discrete aspects of his already registered persona, such as his name,[3] specific images of himself, the "overall look" or trade dress of his advertising services, and his voice. By federal registration of this persona, MarCus means to capture for his own exclusive exploitation the growing bundle of rights conferred by the Lanham Act. These rights include the economic or ownership interest in quality and consistency of services,[4] the competitive interest in excluding market rivals, and the consumer interest in reducing search costs and building brand loyalty.[5] Yet, of equal importance for this exercise, MarCus wishes to redescribe the social meanings associated with his black male identity in market terms, terms over which he would have strict and valuable control.

Redescription in this fictitious commercial exercise rests on the premise of self-authorship in intellectual property laws beyond copyright.[6] It also begins from the cultural proliferation of signifiers and their popular embrace. For instance, two New Jersey high school seniors eagerly offered themselves to corporate bidders, ultimately selling themselves as human billboards throughout college to First USA credit cards in exchange for full tuition at the University of Southern

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[3] Although the Lanham Act explicitly bars registration of surnames (interpreted broadly to include personal name designations of a product), we may assume that the name "MarCus," as a signifier of specific advertising services, has garnered sufficient secondary meaning over the years of its use to be protected. *See* 15 U.S.C. § 1052(f) (2000).

[4] *See* Gorenstein Enters. Inc. v. Quality Care-USA, 874 F.2d 431, 435 (7th Cir. 1989) ("The owner of a trademark has a duty to ensure the consistency of the trademarked good or service. If he does not fulfill this duty, he forfeits the trademark. The purpose of a trademark, after all, is to identify a good or service to the consumer, and identity implies consistency and a correlative duty to make sure that the good or service really is of consistent quality, i.e., really is the same good or service."); El Greco Leather Prods. Co. v. Shoe World, Inc., 806 F.2d 392, 395 (2d Cir. 1986) (stating that "actual quality of the goods is irrelevant; it is the control of quality that a trademark holder is entitled to maintain"); Prof'l Golfers Ass'n of Am. v. Bankers Life & Cas. Co., 514 F.2d 665, 670-71 (5th Cir. 1975).

[5] *See, e.g.*, Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163-64 (1995) ("[T]rademark law, by preventing others from copying a source-identifying mark, 'reduce[s] the customer's costs of shopping and making purchasing decisions,' for it quickly and easily assures a potential customer that this item — the item with this mark — is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.") (citations omitted).

[6] Expansion of copyright law protection provides a wide array of additional challenges for the prospect of human commodification, which are, unfortunately, beyond the scope of this Article. On the expansion of copyright, see James Boyle, *Cruel, Mean or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007 (2000); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002).

California.[7] Bernard Hopkins, a middle-weight boxer fighting for his first big payday, accepted $100,000 to emblazon his bare back with the trademark of a little-known online casino — GoldenPalace.com.[8] In these examples, the human body was leased as advertising space for a corporate "person's" existing signifier; it offered no new commercial meanings. Spike Lee perhaps inadvertently sold a commodified meaning of Malcolm X when the director first merchandised the once-ubiquitous "X"-cap to accompany the movie; for many Americans, the mark transformed the meaning of the man. Elements of hip-hop culture, through videos and lyrics, currently sell a lifestyle of "getting paid," replete with commodified monikers like "pimps" and "hoes." And Tiger Woods, now surpassing the stature of Michael Jordan's assiduously protected and legally protectable persona, sought to enjoin even an artistic rendering of his image by a known artist.[9]

Each of these examples is of a piece with both the Ninth Circuit's majority decision and Judge Kozinski's oft-cited dissent in *White v. Samsung*.[10] That piece is commodification, both its expanding promotion in the sign language of mass society and its expanding protection by laws governing commercial meaning. On the side of culture, as Jean Baudrillard once argued, the more product signifiers become the code of social communication, the more we welcome and depend upon their meanings.[11] On the legal side, the more aggressively the owners of these signifiers assert exclusive identities, the more protection they receive from infringement or dilution and the more they garner monetizable value. The slide down this slope to acceptable human commodification is not hard to see.

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[7] Kate Zernike, *And Now a Word From Your Cool College Sponsor*, N.Y. TIMES, July 19, 2001, at B1. Inspired by Tiger Woods, the two students will "have the First USA logo on their surfboards, surf shorts, camp shirts, indeed, an entire wardrobe's worth of clothing, blurring the line between their life as average college students and their role as pitchmen. And that is just how the company wants it." *Id.*

[8] *See* Michael McCarthy, *Ad Tattoos Get Under Some People's Skin*, USA TODAY, Apr. 4, 2002, at pg. B.03. The fight between Bernard Hopkins and Felix Trinidad took place in New York City on September 29, 2001.

[9] ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003).

[10] White v. Samsung, 989 F.2d 1512, 1513 (9th Cir. 1993), *cert. denied*, 508 U.S. 951 (1993).

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

[11] *See* discussion *infra* p. 5.

Courts have had no trouble finding "integrity" in the identity of a trademark, nor in characterizing a marketplace injury to a trademark in personal terms.[12] Woody Allen's "schlemiel persona" was protected on both Lanham Act grounds and his right of publicity when an advertiser sought to impersonate it.[13] The controversial *White v. Samsung* case, involving a wigged robot turning letters on a game show set, advanced the emerging idea that publicity rights expand beyond a celebrity's name, voice, or signature, to other indicia of personality.[14] Whatever the theory justifying such an expansion, intellectual property and its cultural referents are with few exceptions owned, licensed, traded, securitized, and protected against trespass like traditional forms of property.[15] The combination of forces, cultural and legal, feeds a climate of universal commodification.

I join those scholars who find these developments problematic,[16] especially for the person. The "hyperreality" Baudrillard described, in which these signs take hold of popular meanings, is not a neutral playing field. Whether the danger of universalizing commodification to the

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[12] *See, e.g.*, L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987). This was a trademark dilution case in which the court anthropomorphized the trademark's characteristics in the face of tarnishment.

[13] *See* Allen v. Men's World Outlets, 679 F. Supp. 360, 362 (S.D.N.Y. 1988). The issue was the strength of the mark. However, the court balanced Allen's New York dilution claim against the defendant's civil rights under state law and opined that "if Allen's claim is that his *likeness* rather than his face is a trademark, it would not appear to be dilutable within the meaning of § 368-d n.10 [of the New York General Business Laws]." *Id.* at 366.

[14] *White*, 989 F.2d at 1514 (Kozinski, J., dissenting) ("[I]t's now a tort for advertisers to *remind* the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow.").

[15] *See* The Bellagio Declaration, *reprinted in* JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY, Appendix B, 195-96 (1996); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 895-904 (1997).

[16] *See, e.g.*, Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759 (1990) (arguing that, in addition to allowing warehousing of marks through TMRA's intent-to-use provision [rights expansion itself], Lanham Act is based on false assumption that individual language mark choices are irrelevant because they are fungible when practice shows they are not); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1688 (1999) ("Courts protect trademark owners against uses that would not have been infringements even a few years ago and protect as trademarks things that would not have received such protection in the past. And they are well on their way to divorcing trademarks entirely from the goods they are supposed to represent."). *See generally* ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW (Duke 1998); JANE M. GAINES, CONTESTED CULTURE, THE IMAGE, THE VOICE, AND THE LAW (North Carolina 1991).

point of selling personhood is critiqued for its damage to a pluralist notion of "human flourishing"[17] or for its likely constriction of free speech and a robust public domain,[18] unchecked propertization portends a diminution of personal identity. Exactly where we should draw the line is unclear, but "draw it we must."[19]

Yet, race, as always, complicates the analysis. Many partial or universal noncommodification arguments fare less well when the commodifier-producer is a black male identity seeking protection for the commercial exploitation of himself. Baudrillard's observations lose their neutrality when the code of product branding is used deliberately to elevate and fix the meaning of an outsider's identity. Most of the examples above, not coincidentally, involve black men. Although one might have assumed that the most likely candidate for the first human trademark would be Martha Stewart (before the public meaning of her identity was tarnished permanently by a securities fraud conviction)[20] or Richard Branson of Virgin Airlines, black men like Woods, Jordan, Michael Jackson, and even O.J. Simpson, demonstrate that black personhood in the marketplace has perhaps the most exacting demands for image maintenance and protection. To be commercially successful, these personalities must overcome the stereotypes of personhood that are deeply ingrained in public consciousness. Owning lucrative rights in a fixed, self-authored identity that is federally protected from interference could present, for some, a dream-like temptation. Doing so would effect a classic self-redescription of culturally historic dimensions.

In this Article, I present a friendly but, I hope, formidable challenge to legal opponents of commodification through the vehicle of the toughest-case hypothetical. My vehicle is MarCus, a racially conscious, enormously successful black advertising mogul who has strong personal and professional reasons for trademarking his persona. This challenge, therefore, extends to the liberalizing trend in intellectual property law, exposing the fault lines in judicial endorsements of more expansive rights. The problem throughout the Article is that MarCus's arguments appear to be well-supported and, to some readers perhaps, superior. To further complicate the issues of intellectual property rights expansion

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[17] *See generally* Radin, *supra* note 1; discussion *infra* Part III.

[18] *See* discussion *supra* pp. 3-4.

[19] Palsgraf v. Long Island R.R., 162 N.E. 99, 104 (N.Y. 1928).

[20] According to a recent report of Martha Stewart's legal defense against insider trading charges, her lawyers argued that "Ms. Stewart is a person, not a commodity. She has a daughter, she has friends, she has neighbors." Greg B. Smith, *Martha? Just Like You & Me*, DAILY NEWS, Oct. 7, 2003, at 6.

and human commodification by law, I explore a racial dimension to his quest. After all, race, like trademarks, concerns identity. Here, race works differently in different contexts, but it mostly serves to privilege MarCus's claim to commercial self-authorship.[21] Race also provides a more complex motivation and a justification for seeking personal commodification than mere financial gain. That is, legal commodification in this illustration may result in public redescription of a traditionally debased personhood. Such redescription has the kind of penetrating individual and collective repercussions that best demonstrate why an issue like legal commodification is so important in the first place.

Part I presents MarCus's detailed personal narrative in which he defines himself as a character (and a client) answering the threshold question of whether becoming the first registered human trademark is a desirable quest.[22] His explanation sets forth several themes that appear later in the exercise, including the meanings of commercial signifiers in advertising, the role of consumption, his own race consciousness, the role of competitive identity, the economic significance of black self-ownership, his conception of personal freedom, and the strategic "fraud" of claiming a race-neutral or colorblind commercial identity.

Part II begins the legal analysis of MarCus's trademark application in the context of contemporary interpretations of the Lanham Act and state right of publicity laws. Functioning as the legal equivalent of a human trademark is no longer novel, we shall see, as courts have steadily broadened the grounds on which celebrities and other public figures may protect culturally fixed meanings of their identities under either legal basis. I then critique those legal bases through an analysis of case law and legal scholarship that reveals no clear rationale for extending protections and presents many potential problems for defendants. Nevertheless, Part II concludes that MarCus probably remains on firm

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[21] In this sense, I believe the hypothetical actually mirrors underlying trends in popular culture and thereby injects more realism into MarCus and his case.

[22] I choose the fictional narrative form here as a template because it allows the propertized persona to introduce his complex thinking in his own voice. I have done this before in different scholarship and argued its theoretical benefits, particularly regarding matters of race, on both law and literature and critical race theory grounds. *See* David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18 (1999). However, I am aware of a critical paradox in using narrative here. The character, MarCus, resorts to the humanistic benefits of storytelling, its attention to detail and context, as a means to justify the sale of himself to its opposite, consumption symbols. I, therefore, acknowledge the criticism that the best rebuttal to his quest for a trademarked persona is that, when it comes to making known the deeper reasons of his personality, he willingly disowns the code.

legal ground. MarCus's argument is partially justified by Baudrillard's postmodernist observations about the importance of signs and symbols in commerce and society.

Part III directly confronts the problem of human commodification, forcing MarCus to conform his quest for commercial freedom to some philosophical framework. That framework is essentially Hegelian in that MarCus's entire notion of an intact identity is actualized by objectification, suggesting, as Hegel did, the possibility of freedom. This perspective of commodified identity is at odds with the considered views of Margaret Radin and her embrace of, at most, only partial commodification.[23] As powerful an opponent of universal commodification as Radin is, the arguments we might imagine her proffering are not fully convincing against MarCus's case. At best, they seem to invite little more than a problem of transition.

Finally, in Part IV, the racial aspect of MarCus's claim — the one that appears to have trumped liberal rejoinders up to that point in the exercise — may provide its ultimate undoing. The analysis confronts the claim that his African-American identity can simultaneously embrace colorblindness publicly while remaining vibrant and healthy in private. That, I argue, is not the way race-as-property has functioned in the United States, nor is it significantly altered by MarCus's attempt. I join the insights of James Baldwin to show that, in the end, MarCus's quest would weaken him as a *black* person and as *a* person. Specifically, using Baldwin's critique of another fictionalized black male persona, Richard Wright's "Bigger Thomas" character from the novel *Native Son*, I argue that integrated personhood requires struggle, while commodified identities cannot struggle. A human trademark, I argue, is a shell of personhood, encasing an identity that cannot change if it hopes to keep its value, which is the trademarked persona's entire reason for existence. A human trademark that utilizes racial pretense is a signifier of emptiness. Even if MarCus wins the gamble not to lose his public distinctiveness, he loses the gamble on his private, underlying self, which is already compromised by the pursuit. That, apparently, is not what MarCus set out to do, nor is it a result the law should facilitate. By trademarking his persona, MarCus has locked himself into the status quo. It is redescription only of the loss of the freedom to grow.

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[23] *See infra* Part III.

I. A PORTRAIT OF THE TRADEMARK AS A BLACK MAN: AN ALLEGORICAL BUSINESS PLAN

In his own words, MarCus explains his quest for trademark registration:

Even before I officially dropped my last name and changed the spelling of my first, I understood the commercial value of cultural distinctions. I grew up in the middle of the country in an almost middle class way, studying the brand names of my earliest desires on TV, on the pages of magazines and billboards, in videos and theaters before the feature film began, and, eventually, on Internet pop-up ads. By my early twenties, I was so educated about consumer tastes, minute differences among brands, popular icons, and corporate images, that my college degree in marketing seemed superfluous. By the time I was thirty, I had soldiered in the low ranks of two New York advertising agencies and watched my ideas purloined, dismissed, or appropriated by junior associates. But, at age thirty-five, all of that changed. I had become extraordinarily successful as an advertising executive, primed to become a billionnaire entrepreneur of marketplace imagery and message. My particular melange of methods was so distinctive for its combination of looks, sounds, and unpredictable sequences that Americans in all the middle demographics already knew the name of my firm. Soon, the MarCus name was as identifiable as the products and services the firm pitched. Soon after that, the name became the man again, MarCus, who always managed to include some aspect of my identity within each ad.

I believe in the power of adjectives. Part of what I learned about the substance of advertising in the United States is that it is ubiquitous, cannibalistic in its references, irreverent, compelling, fixed in the political center, casually violent, magical, and even beautiful. Sure, much of it is bad and annoying, but a good advertising firm never lacks for ideas. I can poach the culture for relatively inexpensive licensing fees. I can play the best of the culture's music as background themes or hire platinum-selling recording artists to sing my jingles. Like other firms, mine can regularly integrate the most intimate social settings with a single script and thereby reinvent the racial world. With time lapse photography and other technological sleights of hand, I can reinvent motion. And MarCus, LLP, more than any other national agency, can briefly lease my sense, my appealing style, my persona, and all of my firm's services to a manufacturer and make its goods sell around the world. I do not use the finger-snapping language of the industry to describe my work. Instead, using a word remembered from high school English classes, I simply call them "themes."

Consumption, not genius or originality, makes effective themes possible, I believe. Consumption seems to govern everything. Anything that defies consumption is brief fantasy. Consumer identity matters most to people (when they are conscious of it); it is the prism for their tastes, the things worth working toward, and the services available to serve them. It is the primary lexicon of the social world; and those for whom it is not must actively and loudly rebut the unreality of commercial symbols organizing their lives. They have to talk back and walk the talk in a realm of self-invention. Otherwise, large things, small things, *all* things can be fitted into a matrix of transactions, even feelings, and one can talk about it all in quantitative terms. Materialism is certainly most of it. But I believe politics have gone that way, close relationships and all the necessities of life, down to how often your garbage is picked up or whether your streetlamps stay lit. People just want to know what they can get. Consumption drives them and measures them too. My themes, therefore, reconfigure the public's wants into needs within the codes of consumption as I understand them.

This is not my parents' working-class reality. It lacks their stubborn notions of what is real, and it bends the principles they instilled in me. I grew up in a pretty segregated world, benefiting from a few key breaks and a scholarship here and there to make mine more than a black-only world. When my race worked to diminish me relative to peers, I withdrew into the world of commercial symbols where, even as an adult, I played, rearranging them, redefining them so that they were either harmless or less hurtful. This had worked well enough for a long time until I was singled out for discrimination by my last employer, a giant advertising firm. I had paid my dues there, threatened to become a star there, was the only black, yet was appreciated somehow. That changed suddenly. Over a period of months, my ideas were stolen, I was *myself* accused of theft, people stopped listening to me and my star quite obviously fell. The humiliation was overwhelming, so powerful that when I was finally let go, I swore to avenge the decision. I would return to the world of commercial signals and symbols, but this time I would not play. I grew deadly serious about my work and reclusive with my downtown New York life. This may have been my liberation.

Shortly into my firm's first billion, I heard my lawyer make a rare gaffe and got an idea that would change my life forever. The lawyer had just finished an intellectual property inventory of the firm after three long weeks of work. Plopped exhausted in a chair, my lawyer proclaimed that MarCus's firm alone — not its clients, but the firm itself — probably had more federally registered trademarks than the famous

Martha Stewart.

"And she has registered everything but herself," my lawyer added with a laugh.

That's when I determined to become the first federally registered human trademark. Although my lawyer was dubious of the idea, I embraced it the more we discussed it. The lawyer spelled out the many requirements for registration — things I had half listened to a thousand times — as well as the benefits to MarCus if such a trademark application could be granted. Most of all, I understood that I would have to be distinctive of MarCus, LLP's services, and not in combination with any other marks it owned. My likeness, voice, and possibly even my persona would have to remain consistent and powerfully associated in the minds of the consuming public with my peculiar mode of advertising services. That is, my lawyer explained, my identity featured in connection with the firm's services would have to evoke something commercially familiar to common perception.

"This would be an unusual kind of fame, MarCus," my lawyer added. "It would be monetizable in that you could license it or get damages for its infringement. It would be the kind of fame that is enforceable in any federal court in the country. From a legal standpoint, you would have total control of your symbolic identity. It would mean what you alone intend it to mean. Anyone with the media power to impersonate it or to resemble it too closely would be sued for the confusion they *might* sow in the public mind." Nevertheless, my lawyer remained less impressed with the notion than I was. "Why don't you consider generating a market for yourself under the common law right of publicity instead? That's similar, but it's personal and well understood by the courts already."

I wanted none of it. The right of publicity seemed too accidental, dormant indefinitely, opportunistic when it presented its contested claim to fame. I wanted incontestability and federal protection. I wanted a clearer path to determining my value as an asset. And I wanted no part of conventional fame or celebrity. I demanded my lawyer get to work on the drafting of an appropriate application to the Patent and Trademark Office ("PTO"). The description, I was counseled, was critical to my chances of success. Meanwhile, I would concentrate on delivering my mark to the public more often and more effectively.

When we met again in person, I explained that, after some thinking, I had decided that my lawyer's description of the MarCus human trademark must explicitly use the adjective "colorblind."

"How about 'nonracial' instead?" my lawyer asked.

"I don't care. Just make the point unmistakably clear."

At first, I knew my lawyer was privately skeptical of the addition and found it a little contrived, inauthentic, and largely irrelevant. A day later, he thought otherwise and believed that the colorblind attribute might actually help to persuade a PTO examiner of the application's merits. It would also broaden the racial and ethnic scope of potential copycats I could publicly sue.

But, that is not why I insisted on it. I had a certain change of heart along the way, a small revelation perhaps. There was no question that the publicity a successful application would receive would be wildly lucrative. A lawsuit brought by a rival challenging the mark, if MarCus prevailed, would be even better. But the deeper reason for the change was sentimental and seemed to come up reluctantly from a place I had not visited in years, a place just beside my anger. I could do more through the marketplace and the intellectual property laws than any civil rights leader, politician, writer, religious spokesperson, lawyer, or activist had ever done to transform the way the culture saw race. My distinctive mark would enter *consumption* through every entrance and gradually play upon each consumer's preferences whether known or unknown, disarm their prejudices and reshape their perceptions about race — what little I believe they knew. And I would do this by asserting my paradigm-sized commercial personality in a continuous barrage of advertising "themes" whose subtle symbols of racial life in America would be imitated by others, disseminated and reproduced, made "normal" and taken for granted against the irresistable invitation to consume every last bit of whatever thing was for sale in the ad. Selling harmony at times, selling mischief or small conflicts at others, I, the omnipresent character somehow associated with every disparate message, would lie on my application and deny the obvious: *I would not be black.* I would just decline to say so. I would indifferently carry the fraud upon my demeanor as if it were no more than the zipper on my pants, as if I could not be bothered that it was even there.

It might only take another generation or two, I thought. Kept up, the public would not know anything else after a while. So, it was imperative that I keep my trademark fresh. If things got out of hand, I was allowed by law to abandon myself. But, until then, I and my staff would work years ahead on narratives of MarCus, my distinctive themes and steady, palatable presence. I, as MarCus, would do just one or two interviews a year and remain painfully elusive from the professional public. I wanted my fame to come purely from the symbols of consumption. I wanted to be the fork at every meal, never the food. I could not live completely in

the open, but just enough behind it not to be a constant distraction. I would not wear disguises in the city, but I would just be. Indeed, whatever primary richness there was to my private life, for the secondary world of the public and its interest in me as a trademark, I would just be.

The quest for trademark status sharpened the way I did business. I told the staff that I wanted to be an indelible metaphor of a very satisfying feeling, like a comforting resolution of a question about oneself. Not to overbear. The public was impatient with race and they seemed to resent any history about it. So, as a mark, I would never be a "race man." Yet, I knew that I would be unavoidably "raced." I also knew that Americans habitually recycled soothing versions of past fashions: "retro" waves, they were called. I decided that my likeness would appear only briefly toward the last moment of an ad — a fade to me — and almost get cut off, as if MarCus were unimportant enough to be edited out. But the "themes" themselves, the not easily recounted vignettes and sixty second consumptive episodes, traded on scenes just short of troubling. They deliberately told half stories of racial constellations with just a star or two misaligned. To some, the scene or spliced moment was familiar and infuriating; a Latino bus boy might see hints of a typical act of brief disrespect, "get" the innuendo, and grunt knowingly to himself as he watched it. But, the scene would never fully offend, enlighten, or vindicate. Any vindication would come later, many years after a generation waxed nostalgic for it, recognizing it as *their* special history, their formative inputs on race in certain situations and, in the clarity of hindsight, more people would come to "get" the disrespect and reject it. That is how I expected to be freshened as a metaphor in retro. That is how I believe advertising code really works. For instance, people in the culture industry are still talking about what Mean Joe Green did for racial integration when he gave that white kid a Coke during a Superbowl ad.

Of course, I could not be completely colorblind, not like Tiger or Michael, whom I admire. They simply disavowed race and distracted consumers from the obvious by doing their spectacular best in the fields of their gifts. In contrast, MarCus is both creating and recreating culture; I must feature people in actual scenes identifiable to a racially hypersensitive public. I cannot rely on the easy notoriety of a celebrity's right of publicity. I have to build the moment from scratch and answer to deeply ingrained public expectations. I find the thing is not to try too hard. The public actually wants a little more racial realism. The folks just want it all to work out in the end. That really is the trick — and to

evoke the familiarity of a good thing for sale. So, I am selective about my clients, and, at times, downright unpredictable: an airline or a new arthritis drug could be just as seductive as a trendy beer. Always, my themes are smart, never corny, often funny and unusually watchable for the widest demographic. That gives them the lasting power they need to inject the — let's call it — propaganda.

But, the colorblind addition made me admittedly a bit messianic, because I imagined that I had actually stumbled upon the solution to racial inequality. (Not that I didn't always want to be the answer; every black kid does.) This is how it would work: *most* people are enamored of MarCus ads; they note MarCus's presence and associate me with a subtle, complex, but good feeling. They love the products I lend my gifts to. The racial imagery is a reference; unwittingly, there are a great many members of the public who will use it in conversation as it uses their consciousness and proliferates. There are always at least two messages: to buy the product or service characterized in the ad, and to join the catalogue of social experiences as if it were one's history to join. It is a lot like the experience of hearing a song from one's past and allowing it to label the entire present with its meaning — except that MarCus is as powerful as many such songs.

Why wasn't it black — and something to boast about in the application? Of course it was black. But that would get me nothing. First of all, I could enjoin the works of another black advertising phenom who imitated my themes or look or words or persona, but I might die waiting for that to happen. No, Ralph Lauren, a Jewish man commercially redescribed as a WASP, would never claim Jewishness or WASPness as his proprietary right. But, like him, I could instead claim catch phrases, poses, and appearances in an endless cache of racially ambiguous trademarks over time. Unlike my parents' generation of blacks, I would trademark instead of being stereotyped, turning chronic commercial disadvantage into its opposite.

Second, as a technical matter, perpetrating the fraud of nonraciality would assuage an examiner's instinctive reaction against a racialized mark. (A "black man" trademark would be rejected out of hand.) The fraud itself would yield the bounty of greatly expanded rights. *Whoever* imitated me — whatever color — would face down the barrel of my exclusive federal rights to be what the theoretical public mind found distinctive. Unlike the history of entertainment and music industry lawyers, for instance, *I* would own the rights to a predominantly white market's adulation. With enough consumer investment, this lucrative love would spread into the cultural norm, and anyone who said

otherwise would be ostracized for their extreme and unpatriotic views.

And this is why in the end it is absolutely necessary that I become a trademark, rather than something else. The law will allow me to create myself, to *name* myself in public consciousness. But that alone might not transcend negative views of race. After all, a black man's mark without federal protection could one day be called a "nigger" mark by hateful whites or, worse, a "nigga" mark by hip-hop blacks. No, being a registered trademark allows me both to name myself and to interpret the meaning of that name. That meaning — colorblind and the rest — is so fixed by the law that I can indefinitely enjoin its infringement and even one day prevent its dilution.

A year to the date after that conversation with my lawyer, we filed with the PTO the following application description under multiple categories of goods and services:

> A trademark including the name, image, voice and public persona of "MarCus," majority owner of MarCus, LLP, a person exclusive of race, gender, national origin or religious affiliation, engaged in the interstate sale of advertising and market promotion services in sponsorship with product manufacturers and service providers and described as visually assertive, uncompromising, independent, amoral, cool, and colorblind.

II. INTELLECTUAL PROPERTY: RIGHTS ACQUISITION AND EXPANSION AMID THE CONSUMPTION OF HYPERREALITY

Initially, we must ask whether MarCus really stands a chance of registering himself as a human trademark under intellectual property law as courts currently interpret it. MarCus's trademark application describes a persona consisting of both superficial characteristics (e.g., name, image, voice) and more intrinsic attributes of identity (e.g., independence, amorality, "cool"). Not only do some characteristics defy precision, but they continue to raise context-dependent questions to which the answers remain largely subjective.[24] That may not be fatal, however, because intellectual property law often creates apparent "certainties" from perspective-based contingencies. Therefore, this part analyzes MarCus's quest in the legal and scholarly context, beginning with the applicable threshold requirements for trademark registration by the PTO and the tempting, but less desirable, route of acquiring

[24] Some of those missing details are the subtext of the discussion of commodification in Part III.

aggressive rights of publicity instead. As we shall see, those routes have coalesced as courts have allowed individuals to assert similar claims to commercial self-ownership under section 43(a) of the Lanham Act and state right of publicity laws. After delineating that case law coalescence, I offer some of the salient scholarly criticism of such expansive protection as it relates to general trademark rationales and to the particular complications raised by MarCus's case. Finally, I situate the entire discussion within the larger, enabling context of what Jean Baudrillard called "hyperreality."

A. Registration and Validity

MarCus's legal approach to status takes a direct route to PTO registration, rather than pursuing a more cumulative strategy of gaining recognized rights around more ancillary uses of his identity in commerce.[25] In fact, he hopes that the application process will itself engender legal opposition to his mark so that he can maximize publicity of his successful mark and its value in the marketplace.[26] However, the PTO application is rather straightforward.[27] The narrow legal inquiry for

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[25] For example, MarCus could await infringement of some aspect of his name, image, or other more recognized trademark right and accumulate negative rights in himself through favorable court rulings. *See* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1107 (9th Cir. 1992). Moreover, courts have recognized false endorsement claims brought by plaintiffs, including celebrities, for the unauthorized imitation of their distinctive attributes, where those attributes amount to an unregistered commercial "trademark." *See* Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 205 (2d Cir. 1979) (recognizing claim under § 43(a) because uniform worn by star of X-rated movie was confusingly similar to plaintiff's trademark uniforms, falsely creating impression that plaintiffs "sponsored or otherwise approved the use" of the uniform); Allen v. Men's World Outlet, Inc., 679 F. Supp. 360, 368 (S.D.N.Y. 1988) (celebrity states claim under § 43(a) by showing that advertisement featuring photograph of look-alike falsely represented that advertised products were associated with him); Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 625-26 (S.D.N.Y. 1985) (recognizing celebrity's false endorsement claim under § 43(a) because celebrity has commercial investment in name and face tantamount to interests of trademark holder in distinctive mark).

[26] Legal opposition to registration creates broader recognition of rights because the contours of the rights are legally defined. The practical reality is that an opposition brings about more recognition of an owner's rights because a tribunal has finally decided them in the face of a specific challenge. No such specific clarification occurs for a mark that's merely registered, and there is no publicity surrounding registration like there would be for an opposition or litigation between, say, two ad giants.

[27] "The application shall include specification of the applicant's domicile and citizenship, the goods in connection with which the applicant has a bona fide intention to use the mark, and a drawing of the mark." 15 U.S.C.A. § 1051(2) (West 2002). The USTPO application requires only the name and address of the applicant, a depiction of the mark ("the drawing"), a description of the goods and/or services, an application filing fee, a stated basis for filing, a specimen of the mark in use, and a signature *available at*

the trademark examining attorney is whether MarCus's persona may be perceived as a distinctive signifier of a commercial source (advertising services) to ordinary consumers.[28] The question may be divided into two parts: subject matter protection under the Lanham Act, and validity (or distinctiveness).

There is no explicit subject matter prohibition on the trademark registration of a symbol which happens to be a human being.[29] Under section 43(a) of the Lanham Act, a trademark may consist of any "name, symbol, device or combination thereof" capable of identifying the source of a product or service in interstate commerce.[30] However, the Act's statutory language has not been a bar to the recent registrations of

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http://www.uspto.gov.

Also "An application under § 1(b) or § 44 of the Act, 15 U.S.C. § 1051(b) or § 1126, must be filed by a party who is entitled to use the mark in commerce, and must include a verified statement that the applicant is entitled to use the mark in commerce and that the applicant has a bona fide intention to use the mark in commerce as of the application filing date. 15 U.S.C. §§ 1051(b)(3), 1126(d)(2), 1126(e); 37 C.F.R. § 2.33(b)(2)." TMEP § 1201.00; *see also* TMEP § 1202, Use of Subject Matter as Trademark (citing application of 15 U.S.C.A. § 1127 distinctiveness, functionality, and other standards).

[28] 15 U.S.C.A. §§ 1052(e), (f), 1125(a) (LEXIS through 2004 legislation) (requiring showing of secondary meaning); Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 766 n.4 (1992) ("*Secondary* meaning is used generally to indicate that a mark or dress 'has come through use to be uniquely associated with a specific source.' 'To establish secondary meaning, a manufacturer must show that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.'") (citations omitted); *id.* at 768 ("A trademark is defined in 15 U.S.C. § 1127 as including 'any word, name, symbol, or device or any combination thereof' used by any person 'to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.' In order to be registered, a mark must be capable of distinguishing the applicant's goods from those of others.") (citations omitted).

[29] Indeed, trademarks with humanized features have enjoyed protection for years. *See, e.g.*, Motto Enters., Inc. v. Recusant, Inc., 831 F. Supp. 1491 (W.D. Wash. 1993). The *Recusant* case involved trademark rights in the image and likeness of a well-known volleyball player, Steve Timmons, whose distinctive red hair was cropped in a flat-top style and comprised the graphic to the word mark REDSAND on sports apparel. The defendant clothing manufacturer came up with a competing image for its apparel trademark, RED ERASER, and several instances of actual confusion were found. *Id.* at 1498. After finding that Timmons held trademark rights in his caricature, the court held that a likelihood of confusion existed. *Id.* at 1504. Ironically, Timmons, who described his mark as a "hard core, cool, winner type," objected to a mark that was deliberately created to trade on the popularity — in red — of black male hairstyles. *Id.* at 1495-96; *see also* Goodheart Clothing Co., v. Goodman Enters., Inc., 1988 U.S. Dist. LEXIS 8762 (S.D.N.Y. Aug. 10, 1988) (protecting one-eyed mark with heart-shaped face, nose, and lips); Castle & Cooke, Inc. v. Williams, 496 F.2d 857 (9th Cir. 1974) (protecting humanized bee mark); Planters Nut & Chocolate Co. v. Crown Nut Co., 305 F.2d 916 (C.C. Pa. 1962) (protecting "animated nuts").

[30] 15 U.S.C. § 1125(a)(1) (2000).

color,[31] sound,[32] or smell,[33] none of which falls within even a liberal reading of the Act's categories.[34] Colors, sounds, and smells simply are not words, names, symbols, or devices in any traditional sense, though the interpretations that have permitted their registration — like groundbreaking trade dress decisions before them — recognize that the essence of a trademark is its source-identifying capacity (i.e., its inherent, or secondary, ability to function as a commercial signifier). When the Supreme Court decided that color alone could function as a trademark, it spent little time on any plain-language statutory bar.

> Both the language of the Act and the basic underlying principles of trademark law would seem to include color within the universe of things that can qualify as a trademark. The language of the Lanham Act describes that universe in the broadest of terms. It says that trademarks "include any word, name, symbol, or device, or any combination thereof." § 1127. Since human beings might use as a "symbol" or "device" almost anything at all that is capable of carrying meaning, this language, read literally, is not restrictive.[35]

Assuming MarCus overcomes the subject matter threshold, his primary requirement for registration would be to demonstrate that his mark had sufficient distinctiveness; that is, that the mark is readily identifiable to an appreciable segment of the public as a symbol of source. Distinctiveness analysis, sometimes referred to as a mark's validity, tends (sometimes awkwardly) to proceed according to a five-point continuum first announced by Judge Friendly in *Abercrombie &*

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[31] Qualitex Co. v. Jacobsen Prods. Co., 514 U.S. 159, 162 (1995); *see also In re* Owens-Corning Fiberglas Corp., 774 F.2d 1116 (Fed. Cir. 1985) (allowing registration of color pink for fiberglass insulation). "The jurisprudence under the Lanham Act developed in accordance with the statutory principle that if a mark is capable of being or becoming distinctive of applicant's goods in commerce, then it is capable of serving as a trademark." *Id.* at 1120.

[32] *See In re* Gen. Elec. Broad. Co., 199 U.S.P.Q. (BNA) 560 (T.T.A.B. 1978) (allowing registration of NBC chime sounds); U.S. Trademark Registration No. 2,158,156 issued to MTM Enter., Inc. (May 19, 1998) (allowing registration of cat meowing); U.S. Trademark Registration No. 2,210,506 issued to Edgar Rice Burroughs, Inc. (Dec. 15, 1998) (allowing registration of Tarzan yell).

[33] *In re* Clarke, 17 U.S.P.Q. (BNA) 2d 1238 (T.T.A.B. 1990) (allowing registration of fragrance of Plumeria blossom for thread).

[34] Nor does trade dress, though there is ample case law upholding it. *See, e.g.*, Two Pesos v. Taco Cabana, 505 U.S. 763 (1992) (protecting restaurant decor); Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205 (2000). Trade dress protection addresses the "total impression" of a product's design or packaging. MarCus is not seeking protection for the trade dress of his person, nor for his mark as a source-signifier of goods. The mark represents advertising services.

[35] *Qualitex*, 514 U.S. at 162.

Fitch v. Hunting World, Inc.[36] Judge Friendly's factors test a mark's distinctiveness by considering whether it should be characterized as "generic," for which it receives no federal protection; "descriptive," for which it only receives protection upon a showing that it has also acquired secondary meaning in the minds of the relevant public;[37] "suggestive"; "arbitrary"; or "fanciful." The latter three categories of marks nearly always receive protection.

Under the *Abercrombie & Fitch* test, MarCus's persona would likely be sufficiently distinctive. MarCus's persona cannot be considered generic, because in the context of the market, it expresses a uniqueness of personality that cannot be said for all humans. To call it descriptive would also be inaccurate because his personhood does not instantly describe his unique advertising services. Consumers cannot perceive the precise function of MarCus, LLP, marketing services by MarCus's appearance, voice, or other specific indicia of his persona. At the least, MarCus's mark in himself suggests his peculiar advertising methods and effects. But, while a suggestive mark like Coppertone suggests what the consumer may experience by using the product, MarCus's services may not be so readily identifiable. Nor is the MarCus mark fairly called fanciful in the sense that it is entirely made up. He is no more "made up" or self-invented than any other human being. What is most distinctive about MarCus as a mark is that he has sought arbitrarily to equate his personality with a signifier of commercial source and, as far as the consuming public is concerned, nothing else. Therefore, the MarCus mark is probably arbitrary and presumptively entitled to a finding of validity.[38]

However, these are merely the technical requirements that MarCus must overcome. For the sake of the hypothetical, we may assume he has already done so. The more interesting analysis concerns developments

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[36] *See* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (2d Cir. 1976).

[37] Secondary meaning considerations have figured in at least one important recorded decision involving exclusive trademark rights in a human being's identity. *See* Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013 (C.D. Cal. 1998) (discussing battle over meaning — primary and secondary — of Princess Di's name for charitable organization, "Diana, Princess of Wales Memorial Fund," and defendant goods merchandiser, "Diana, Princess of Wales"). The court doubted whether Di's name's primary descriptive meaning made it "unlikely that her name could acquire secondary meaning, at least in the context of fund-raising for charitable services" submerging the primary. *Id.* at 1044. Without secondary meaning, the claim was denied. *Id.* at 1044-45.

[38] Two Pesos v. Taco Cabana, 505 U.S. 763, 768 (1992) ("The latter three categories of marks [suggestive, arbitrary, or fanciful], because their intrinsic nature serves to identify a particular source of a product, are deemed inherently distinctive and are entitled to protection.").

in both Lanham Act case law and the right of publicity, which over the past two decades have laid the foundation for legal claims to self-commodification.

B. The Lanham Act § 43(a) and Protection of Persona

1. The Lanham Act § 43(a)

Trademark registration of one's persona is only the most explicit way to own a federally protected identity. The process of conferring rights in *unregistered* commercial marks has been underway for years in the guise of section 43(a) false endorsement and false advertising claims brought by celebrities (often accompanied by strong right of publicity claims).[39] To make out a prima facie case, a plaintiff must demonstrate that her identity — name, likeness, voice, identity, or "symbol" — was used in affiliation, connection, or association with the defendant's goods or services or as to plaintiff's participation in the origin, sponsorship, or approval of the defendant's goods or services without plaintiff's consent and in a manner likely to confuse or deceive consumers.[40] Several cases have established that section 43(a) claims can function like a federal right of publicity.[41] However, it may have been the Ninth Circuit's opinion in a voice misappropriation case that clarified how a broad view of the term "symbol" in the Act could make a right of publicity claim nearly equal to that of a trademark.[42] To identify the key dynamics of trademark rights

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[39] There are two bases under section 43(a) for false representation, and they are distinct. The first is false association, concerning false representations about the origins, source, or endorsement of goods or services through the use of another's mark, symbol, or device. This prong is more easily associated with trademark infringement and derives from section 43(a)(1)(A). The other is false advertising, which concerns the false representation of qualities or characteristics of goods made in commercial advertising, and is often associated with the facts of right of publicity cases and derives from section 43(a)(1)(B). *See* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1109-10 (9th Cir. 1992).

[40] *See, e.g.*, Parks v. LaFace Records, 329 F.3d 437, 446 (6th Cir. 2003).

[41] *See* Landham v. Lewis Galoob Toys, Inc., 227 F.3d 619, 626 (6th Cir. 2000); Wendt v. Host Int'l., Inc., 125 F.3d 806 (9th Cir. 1997); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Hoffman v. Capital Cities/ABC, Inc., 33 F. Supp. 2d 867 (C.D. Cal. 1999).

[42] In *Waits*, the court stated:

> Section 43(a) now expressly prohibits, *inter alia*, the use of any symbol or device which is likely to deceive consumers as to the association, sponsorship, or approval of goods or services by another person. Moreover, the legislative history of the 1988 amendments also makes clear that in retaining the statute's original terms "symbol or device" in the definition of "trademark," Congress approved the broad judicial interpretation of these terms to include distinctive

expansion, I examine two other cases — both of which incidentally involve black male celebrities — which demonstrate how such a move continues to facilitate the commodification of identity. For the purpose of supporting MarCus's case, I follow that analysis with less obvious observations about trademark's process of authorization.

In the first decision, *Kareem Abdul-Jabbar v. General Motors*,[43] the Ninth Circuit relied on its opinion in *Waits v. Frito-Lay, Inc.*[44] to go beyond the unfair competition roots of section 43(a)'s false endorsement language and to declare (somewhat hesitantly) the functional equivalent of a human trademark. Abdul-Jabbar filed suit against GMC for using his former name, Lew Alcindor, in a car commercial which ran during the televised 1993 NCAA basketball tournament.[45] Years before, when Abdul-Jabbar played college basketball, he used his given name, and GMC's ad made specific mention of that fact, including recitation of his championship accomplishments and comparing Jabbar's stature to that of the Oldsmobile 88.[46] The court began analyzing the Lanham Act false endorsement claim by stating that "[s]ection 43(a) [as amended in 1988] . . . expressly prohibits, *inter alia*, the use of any symbol or device which is likely to deceive consumers as to the association, sponsorship, or approval of goods or services by another person."[47] According to the court, if it can be deemed a symbol and has the capacity to confuse or deceive consumers, then it may be treated as a trademark.[48] "Symbol" encompasses "other uniquely distinguishing characteristics," and, therefore, may be conceivably the celebrity's name alone or other traits associated with his identity. Here, GMC had used more than Abdul-Jabbar's given name. It also conveyed specific facts about his career that

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> sounds and physical appearance. *See* S. Rep. No. 101-515 at 44, 1988 U.S.C.C.A.N. at 5607. In light of persuasive judicial authority and the subsequent congressional approval of that authority, we conclude that false endorsement claims, including those premised on the unauthorized imitation of an entertainer's distinctive voice, are cognizable under section 43(a).

Waits, 978 F.2d at 1107 (footnotes omitted).

[43] Kareem Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407 (9th Cir. 1996).

[44] *Waits*, 978 F.2d at 1093.

[45] *Kareem Abdul-Jabbar*, 85 F.3d at 409.

[46] *Id.*

[47] *Id.* at 410 (quoting *Waits*, 978 F.2d at 1107).

[48] "Accordingly, we held actionable: [a] false endorsement claim based on the unauthorized use of a celebrity's identity . . . [which] alleges the misuse of a trademark, i.e., a symbol or device such as a visual likeness, vocal imitation, or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff's sponsorship or approval of the product." *Id.* at 410 (quoting *Waits*, 978 F.2d at 1110).

amounted to enough indicia of identity to cause consumer confusion.[49] But, is that sufficient analysis to conclude that Abdul-Jabbar is a human trademark? Perhaps not, at least as the court leaves it; but he can function as one.[50]

In a second, arguably more explicit, attempt to gain trademark protection for a persona, the Seventh Circuit majority looked less favorably on golfer Tiger Woods' (Earl "Tiger" Woods, or "ETW") claims.[51] ETW sued Rick Rush, the self-styled "America's Sports Artist," and his art publisher for using Woods' image in a painting called *The Masters of Augusta* and his name, a registered trademark, in retail materials.[52] According to the facts, Woods' image was actually portrayed in three different poses in the piece, which also included the likenesses of several other golfing greats in a scene commemorating Woods' historic victory at the Masters Tournament in 1997.[53] ETW offered several theories of liability, suing under the Lanham Act for trademark infringement, false advertising, and dilution as well as asserting his Ohio common-law right of publicity.[54] The majority denied ETW relief on all grounds. However, its characterization of ETW's trademark claims is noteworthy.

> Here, ETW claims protection under the Lanham Act for any and all images of Tiger Woods. This is an untenable claim. *ETW asks us, in effect, to constitute Woods himself as a walking, talking trademark.* Images and likenesses of Woods are not protectable as a trademark

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[49] *See id.* at 413.

[50] In a different part of the analysis, for instance, the court finds that, despite changing his given name to a Muslim name, he had not abandoned his name. *Id.* at 411-12. For such analyses, only a trademark may be abandoned. The court's language here is imprecise, however, treating a former name as a mark on the one hand, but as something slightly different on the other:

> While the Lanham Act has been applied to cases alleging appropriation of a celebrity's identity, the abandonment defense has never to our knowledge been applied to a person's name or identity. We decline to stretch the federal law of trademark to encompass such a defense. One's birth name is an integral part of one's identity; it is not bestowed for commercial purposes, nor is it "kept alive" through commercial use. A proper name thus cannot be deemed "abandoned" throughout its possessor's life, despite his failure to use it, or continue to use it, commercially. In other words, an individual's given name, *unlike a trademark*, has a life and a significance quite apart from the commercial realm.

Id. (emphasis supplied).

[51] ETW Corp. v. Jireh Publ'g., Inc. 332 F.3d 915 (6th Cir. 2003).

[52] *Id.* at 918-19.

[53] *Id.* at 918.

[54] *Id.* at 919.

> because they do not perform the trademark function of designation. They do not distinguish and identify the source of goods. They cannot function as a trademark because there are undoubtedly thousands of images and likenesses of Woods taken by countless photographers, and drawn, sketched, or painted by numerous artists, which have been published in many forms of media, and sold and distributed throughout the world.[55]

This probably states too much, and the majority may have been displaying some underlying antipathy for the nature of the claim. In any event, the court held that ETW did not hold trademark rights in all images and likenesses of Woods.[56] In a spirited dissent, at least one justice argued that Woods' image may function as a trademark, provided, for example, that consumers identified him in a specific and familiar pose appropriated by the artist.[57] The case demonstrates the lack of clarity as to whether the Lanham Act protects human personas "like" a trademark or if it is inevitable that the Act will protect human personas "as" trademarks.[58]

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[55] *Id.* at 922 (emphasis added).

[56] Consequently, the court denied ETW's dilution claim on the grounds that there was no trademark to dilute. Applying the *Rogers* test, the court analyzed ETW's section 43(a) false advertising/false endorsement claim together with its right of publicity claim and held that the public interest in free expression outweighed any commercial interest Woods had in his identity.

[57] As the Sixth Circuit said in *ETW*:

> Simply stated, contrary to the majority's contention, the jurisprudence clearly indicates that a person's image or likeness *can* function as a trademark as long as there is evidence demonstrating that the likeness or image was used as a trademark; which is to say, the image can function as a trademark as long as there is evidence of consumer confusion as to the source of the merchandise upon which the image appears.

ETW Corp. v. Jireh Publ'g., Inc. 332 F.3d 915, 941-42 (6th Cir. 2003) (Clay, J., dissenting).

[58] The following typifies the imprecision (or metaphorical description) in the case law:

> It is not necessary for them [OutKast] to make a "trademark" use of Rosa Parks' name in order for her to have a cause of action for false advertising under § 43(a) of the Lanham Act. Rosa Parks clearly has a property interest in her name akin to that of a person holding a trademark. It is beyond question that Parks is a celebrity. . . . We have already established, *supra*, that courts routinely recognize a property right in celebrity identity akin to that of a trademark holder under § 43(a).

Parks v. LaFace Records, 329 F.3d 437, 446-47 (6th Cir. 2003).

2. Perception and Protection

The public's perceptual labor on a mark may affect its protectability as well. Some commentators have suggested that federal protection of a human persona as a trademark — *de jure* self-authorship — may eventually occur through the interplay of the trademark owner's assertion and the public's recognition of the owner's identity as a mark. Consumer perceptions about the particular source that stands behind a product signifier,[59] and even about the nature of corporate behavior, have been part of Lanham Act analysis since at least the Second Circuit decision in *Polaroid v. Polarad*.[60] That decision offered one of the most lasting frameworks for determining the likelihood of consumer confusion in infringement actions, presenting a nonexhaustive list of eight factors for consideration by trial courts.[61] One of those factors, bridging the gap, asks whether consumers may possibly be confused by the presence of the junior user's mark in a different but similar market to the senior user's.[62] If the senior user has demonstrated some plan or willingness to expand into other markets, and provided consumers *expect* such an expansion, then the junior user's presence may cause confusion by suggesting the senior user has already bridged the gap into the new market.[63] This *Polaroid* factor comes very close to protecting property rights in trademarks without much regard for the consumer's interest, so long as a court may assume consumer expectations about what corporate mark holders typically do with their property.[64]

This is but one example of the ways in which consumer knowledge of and expectations about the operation of trademarks may work to expand the scope of such operation. As one critic argues, "People's anticipations of law (however reasonable, ill informed, mythical, or even paranoid)

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[59] Secondary meaning is the main example here.

[60] Polaroid v. Polarad Elecs. Corp., 287 F.2d 492, 496 (2d Cir. 1961), *cert. denied*, 368 U.S. 820 (1961).

[61] *Id.* at 495 (listing eight factors as: "the strength of his mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers. Even this extensive catalogue does not exhaust the possibilities — the court may have to take still other variables into account.") (citations omitted). As of January 21, 2005, LEXIS indicated that 464 cases had followed the *Polaroid v. Polarad* decision.

[62] *Id.*

[63] Arguably, the bridging the gap factor may also work to protect the right of a trademark owner to expand into a related market, even without being able to demonstrate specifically plans to do so.

[64] *See generally* Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain*, 18 COLUM.-VLA J.L. & ARTS 191, 238 (1994).

may actually shape law and the property rights it protects. This is especially true in areas such as trademarks, which . . . are premised upon legal fictions of public meaning and consumer confusion."[65] Thus, if we *believe* a particular commercial personality should own rights against infringement of that persona, the law may evolve to give him such rights.

Keith Aoki links these arguments with the emergence of a self-authorship rationale in trademark law. Recall that trademark law, unlike copyright or patent, does not recognize the efforts of the author or inventor in the romantic sense. A strong mark has no definable origin *per se*, no necessary claim to originality, utility, or aesthetic desirability. Rather, its strength is its marketplace popularity with consumers (i.e., its place in their minds). Yet, as Baudrillard asserts later in this part, a mark's commercial meanings seek to fix themselves on the culture, especially, of course, on its positive connotations. These connotations may be so positive as to dwarf the desirability of the product they represent. For example, consider the popularity of Nike swooshes on types of apparel only remotely associated with the brand's primary inventory. Rochelle Dreyfuss has called this the distinction between "signaling" uses of a mark, on which Lanham Act protection was originally based, and "expressive" uses.[66] Expressive uses give rise to what she calls "surplus value" in the mark, or the value to the consumer "in excess to, or a surplus over, its function as a signal" about the goods.[67] According to Aoki, the surplus value created by expressive uses is the result of a kind of collective labor by consumers upon the mark. That is, "Consumers also become a resource the trademark owner draws on to legitimate her property interest in the mark. The minds of the public are the field in which 'positive connotations' are sown and from which their benefits are reaped by the trademark owner. . . ."[68] In the case of a human trademark, then, the author's assertion of a commercial persona may be corroborated or ratified by consumers who have increasingly grown to assume the existence of such identities, even when they invest that human signifier with some of their own meanings. The fact that self-authorship may involve the public's participation in some of a mark's meaning should not defeat its claim for protection against competitors in the marketplace.

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[65] COOMBE, *supra* note 16, at 9.

[66] Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 401-02 (1990).

[67] *Id.* at 402.

[68] Aoki, *supra* note 64, at 242.

MarCus may proudly assert this self-authorship dynamic as a basis for protecting himself as a trademark. As a trademark, he occupies hybrid status between signaling and expressive use. That much is clear because of the unique market in which his mark operates as a signifier: he sells advertising services, which in turn sell other trademark owners' goods. To his firm's clients, the MarCus persona is a signaling use, distinguishing his look, feel, and methods from other advertising companies. To the public, however, the MarCus persona is also an expressive use of a mark, generating, by his presence in the marketed experience, positive connotations with which they happily identify. As both Aoki and Dreyfuss have suggested, courts may grant protection from competitive harm to the goodwill of the MarCus mark on a "sweat-of-the-brow/reap-what-one-sows" rationale.[69] However, once recognized by courts, as Aoki explains at length, authorial rights in trademarks such as MarCus's will "freeze" the meanings of the sign against competitors:

> Trademarked symbols become heavily imbued with economic and expressive value through extensive advertising. These abstract advertising symbols lack any intrinsic meaning other than that of the specifically "owned" meanings assigned to them by the trademark owner and the electronic media. A situation is created wherein the more thoroughly an advertised mark permeates our private individual and public cultural spaces, the more propertized, propertizable and valuable such a trademarked symbol becomes. Under trademark law, these highly "publicized" and socially created "facts" paradoxically become a trademark owner's "private" property. This analogy to property allows trademark owners to suppress and exclude alternative uses or meanings of such "propertized" marks, even in uses and contexts without danger of consumer confusion — in other words, the trademark owner becomes "author-ized."[70]

The process of authorization and the concomitant extension of property rights in trademark may present many legal problems; we will discuss its normative questions in greater detail later. Brand appeal — and its legal counterpart, trademark validity — is a complicated creation.

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[69] *Id.*; *see also* Dreyfuss, *supra* note 66, at 403-04. Both authors decry the corresponding shrinking without apparent limits of the public domain.

[70] Aoki, *supra* note 64, at 245-46. *One* author has argued that the expansion of trademark protection along with saturation advertising should give rise to a ubiquity defense in the dilution context. *See* Sarah Stadler Nelson, *The Wages of Ubiquity in Trademark Law*, 88 IOWA L. REV. 731, 800 (2003).

Yet, the authorization mechanics discussed in this section generously enrich the case for commodifying a human sign. If MarCus, already a potent product signifier, can achieve valuable consumer associations of his distinctiveness through the public's tendency to create expressive uses of popular marks, he is that much closer to becoming the rare person to whom author-signifier status is federally conferred.

C. The Right of Publicity

Despite MarCus's understandable reluctance to pursue commodification under a right of publicity theory, these common law and state statutory rules set the foundation for Lanham Act protection of celebrity persona. The right of publicity was not explicitly recognized until 1953,[71] and the Supreme Court has ruled on it just once, twenty-four years later.[72] However, since that decision, a variety of forces have converged to popularize such claims, including the increased market value of fame, the increased public obsession with famous people, and the proliferation of consumption outlets for purchasing information and merchandise about popular icons.[73] The expansion of publicity rights beyond name, likeness, or performance to reach voice,[74] characterization,[75] or mere "indicia of identity"[76] has not gone without its critics,[77] as I explore more fully in the next section. Much of that critique

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[71] *See* Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (recognizing common law right in publicity), *cert. denied*, 346 U.S. 816 (1953). The germ of the jurisprudential idea for the right originated in Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[72] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) (identifying right of publicity as proprietary interest in performer's act).

[73] One need only look to the proliferation of magazines and television shows devoted to keeping tabs on our favorite stars, like: People, US Weekly, Entertainment Tonight, Extra, Access Hollywood, and the E! television channel.

[74] *See, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

[75] *See* Wendt v. Host Int'l, Inc., 125 F.3d 806, 812 (9th Cir. 1997); McFarland v. Miller, 14 F.3d 912, 918 (3d Cir. 1994) (finding "Our Gang" character "Spanky" was so identified with person of George McFarland that actor could sue for violation of publicity rights in specific fictional name by which he was known); Carson v. Here's Johnny Portable Toilets, 698 F.2d 831, 837 (6th Cir. 1983) (Defendant's use of catch phrase associated with the celebrity, "there was an appropriation of Carson's identity without using his 'name.'"); *see also* Lugosi v. Universal Pictures, 603 P.2d 425, 429 (Cal. 1979) (en banc).

[76] *See* White v. Samsung, 989 F.2d 1512, 1514 (9th Cir. 1993) (stating that advertisement using robotic impersonation of plaintiff's TV character violates publicity right).

[77] *Id.* (Kozinski, J., dissenting); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 973-76 (10th Cir. 1996); Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 960 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun out of Control*, 45 U. KAN. L. REV. 329 (1997); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81

follows as-yet unsuccessful attempts to federalize the right of publicity by amending the Lanham Act.[78] However, the right of publicity has been added to the Restatement.[79]

The more interesting inquiry for these purposes is not the fact that intellectual property law has rather uncritically enabled increased propertization of the celebrity persona. Instead, it is the nature of that ride down a slippery slope into universal marketability. Specifically, courts have overprotected the asset of celebrity identity, not just the attributes of personhood it may encompass, but the scope of possible harms to it. It is one thing to exploit a marketable celebrity face in an unauthorized advertisement for which a reasonable royalty is an

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CAL. L. REV. 125 (1993); Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 781 (1997); Steven C. Clay, Note, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485 (1994); William M. Heberer III, Comment, *The Overprotection of Celebrity: A Comment on White v. Samsung Electronics America, Inc.*, 22 HOFSTRA L. REV. 729 (1994); Todd J. Rahimi, Comment, *The Power to Control Identity: Limiting a Celebrity's Right to Publicity*, 35 SANTA CLARA L. REV. 725 (1995); Sudakshina Sen, Comment, *Fluency of the Flesh: Perils of an Expanding Right of Publicity*, 59 ALB. L. REV. 739 (1995); Linda J. Stack, Note, *White v. Samsung Electronics America, Inc.'s Expansion of the Right of Publicity: Enriching Celebrities at the Expense of Free Speech*, 89 NW. U. L. REV. 1189 (1995); Fred M. Weiler, Note, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223 (1994).

[78] The entertainment industry and the International Trademark Association ("ITA") have worked to federalize the right in the Trademark section of the Lanham Act. *See* Int'l Trademark Ass'n ("ITA"), *Request for Action by the ITA Board of Directors*, March 3, 1998, *in Board Adopts Right of Publicity Resolution*, INTA BULL., Mar. 15, 1998, at 6 (on file with author) [hereinafter ITA, *Request for Action*]. The ITA published a "request for action" on March 8, 1998. *See id.* The rationale behind an amendment to the Lanham Act including the right of publicity was that "existing state common and statutory law" was "patchwork" and created "uncertainty." *Id.* In 1999, the ABA formed a joint task force on a federal right of publicity.

The effort stalled in part over the difficulty of deciding an unfair competition tort under Trademark law. "But because of its limited wording, federal Lanham Act § 43(a) can never be a federal codification of that expansive category of law called 'unfair competition.'" J.T. McCarthy, "Rights of Publicity and Privacy," in III. FEDERAL LAW at § 6:130 (2003). Since 1994, the ABA has continued to review the problem of what the ITA calls "confusing" and "a patchwork" of state law. *See* Frederic Rodgers, *ABA Delegates' Report, ABA House of Delegates Agenda Items for the Midyear Meeting, Seattle, WA, to be Held February 10-11, 2003*, 32 COLO. LAW. 35 (2003); ITA, *Request for Action*, *supra*. The issue was discussed in Congress in 1998. *See Trademark Anticounterfeiting Act of 1998; Amending the Trademark Act of 1946 with Respect to the Dilution of Famous Marks; Celebrity Imposters and a Federal Right of Publicity; State Commodity Commissions and Product Certification; International Expropriation of Registered Marks, and Patent Extension Review, Hearing on H.R. 3891 and H.R. 3119 Before the Subcomm. on Courts and Intellectual Prop. of the Comm. of the Judiciary*, 105th Cong., 2d Sess. (1998).

[79] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (right of publicity); *id.* cmt. a: "Appropriation of another's identity for use as a trademark or trade name is similarly actionable."

appropriate remedy. It is quite another thing to couple an arguably "economic" right of publicity with a dignitary or privacy interest, thus expanding indefinitely the types of harm that a willing court may enjoin.[80] In fact, one reason states differ in applying the right of publicity is that some are more willing to go beyond the rationale for economic rights, based in Lockean labor theory, and to regard publicity rights as a species of privacy.[81] The difficulties are especially clear in the context of

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[80] The right developed as an economic right, originally derived from the right of privacy. *See* J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 134 (1995). However, courts are also increasingly willing to recognize a personal dimension to publicity rights. *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1107 (9th Cir. 1992) (recognizing singer's interest in maintaining endorsement-free reputation); Hoepker v. Kruger, 200 F. Supp. 2d 340, 349 (S.D.N.Y. 2002) (recognizing unauthorized use of corpse's photograph in sales brochure was violation of right of publicity); Hoffman v. Capital Cities/ABC, Inc., 33 F. Supp. 2d 867, 874 (C.D. Cal. 1999) (recognizing actor's interest in maintaining long-held reputation as well as high market value by refusing commercials); Simeonov v. Tiegs, 602 N.Y.S.2d 1014, 1018 (N.Y.Civ. Ct. 1993) (holding unauthorized bronze scuptures made of supermodel violated her right of publicity).

For formidable arguments in favor of explicit statutory recognition of the right of privacy's "double function," please see Alice Haemmerli, *Who's Who: The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999).

[81] In general, this distinction is sometimes referred to as the California versus New York approach, because the former recognizes the right by statute and at common law whereas the latter codifies the right as privacy protection under its human rights statutes. In light of the case law, this may be an oversimplification. Side by side, the relevant text of the two laws is revealing. N.Y. CIV. RIGHTS LAW §§ 50, 51 (1995) (creating Right of Privacy). Section 51 states:

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without . . . . written consent first obtained . . . may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

Id. § 51.

The Ninth Circuit recently addressed the convergence of California's versions of the current California Civil Code § 3344 ("Use of another's name, voice, signature, photograph, or likeness for advertising or selling or soliciting purposes"):

> California's post-mortem right of publicity statute, in both its former version, California Civil Code § 990(a), and its current version, California Civil Code § 3344.1(a), provides in part that "any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the [decedent's successor or successors in interest], shall be liable

First Amendment defenses. A recent case involving the civil rights icon Rosa Parks illustrates the confusion.

In *Parks v. LaFace Records*,[82] Parks sued a record label under Michigan's common-law right of publicity and Lanham Act section 43(a) (false advertising/endorsement), claiming both common-law interference with business relations and defamation. Parks sought to enjoin the rap group Outkast from using her name as the title of a song seemingly unrelated to her identity as a public figure. Arguably, only the defamation claim expressed the plaintiff's interest with any accuracy; however, the appellate court affirmed the dismissal of both claims. Outkast defended primarily on the grounds that the First Amendment protected its right to use her name. The song's lyrics themselves were devoid of any recognizable reference to Parks other than a single line in the chorus ("Everybody move to the back of the bus"). Indeed, when Parks offered a nonslang "translation" of the chorus, the lyrics revealed little more than late-night, dance club braggadocio.[83] When pressed during discovery about why the band called the song *Rosa Parks*, Outkast made the fatal error of characterizing the name as "symbolic" with no other intended connection to Parks.[84] The Sixth Circuit seized upon this statement and reversed the district court's grant of summary judgment in favor of Outkast.

Parks clearly believed she had the right not to be associated with a boastful rap song, but it is far from intuitive that she had legally protectable rights in her name and the identity it represents to some.[85] Although there was evidence that she had lent her name to a civil rights tribute recording, it is probably a stretch to assert, as the trial court allowed, that her identity has commercial value. Yet, the current interpretations of both Lanham Act and right of publicity claims permit a public figure with a wounded dignitary interest to state a cause of action in which she necessarily presents *herself* as a misappropriated commodity.[86] Parks wears two hats here: posing "like" a trademark

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for any damages sustained by the person or persons injured as a result thereof." It further provides that "[t]he rights recognized under this section are [personal] property rights."

CAL. CIV. CODE § 990(b) (West 1998); CAL. CIV. CODE § 3344.1(b) (West 2002), *quoted in* Cairns v. Franklin Mint Co., 292 F.3d 1139, 1146 (9th Cir. 2002).

[82] Parks v. La Face Records, 329 F.3d 437, 441 (6th Cir. 2003).

[83] *Id.* at 452.

[84] *Id.* at 454.

[85] Parks's stipulated qualities represent "freedom, humanity, dignity and strength." *Id.*

[86] What further confounds about Parks's Lanham Act claim is her assertion that the

under section 43(a), Parks should have control of her market identity against stray meanings, yet by asserting herself as a celebrity enforcing a publicity right, she may also prevent artists from economic free-riding on the goodwill of her name. Intellectual property narratives may, therefore, work to convert weak privacy claims into strong property claims by limiting disputes to market rhetoric.

Allowing such approaches to trump free speech interests moves us closer toward universal marketability. As to the First Amendment defense offered by Outkast and the court's application of *Rogers v. Grimaldi*,[87] a Second Circuit opinion whose test demonstrates the extent to which a categorical analysis may hasten overprotection even in the absence of cognizable harm. *Rogers* asks whether the use of a title has any "artistic relevance" to the underlying work or the use was "simply a disguised commercial advertisement for the sale of goods or services."[88] The Sixth Circuit decided to apply *Rogers* stringently, despite clear indications that Outkast's nontrademark use of Parks's name was fanciful and "symbolic."[89] The artists were, in effect, being silly. The court, however, was not in a humorous mood. Finding no artistic relevance, the court deemed Outkast's egomaniacal ranting in the song and Parks's character antitheses, unconnected, as defendants claimed, by any useful metaphor. Ultimately, according to the court, the First Amendment defense must fail under *Rogers* because the defendants were only using Rosa Parks's name as "a good marketing tool."[90] Outkast failed its implied duty to explain what it meant by "symbol" (a duty it might have avoided entirely had the song been an instrumental).

While clear explanations accommodate public understanding and civil adjudication, they may have little to do with what motivates art that

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title "misleads consumers into believing that the song is *about her* or that she is affiliated with the Defendants, or has sponsored or approved" of the song or the album. *Id.* at 446 (emphasis added). Affiliation, sponsorship, or endorsement may be the essence of such claims, but, the idea that Rosa Parks could sue because consumers were misled into thinking a song was about her, if accepted, would turn her identity into an immutable trademark over which she would expect substantial market control.

[87] Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989). Further demonstrating the fluidity between theories of recovery, the appellate court applied the *Rogers* analysis to both Parks's Lanham Act claim and the right of publicity with little differentiation. However, the court noted that "publicity rights carry a greater danger of impinging on First Amendment rights than do rights associated with false advertising claims." *Parks*, 329 F.3d at 460 (citing *Rogers*, 875 F.2d at 1004).

[88] *Parks*, 329 F.3d at 461 (quoting *Rogers*, 875 F.2d at 1004).

[89] The district court also applied *Rogers* and found artistic relevance between the song and the famous name. Parks v. LaFace Records, 76 F. Supp. 2d 775, 781 (E.D. Mich. 1999).

[90] *Parks*, 329 F.3d at 453.

draws on culture. Nor should they rely on such artistic motivations.[91] For the defendants to have prevailed in *Parks*, the Sixth Circuit stated that Outkast should have connected the title of their song to the lyrics in the manner cited by the Ninth Circuit in the *Mattel v. MCA Records* case, also involving a *Rogers* analysis and the name of an iconic toy.[92] "We expect a title to describe the underlying work, not to identify the producer, and Barbie Girl does just that. . . . As noted, the song is about Barbie and the values Aqua claims she represents."[93] That may be one purpose artists employ in titling their works, but it seems odd that courts would limit artistic expression by adopting such a narrow construction of the law.[94] Understandable as was Parks's perceived invasion of privacy, her victory gave rise to a new asset: a legally authenticated commodification of identity, granted at the expense of artistic freedom. MarCus would be pleased.

D. Critical Commentary and the Ambiguity of Legal Identity

A federal right of publicity might go a long way toward deciding MarCus's legal path to commercial self-authorship, provided that he could register his status.[95] It would not, however, resolve the normative

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[91] Artistic meaning is routinely nebulous and therefore frequently "misleads" or contorts conventional understandings (not surprisingly, Parks submitted 21 affidavits of consumers erroneously assuming the song was about her).

[92] *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901-02 (9th Cir. 2002).

[93] *Id.*

[94] Instead, an analysis based on a balance of artists' rights to free expression on the one hand and a celebrity's desire to maintain a bona fide market in her more particularized persona on the other would have yielded a more understandable result in *Parks*. Outkast is a music group expressing their artistry as music groups do, often with offensive results that do not comport with linear reasoning. Rosa Parks is not in the business of promoting her persona as a freedom-fighting, dignified, strong defender of civil rights (indeed, the idea of a market for such qualities seems antithetical to the qualities themselves); thus, her commercial interest is extremely thin. Parks's *personal* interest in her dignified identity being free from rap lyric exploitation should not be readily cognizable under either the Lanham Act or the right of publicity. Under such laws, she suffers no harm sufficient to override the First Amendment. Her privacy rights against defamation, however, may be a different matter.

[95] In his narrative, MarCus offers several objections to using the right of publicity as the source of exclusive rights in himself. First and doctrinally, it is a less efficient right to enforce. Despite brief efforts to federalize the right, it currently lacks a system of nationwide constructive notice, as trademark registration offers. Further, its existing vagaries of scope from state to state leave open the possibility of loopholes (including, for instance, whether his rights would die with him). Second, it depends on fame, which represents a different kind of dependence on the public's labor. Trademark registration is not without its risks of losing inconstestability, but its meanings are probably more fixed than those attributable to a movie star. Why? Because trademark relies on purer fictions of

questions regarding the boundaries of his legal identity. The problem thus far is the character of the legal critique. Most scholarship criticizing the potential for overprotection and commodification in intellectual property law, though valid, views the problem through an outward, normative lens that focuses on economic rights.[96] For example, one critique, perhaps attempting to break through a little examined consensus about the efficiency of propertizing culture, argues that current trends conflict with the traditional rationales for trademark protection.[97] This, in turn, results in a lack of competition, higher priced goods, higher transaction costs in general, greater legal uncertainty, and, thus, more litigation.[98] Several scholars have focused on the constriction of the public realm and the constraints on important First Amendment freedoms that result from an unrestrained willingness to convert semiotic power into private monopoly.[99] One scholar attacks the Lockean premise by which valuable fame is believed to arise and challenges the law to resist facilitating commercial capture by opportunistic celebrities.[100]

These are all well-founded criticisms of the dangers of legally sanctioned propertization, but they are rendered weak against individuals such as MarCus who would choose to commodify their own

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symbolic representation, the sign and its (intended) commercial meaning, which is a less malleable thing than fame. Finally, and most importantly, under the right of publicity, consumers may not consume the "fraud" at the crux of MarCus's hope for registration: that his status is colorless. For all its disadvantages, at least the right of publicity demands transparency of image. On paper, the trademark application to the PTO, MarCus and his counsel may assert that his representation as a source signifier of distinctive advertising services is race neutral. For many it may be. As a celebrity human enjoying the protection of publicity rights, however, he is, in the eyes of most, a black marketing mogul.

[96] Lemley, *supra* note 16, at 1696-97.

[97] *Id.*

[98] *Id.*

[99] *See generally* COOMBE, *supra* note 16, at 294; GAINES, *supra* note 16, at 84-104 (1991) (analyzing Onassis v. Christian Dior, 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984) and legal suppression of multiple meanings).

[100] *See* Madow, *supra* note 77, at 198-99:

> When a quintessentially "postmodern" (that is, openly and unabashedly derivative) performer like Madonna complains of unauthorized appropriation of her image, she is seeking to have it both ways. Having drawn freely and shamelessly on our culture's image bank, she is trying to halt the free circulation of signs and meanings at just the point that suits her. She is seeking to enforce against others a moral norm that her own self-consciously appropriationist practice openly repudiates. The law need not be party to such contradiction.

Still others critique the logic of publicity rights expansion. *See* Harvey L. Zuckman, *The Ninth Circuit's Invasion of the Tort of Invasion of Privacy*, 11 COMM. L. CONSPECTUS 237 (2003).

identity by law. These outer-directed critiques do not really reach MarCus's inner-directed bargain. That is not to suggest every individual would not suffer a potential threat to an autonomous self where First Amendment freedoms are routinely subordinated to private ownership; she would. Rather, the outward gaze fails to challenge the notion of personhood that authors *itself* in the market. MarCus is still a competitor in that market, still angry, still seeking a kind of freedom there and determined thereby to effect for himself a kind of racial redescription of his material *and* social value in the world. Ironically, the strongest critique of expanding intellectual property laws in this regard is offered by a *proponent* of a federalized right of publicity.

Alice Haemmerli squarely supports MarCus's case, beginning with the assertion that commodification may be a very good thing for individual freedom if publicity law were based on a Kantian system of personhood.[101] Rejecting the labor theory, Haemmerli argues that "[t]he right to control the use of one's image or other objectification of identity is a property right based directly on freedom, autonomy, or personality."[102] Haemmerli's superficially attractive argument has four relevant components. First, the right of publicity, whatever its jurisprudential origins, ought to recognize both economic *and* moral or privacy interests.[103] Second, selfhood is intuitively enhanced, not corrupted, by external objects to which people feel uniquely attached; a manifestation of personal identity should be no different.[104] Third, to the extent that externalized identities exist in the marketplace, the "source" has a better claim to them than anyone else.[105] Finally, and very importantly, there probably is a difference between the self and the commodified self. The latter, therefore, may not cancel out the former.[106] As a normative matter, then, there is much to recommend Haemmerli's

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[101] Haemmerli, *supra* note 80, at 383. Specifically, she writes:

> Commodification is viewed as at once an implicitly terrible fate and a self-inflicted wound. But commodification can also be seen as a choice that an autonomous person may make as long as it does not vitiate his humanity. Once the choice is made, the next question is whether it necessarily entails a relinquishment of morally, as opposed to economically, motivated objections to unauthorized uses. As the rhetorical questions here suggest, I believe the answer to this question is a resounding no.

Id. at 403 n.76.

[102] *Id.* at 421.

[103] *Id.* at 422.

[104] *Id.* at 423-24.

[105] *Id.* at 418.

[106] *Id.* at 427-28.

approach to the right of publicity: it places primary emphasis on human worth and self-determination.[107]

As compelling as Haemmerli's thesis sounds, it seems more of a salve to our hypothetical persona, MarCus, than a persuasive rebuttal to the postmodern-leaning scholars she meant to rebut, especially in regard to First Amendment concerns.[108] It is hard to imagine how a federalized publicity right supported by two important interests — moral and economic — would not result in many more First Amendment balances that decidedly favor the human "source," unless what is deemed "commercial" is interpreted in only the narrowest terms. Further, the thesis presents an active embrace of human commodification, which not only suggests much more humanity for sale (probably at higher market rates), but, if one accepts Radin's analysis,[109] greases the slide into universal commodification. However, Haemmerli correctly emphasizes the distinction between an underlying personhood and an outward personality — a self and a persona. MarCus, as I discuss in the next two parts, counts on that distinction both as a matter of maintaining the racial "fraud" of a colorblind self and in the hope that redescription will only mean that the commodified personality enhances, but does not corrupt, the "real" person. If the commercial persona does even unintended violence or diminution to the real and private person — if commodification of the human can foreseeably lead to either diminished freedom or less "human flourishing" — then the case for human

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[107] It is also a helpful contribution to the effort among scholars to provide coherent philosophical contours to proliferating intellectual property rationales.

[108] Haemmerli's interesting debate with postmodern-influenced scholars seems to come down to her conviction that the expansive, dual-functioning Kantian right of publicity is limited to those exploitations that are "commercial" and that her opponents exaggerate the harms to a public that not only plays a substantial role in creating valuable fame but also needs to use celebrity personas for recoding culture, a kind of speech right. *Id.* at 434-41 (citing work of Madow, Gaines, and Coombe in particular). Several problems are suggested by her analysis, despite her well-intentioned efforts to constrain publicity rights from swallowing less obvious First Amendment concerns. First, she may simply have overlooked the possibility that courts like the Sixth Circuit in *Parks* would more leniently lean toward recognizing a use as commercial. Second, the stifling effect on artistic expression is not a simple matter of claiming First Amendment protection when already well-financed artists like Rick Rush must face down the prohibitive costs of a lawsuit brought by Tiger Woods' lawyers. That is chilling, and a harsher chill remains in the air when celebrities' lawyers rightly believe that the judicial climate is more favorable to their claims. Third, with respect to a discrete public's speech-like needs to "recode," that interest goes completely unrepresented in a legal dispute between a celebrity and a T-shirt mass marketer. Of course the latter loses, but as long as the manufacturer's goods are not clearly expressive, the defense to the cause of action is too narrow to encompass a broader public interest.

[109] *See* analysis *infra* notes 125-33 and accompanying pages.

trademarks is considerably weakened.

The resolution of many such difficulties requires greater clarification of what we mean by identity and whether it is synonymous with "persona." Haemmerli, for instance, approves of the International Trademark Association's broad definition of persona that essentially encompasses externalized aspects of personality, such as name, image, voice, distinctive characteristics, or associated characters.[110] These appear to be "things" that a court could distinguish from the internal self even while, in Haemmerli's view, awarding relief for moral injury to these aspects of the persona. This is not an implausible notion. As another thoughtful commentator has observed, "Nothing stops us from borrowing the intimation that we have a deeper self from modernism, while borrowing the freedom to dress up the self in new personalities from postmodernism."[111] This should be nothing novel or difficult for African-Americans, especially those like MarCus who have been viscerally affected by systematic public condemnations of their external identities while living inside the "real world" of their more private humanity. One is rarely ever who one appears to be. But, a person must choose whether or not to accept that this simultaneous disconnection and reconnection of self and persona poses no threat to self-identity. How one decides probably depends upon what one believes really happens to identity when it is split, and what this means for the identities of others. Before we can explore that important question, we must first take a postmodernist turn into the context of contemporary Western consumption dynamics.[112]

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[110] Alice Haemmerli has suggested amending the Lanham Act to define "persona" as follows:

> Section 45. Persona. The term "persona" means the following or an imitation thereof: the legal name of any natural person or any other name by which a natural person is known to any material segment of the general public; signature; voice; image; distinctive characteristics and personal indicia by which a natural person is immediately identifiable to any material segment of the general public; or a character portrayed by the natural person on stage, in film or television or in live performances or other entertainment media, provided that the character has been created by the natural person and has become so associated with the natural person as to be indistinguishable from the natural person's public image.

Haemmerli, *supra* note 80, at 489.

[111] Malkan, *supra* note 77, at 782.

[112] Like MarCus, Madow and others also point to the consumer context as integral to an understanding of how intellectual property rights function. "The dominance of global entertainment and media conglomerates has instead made popular cultural practice predominantly a matter of *consumption*." Madow, *supra* note 77, at 138.

E. Baudrillard's Prophecies of Consumption Amid "Hyperreality"

The French philosopher and sociologist Jean Baudrillard, beginning in 1968, prophesied specific dynamics between the world of advertising and the contemporary state of intellectual property law. Although not the first postmodernist or poststructuralist thinker to describe cultural patterns in capitalist consumption, Baudrillard has been especially prescient. For example, he saw advertising at the heart of mass society, whereby social organization would increasingly become a function of signifier manipulation and socialization and the popular assimilation of its "codes."

> The object/advertising system constitutes a system of signification but not language, for it lacks an active syntax: it has the simplicity and effectiveness of a code. It does not structure the personality; it designates and classifies it. It does not structure social relations; it demarcates them in a hierarchical repertoire. It is formalized in a universal system of recognition of social statuses: a code of "social standing". . . . [T]he collective function of advertising is to convert us all to the code. Since it is sanctioned by the group the code is moral, and every infraction is more or less charged with guilt. The code is totalitarian; no one escapes it[.][113]

Baudrillard's early discourses track, in different terms, some of the same features of trademark expansion described more recently by legal and cultural studies scholars, such as Dreyfuss's signaling-expressive functions and Aoki's description of positive connotations garnered as surplus value.[114] In that regard, Baudrillard's discussions are particularly useful to this analysis of MarCus's quest for human commodification.

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[113] JEAN BAUDRILLARD, THE SYSTEM OF OBJECTS, *reprinted in* SELECTED WRITINGS 22 (Mark Poster ed., 2001).

[114] In *The System of Objects*, Baudrillard described the development of an object/advertising system. "The [idealist-consumerist philosophy] is based on the substitution of live, conflictual human relationships by a 'personalized' relationship to objects." JEAN BAUDRILLARD, THE SYSTEM OF OBJECTS 187 (James Benedict trans., Verso 1996). Social meanings are policed by products under controlled significations — primarily, the brand. BAUDRILLARD, SYSTEM OF OBJECTS, *supra* note 113, at 20. Furthermore:

> The function of the brand name is to signal the product; its secondary function is to mobilize connotations of affect. . . . This is undoubtedly the most impoverished of languages: full of signification and empty of meaning. It is a language of signals. And the "loyalty" to a brand name is nothing more than the conditioned reflex of a controlled affect.

Id. at 20-21. These "secondary functions" reflect the surplus value of trademarks-brand names that have succeeded in becoming expressive uses. Arguably, not all marks or brands are so capable. But those that do are assisted by the "language of signals." *Id.*

As signifier codes and their incomplete meanings become more universally understood in Western societies, their consumption contributes both to the expansion of trademark law and to the possibility that we may soon see the registration of a human commercial signifier. Consumption, as MarCus also suggested in his narrative, is the precondition. To Baudrillard, it is *"the virtual totality of all objects and messages presently constituted in a more or less coherent discourse.* Consumption, in so far as it is meaningful, is *a systematic act of manipulation of signs."*[115]

The immediate aftermath of the terrorist attacks on New York City and Washington, D.C. supports Baudrillard's claim. As people in those cities attempted to process their tremendous fear and anger over the unprecedented trauma (and economic dislocation), both President George W. Bush and New York Mayor Rudolph Giuliani repeatedly exhorted the public to demonstrate their patriotic support for recovery by shopping as much as possible.[116] Arguably, President Bush and Mayor Giuliani meant to combat chaos in familiar terms and to restore calm to the public and the markets without intentionally advertising for advertisers. Nothing like the horror of September 11, 2001 had ever been meaningful to Americans before. Yet, the instinct to send a clear message of consumption, as the departure point for national healing, shows the extent to which a consumer system permeates our lives. The two men linked its terms to whatever recovery would mean. "[C]onsumption," Baudrillard adds, "is *social labor.*"[117] We do it collectively and are together implicated in it.[118]

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[115] *Id.* at 25 (italics in original).

[116] "People are going about their daily lives, working and shopping . . . . Life in America is going forward . . . . that is the ultimate repudiation of terrorism." George W. Bush, Presidential Address (Nov. 8, 2001), *in Americans Have Responded Magnificently,* BOSTON GLOBE, Nov. 9, 2001, at A37.

"The challenge right now, in the next week or so, is for people to keep repeating, 'Don't be afraid, go about your business. Do the things you're supposed to do and don't let it stop you.' And I think as people get further and further from the event, you can see things coming back to normal." Jonathan Alter, *Rudy Giuliani: "Don't Be Afraid,"* NEWSWEEK, Sept. 25, 2001, at 1 (quoting Rudy Giuliani), *available at* www.newsweek.com (last visited Feb. 25, 2005); *see also* LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 401 (2003); Bruce Horovitz, *Shoppers Splurge for Their Country,* USA TODAY, Oct. 3, 2001, at A.01.

[117] JEAN BAUDRILLARD, THE CONSUMER SOCIETY: MYTHS AND STRUCTURES 84 (Sage trans., 1970) (italics in original).

[118] Madow makes a similar point in a different context. "[T]he consumption of cultural commodities can be, and often is, an active, creative practice, in which the 'consumer' appropriates the product by investing it with (new) meaning." Madow, *supra* note 77, at 140.

In this context, MarCus wishes to become the first human trademark. Yet, as a black man, he believes that his chances of success would be substantially greater if he were to disclaim the racial aspect of his identity. That is, he accepts that his culture, like most cultures, emphasizes race in its code of social meanings. These social meanings are composed of the same spoken and unspoken social ambivalence about race that he and his lawyer believe would cause the PTO examiner to disqualify his trademark application "on its face," so to speak. MarCus is not sure if race is only socially constructed, as many writers assert,[119] but he believes that his legal project requires social *de*-construction of such codes. This task lies at the heart of his redescription through commercial symbolization. Therefore, his colorblind claim must somehow refigure consumer expectations. His signifier must re-sign his race.

Baudrillard would respond that MarCus as signifier must transcend representation and become simulation to be consumed. As MarCus tells us, other well-known blacks have succeeded at this to varying degrees. Tiger Woods' and Michael Jordan's blackness is merely one aspect of their enormous public personas, but it is rarely ever the cultural focal point. Michael Jackson, on the other hand, seems to have failed in effecting this result, perhaps in part by trying to de-racify too hard and too openly, and in part because of public obsession with his physical transformation. The answer may lie in resisting what America's racial code might call "the real." Woods and Jordan are examples of signifiers that painstakingly avoid a conscious embrace of racial representation. As for their intended meanings of themselves as commercial endorsers, they appear to offer a colorless reality, rather than, say, symbols of African-American achievement. Simulation, according to Baudrillard, is the perversion by signs of the real, into a "hyperreality" where references turn in on themselves and where signs without nonsign origins predominate.[120] The work of such de-racializing simulation

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[119] *See, e.g.*, Ian Haney-Lopez, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1, 27-28 (1994):

> [H]uman interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization. The process by which racial meanings arise has been labeled racial formation. In this formulation, race is not a determinant or a residue of some other social phenomenon, but rather stands on its own as an amalgamation of competing societal forces.

Id.

[120] JEAN BAUDRILLARD, SIMULACRA AND SIMULATIONS 1 (Sheilia Faria Glaser trans., 1981).

would be performed through marketplace imagery and saturation, always lacking in familiar racial reference points, until such references disappear altogether.[121]

"To dissimulate is to pretend not to have what one has," Baudrillard wrote. "To simulate is to feign to have what one doesn't have."[122] On the matter of his colorblind trademark status, MarCus is clearly dissimulating race. Therein lies the "fraud" of which he speaks. It is a personal fraud because he privately admits a proud racial consciousness animated by racist treatment, but publicly and deliberately ignores this in the service of commodification.[123] It may also be a fraud in the sense that it is a direct manipulation of signs in order to achieve greater public consumption — an intentional misrepresentation of his racial status in order to "deceive" the trademark examiner and reach a consumer audience inebriated by advertised fantasies of real life.

Baudrillard's apparent neutrality obscures this particular perversion in his discussion of hyperreal dynamics. He admits that what is occurring here is partly social indoctrination and social control, but he reaches no normative conclusion about the kind of society it produces.[124] It is

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[121] By this analysis, Woods and Jordan enter a kind of consumption space where their race is re-signed:

> By this crossing into a space whose curvature is no longer that of the real, nor that of truth, the age of simulation thus begins with a liquidation of all referentials — worse: by their artificial resurrection in systems of signs, which are more ductile material than meaning, in that they lend themselves to all systems of equivalence, all binary oppositions and all combinatory algebra.

Id. at 2.

That space arguably already exists in commonplace to television advertising. Take, as a somewhat humorous example, the plethora of automobile, beer, and other ads that consistently portray racially integrated settings and social relationships. It is a regular feature of TV advertising that the viewer enters the home of a white host and sees that one-out-of-the four invited couples is black. The two guys in the twenty-something's SUV are black and white (if there are four people, one is usually black). The group that goes out partying over a few beers is nearly always mixed. One-of-the-four women talking about feminine hygiene is typically black. One-out-of-three kids happily eating children's fast food meals is black. And so on, even though most social science research still demonstrates that as the nation becomes even more suburbanized, racial integration diminishes. *See generally* DOUGLASS MASSEY & NANCY DENTON, AMERICAN APARTHEID (Harvard 1993). Further, the author of the present Article believes that the proportionality of racial togetherness depicted in TV advertising is also well out of step with demographic proportions, but, not surprisingly, in step with *consumer* demographics.

[122] BAUDRILLARD, SIMULACRA AND SIMULATIONS, *supra* note 120, at 3.

[123] BAUDRILLARD, THE SYSTEM OF OBJECTS, *supra* note 113, at 20.

[124] In the late 1960s, Baudrillard believed that "The code produces an illusion of transparency, an illusion of readable social relations, behind which the real structure of production and real social relationships remain illegible." BAUDRILLARD, THE SYSTEM OF

merely the field of play, as if the dynamics of social life and commerce constitute a game. MarCus, like anyone, is free to reject race as an essential ingredient of his public persona. Provided that it follows some principle and causes no identifiable injury, he may arguably do so by any means necessary. But, when the means is a monopoly on product signifiers under the protection of federal laws, we are faced with the questions unanswered at the close of the preceding section. How do we constructively characterize just what is being sold? And, if it amounts to integral aspects of personhood, how is it ever reclaimed? What are the risks to one's own identity and the conditions produced which structure the identities of others? These questions form the framework of the next two parts.

III. COMMODIFICATION: RADIN, HEGEL, RACE, AND THE PROBLEM OF TRANSITION

Intellectual property lends itself to the language of commodification, if it is not already a language itself. MarCus has seized it for the dual benefit of revenge by monopoly and self-actualizing freedom. The terms of trademark law require that he signify his persona in distinctive and consistent ways across the markets he services, rewarding him with fixed and lucrative meanings which only he may own and intend. Whatever abstract injury to his personhood this may cause, he believes, would be amply compensated by having pulled off his transformation amidst a culture prone to regard him as less than he is. This culture allows such a transformation because of the transreferential state of consumptive hyperreality in which we live and the ideal of colorblindness to which we nominally aspire. This cultural scenario provides an Eden for commodification, and few scholars have written as much or as well about the subject than the legal philosopher Margaret Radin. Radin's analyses raise profound concerns about this manipulation of commerce and personality, beginning, perhaps, with its indulgence of implicit market rhetoric. "The rhetoric of commodification has led us into an unreflective use of market characterizations and comparisons for almost everything people may value, and hence into an inferior conception of

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OBJECTS, *supra* note 114 at 195-96. In 1970, he believed that consumption heralded a kind of producer sovereignty. JEAN BAUDRILLARD, THE CONSUMER SOCIETY, *reprinted in* SELECTED WRITINGS 42 (Mark Poster ed., 2001). Masked, "[T]he manufacturers control behavior, as well as direct and model social attitudes and needs. In its tendencies at least, this is a total dictatorship by the sector of production." *Id.* Consumption "is a complete system of values, with all that the term implies concerning group integration and social control." *Id.* at 52. But, his later writing abandons such critiques.

personhood."[125]

Many of Radin's considerable arguments are asserted against the "universal commodification" proffered by Richard Posner and other law and economics theorists, an end she sees as threatening to the notion of "human flourishing." At the opposite extreme of universal commodification is total market inalienability under which certain "goods" are deemed nonsalable and removed entirely from market transactions.[126] Her own view, called "interim pluralism," is one of incomplete commodification during which some things would be freely alienable while others would not. The conclusion is both moral and pragmatic. It acknowledges the "non-ideal circumstances" under which our consumptive habits are not easily altered, and that these circumstances produce an "inferior conception of human flourishing."[127] Interim pluralism recognizes that these forces must be counteracted lest Baudrillard's universalized codes of consumption facilitate blind acceptance of universal commodification, "transform[ing] the texture of the human world."[128]

Unlike Baudrillard's emphasis on signs and trademark law's emphasis on commercial signifiers, Radin focuses her critique on market rhetoric. But, the outcomes may be the same:

> Market rhetoric, the rhetoric of alienability of all "goods," is also the rhetoric of alienation of ourselves from what we can be as persons. One way to see how universal market rhetoric does violence to our conception of human flourishing is to consider its view of personhood. In our understanding of personhood we are committed to an ideal of individual uniqueness that does not cohere with the idea that each person's attributes are fungible, that they have a monetary equivalent, and that they can be traded off against those of other people. Universal market rhetoric transforms our world of concrete persons, whose uniqueness and individuality is

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[125] Radin, *supra* note 1, at 1936.

Note on Radin sources: Many of the arguments Professor Radin first explored in the above article, as well as others, were later duplicated or expanded upon in a book entitled *Contested Commodities* (1996). The reader may note a certain fluid movement back and forth between the sources based solely on the relevance of the way Professor Radin framed a particular point in a different context. MARGARET JANE RADIN, CONTESTED COMMODITIES (1996).

[126] Radin, *supra* note 1, at 1855. "When something is noncommodifiable, market trading is a disallowed form of social organization and allocation. We place that thing beyond supply and demand pricing, brokerage and arbitrage, advertising and marketing, stockpiling, speculation, and valuation in terms of the opportunity cost of production." *Id.*

[127] *Id.* at 1903.

[128] *Id.* at 1884.

> expressed in specific personal attributes, into a world of disembodied, fungible, attribute-less entities possessing a wealth of alienable, severable "objects." This rhetoric reduces the conception of a person to an abstract, fungible unit with no individuating characteristics.[129]

While the tone of Radin's analysis suggests that she is MarCus's defender (e.g., the workplace racism he claims to have experienced is prima facie objectification and denial of individual uniqueness), it is, nevertheless, hard to imagine a hypothesis more repugnant to her market inalienability position than his quest for human trademark status, colorblind or not. Of the three scenarios she addresses — surrogacy, baby-selling, and prostitution — prostitution seems most closely analogous to MarCus's career objective. Yet, the tone of his narrative suggests that the comparison to prostitution (for which Radin would grant incomplete noncommodification) is repugnant to MarCus. Radin's answer to the questions posed at the end of the last part is that such a move through trademark law would sell inferior conceptions of personhood and morally impoverished modes of human flourishing from which society could not easily retreat. Her analysis relies primarily on ideas of fungibility, freedom, and context. Through each, MarCus's rejoinder relies on the protective architecture of trademark law and a more forceful assertion of the difference racial identity makes. This reveals, I believe, that the problem with Radin's analysis is not that it is wrong, but that it is unconvincing. The impasse may turn on how best to resolve the problem of transition.

A. Fungibility

Radin's interim pluralist position clearly opposes the fungibility rendered by commodification of things she regards as important to personhood. If market rhetoric is capable of transforming concrete individuals into "disembodied, fungible, attribute-less entities,"[130] as the long quote above indicates, surely the registration, exploitation, and legal defense of a commodified persona is such a transformation. An example demonstrates Radin's critique. Imagine a celebrity endorser of a specific product who, over enough time, through commercial exposure and the abandonment of his celebrity career, could become a registered trademark of the company's products. The celebrity becomes a mere

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[129] *Id.* at 1884-85 (footnotes omitted).

[130] Radin, *supra* note 1, at 1884-85.

celebrity endorser, fungible in the common trade of such pitchmen. By abandoning the career for which he first garnered fame, he loses his personal attributes and assumes (in an almost disembodied form) the attributes of the products with which the public now identifies him. Before commodification, the celebrity had unlimited potential for personal growth. However, having forsaken his potential in the pursuit of the market objectives of the trademark owner-manufacturer, we might say that he has prostituted his identity for a market persona. Or, as Radin argued, "Systematically conceiving of personal attributes as fungible objects is threatening to personhood, because it detaches from the person that which is integral to the person."[131]

But, MarCus (or his lawyer) might argue that trademark law works to protect his particular identity differently. Though he may serve as the pitchman for some advertised products, he is essentially the pitch itself. His licensed identity as a trademark roams the market, identifiable as a signifier of its own source rather than of the particular product he represents in a particular ad. That ability to roam, yet remain commercially distinctive, is a unique attribute which the Lanham Act would deny to more commonplace signifiers. While the hypothetical pitchman trademark always risks being perceived as generic (another nondistinct endorser), MarCus *must* maintain his distinctiveness or risk cancellation of his mark.[132] He achieves that by consistently saturating the marketplace with his individuating characteristics. MarCus must expend tremendous amounts of time and energy to maintain his signifier status in the market. But, the creative costs are outweighed by the benefits to MarCus, who experiences a sense of flourishing in his professional self due to increased industry recognition. Further, the reward for distinctiveness is incontestability and, thus, federally enforceable rights in the exclusive use of himself, with constructive notice across the nation.[133] Quite unlike the prostitute, federal law protects him from imitators of his unique services.

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[131] *Id.* at 1881.

[132] *See* 15 U.S.C.A. § 1127 (West 2000) (defining abandonment of mark); *see also* King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577 (2d Cir. 1963) (showing mark falling into public domain by losing its distinctiveness); McCarthy, *supra* note 78, at 136 (defining distinctiveness in right of publicity as "the elements . . . geometrically, . . . [in] totality . . . [show a] . . . distinctive and widely recognizable . . . [persona that] point[s] to the identity of only one person.")

[133] *See* 15 U.S.C.A. §§ 1065, 1115(b) (West 2002) (regarding incontestability); *see also* 15 U.S.C.A. § 1052 (West 2002) (regarding distinctiveness and statutory standards); Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 205 (1985) (showing incontestability can be used to enjoin infringement); McCarthy, *supra* note 78, at 141 (justifying reward for maintaining distinctiveness in right of publicity).

B. Hegelian Freedom and Crossing the Subject/Object Border

Radin further argues that commodification of the person wreaks a certain havoc with liberal notions of freedom, justifying market-inalienability of things personal.[134]

> Another way to see how universal market rhetoric does violence to our conception of human flourishing is to consider its view of freedom. Market rhetoric invites us to see the person as a self-interested maximizer in all respects. Freedom or autonomy, therefore, is seen as individual control over how to maximize one's overall gains. In the extreme, the ideal of freedom is achieved through buying and selling commodified objects in order to maximize monetizable wealth.[135]

This assertion implicates Hegel for two reasons. First, MarCus's position borrows heavily from Hegel's concept of freedom, though, in order to forge his own freedom through self-objectification, MarCus must reinterpret the effect of crossing the border between subject and object. Second, Radin argues that, though Hegel did not advocate universal commodification, contradictions contained in *The Philosophy of Right* lead to it.[136]

MarCus's quest relies upon a Hegelian view of freedom.[137] Indeed, becoming master of himself, licensor of aspects of his personhood, and owner of his commercial persona are the keys to his redescription through intellectual property law and the markets it supports. Both Kant and Hegel believed that private property was necessary to actualizing the will and, therefore, was a precondition to freedom. MarCus sees himself as *performing* a kind of freedom. Both Kant and Hegel employed a subject/object (i.e., person/thing) dichotomy, distinguishing initially between those things that are alienable as property because they are external and those that are inalienable as property because they are internal, containing aspects of human will and what Radin calls "substantive characteristics" of personality.[138] This, too, MarCus accepts, at least to the extent that he believes the commodification of his personality through trademark protection and market exploitation

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[134] Radin, *supra* note 1, at 1906.

[135] *Id.* at 1885 (citations omitted).

[136] RADIN, CONTESTED COMMODITIES, *supra* note 125, at 39.

[137] Thus, MarCus takes necessary issue with the quote from Kant that begins this Article.

[138] Radin, *supra* note 1, at 1892-93; *see also* GEORG WILHEM HEGEL, THE PHILOSOPHY OF RIGHT (T.M. Knox trans., 1952) [hereinafter THE PHILOSOPHY OF RIGHT].

would leave much of his private consciousness unknown to the public and untouched by the market.

Radin looks to Hegel's *The Philosophy of Right* and finds that its contradictions take Hegel down the path toward universal commodification. Radin begins her inquiry with this question: "Why is it that personhood cannot be objectified while at the same time personhood requires objectification (in things)?"[139] Radin argues that this apparent contradiction in Hegel's thinking creates ambiguities which cause, in essence, a slippery slope toward universal commodification.[140] In the case MarCus presents, the answer lies in re-reading that ambiguity, especially the transcendence of one's personality through one's labor, the qualified joining of personality (subject) and its marketable signifier (object) in the contemporary light of freedom.

The answer begins with the person, "a unit of freedom aware of its sheer independence."[141] Hegel described three moments in the development of personality. The first consists of an abstract, universalized will — "[t]he pure thought of oneself."[142] In the second moment comes differentiation by the ego, or particularization and determination. "Through this positing of itself as something determinate, the ego steps in principle into determinate existence."[143] The two need each other, and their necessary union takes place in Hegel's third moment.[144] The third moment also suggests a struggle as well as unification. "Personality is that which struggles to lift itself above this restriction and to give itself reality, or in other words to claim the external world as its own."[145]

Propertization is also essential to Hegel's notion of personhood. As a subject, a person's will is actualized by its projection into an external object, such as a field of corn, a work of art, or a trademark.[146] This

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[139] RADIN, CONTESTED COMMODITIES, *supra* note 125, at 40. She puts it slightly differently in "Market-Inalienability": "Exactly what items are permanently 'inside the subject and incapable of objectification?'" Radin, *supra* note 1, at 1896.

[140] "Without the bright line, arguments delineating the market realm on the basis of the subject/object distinction lose their force." RADIN, CONTESTED COMMODITIES, *supra* note 125, at 40.

[141] THE PHILOSOPHY OF RIGHT, *supra* note 138, at 120 ¶ 35.

[142] *Id.* at 13 ¶ 5. To stop here is Hegel's concept of negative freedom, which he describes like a voracious id.

[143] *Id.* at 13 ¶ 6.

[144] This is because "in any activity, whether of thinking or willing, both moments are present." *See id.* at 116 ¶ 4.

[145] *Id.* at 21 ¶ 39.

[146] "A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny

connection, even, at times, a transcendence between subject and object during the physical embodiment of personality through propertization, has clear implications for individual freedom.[147] "[T]he true position is that, from the standpoint of freedom, property is the first embodiment of freedom and so is in itself a substantive end."[148] Finally, there is an objectified personality yearning to be free. "Personality is that which struggles to lift itself above [the] restriction [of being only subjective] and to give itself reality, or in other words to claim that external world as its own."[149]

This surely seems accurate, as a simple, if not simplistic, illustration shows. Anyone who has observed a toddler navigate her world knows that a critical activity in the almost innate drive toward personality development is searching for and grasping any and every object she can find. Her eyes constantly roam the landscape for objects to hold, and, once grasped, she invests her will in them, letting go only when she is ready. It is rarely the objects themselves that matter (individually, they seem to attract no lasting desire) so much as the fact that she is now, on her own for the first time, able to externalize her self, to take possession of objects and thereby make them hers. The exercise is repeated so often that the toddler may lose consciousness of the object she carries, sometimes for hours. In so doing, she becomes a little more and experiences a nascent freedom from a life that only weeks or months ago was sedentary, passive, and subject mainly to the wills of caregivers. Yet, this common human developmental activity is not purely Hegelian, Radin might argue, because the toddler's personality will mature into a clear understanding that she may invest her will into the object and she may own and possess it, but she will (and must) never *become* the object. "If the person/thing distinction is not a sharp divide, neither is inalienability/alienability."[150] Confusing oneself with one's objects leads to universal commodification and an inferior conception of human flourishing. Expressed here as a problem of moral line-drawing, the issue remains unresolved: why should MarCus's claim to trademark objectification and self-ownership not constitute a transcendence of the

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and soul from his will. This is the absolute right of appropriation which man has over all 'things.'" *Id.* at 23 ¶ 44.

[147] "But I as free will am an object to myself in what I possess and thereby also for the first time am an actual will, and this is the aspect which constitutes the category of *property*, the true and right factor in possession." *Id.* at 23 ¶ 45 (emphasis in original).

[148] *Id.* at 23 ¶ 45.

[149] *Id.* at ¶ 39. *See supra* note 136.

[150] RADIN, CONTESTED COMMODITIES, *supra* note 125, at 40.

subject/object boundary and result in his own human flourishing?

C. *Context*

Again, race complicates things. MarCus would have been a slave when Hegel wrote, and to be sure, the meanings of freedom to him would have been somewhat different. The question, therefore, demands context. MarCus regards his objective as "liberation." Indeed, the undertaking constitutes an act of negative liberty — the ability to manifest himself as an exclusive signifier without interference or infringement and the autonomy to "just be" as he chooses. That his choice may also represent a degree of racial "fraud" and may thereby open him to criticism does not undermine its character as a subjective pursuit of individuation. His narrative describes how, before reaching his novel decision, he had internalized liberal notions of freedom as a creative person in his industry only to feel devalued in his personhood by discrimination. His resulting advertising methodology may fairly be described as an approach committed to freeing his medium of freedom-reducing conventions. His success is a testament to his gamble to be different. His revenge upon his advertising industry rivals is, in his mind, part business, part race. The racial part is the primary motivation to take the step beyond mere business success and to become a trademark. Even the manipulation of colorblindness, an idea he neither authored nor seemed to believe in, could be seen as a freedom-enhancing effort to own the meaning of the social constructs which, in the wrong hands, are capable of diluting his special differences as a black entrepreneur. Finally, if for some reason his experience with trademark status is not to his liking, MarCus has the legal freedom to abandon his mark and remain an ordinary person.[151]

Assuming Hegel accounted for more overlap, even ambiguity, in the transition between "substantive characteristics" merging with and sharing the qualities of objects, MarCus would argue that the commodification of his personality through trademark is neither bad nor part of a slide toward universal commodification. This is because, in his view, the distinction between person and thing, which Radin calls blurry, actually remains clear. Propertizing aspects of MarCus's personality by willing his way to trademark status is not the same as putting his whole personhood up for sale.[152] To put it differently, what

[151] *See* 15 U.S.C. § 1127 (2000) (defining abandonment of mark).

[152] As Hegel explained in describing substantive characteristics, "Such characteristics are my personality as such, my universal freedom of will, my ethical life, my religion."

may be a deliberate alienation of personality in market terms does not simultaneously work an alienation of the person in psychic terms.[153] Why not? Because neither MarCus nor his market signifier is introducing into the market anything more than a superficial (and arguably fraudulent) symbol of his "self." The superficial symbol is enough, provided that MarCus remains hard at work on the private business of personhood apart from advertising.

> The right to what is in essence inalienable is imprescriptible, since the act whereby I take possession of my personality, of my substantive essence, and make myself a responsible being, capable of possessing rights and with a moral and religious life, takes away from these characteristics of mine just that externality which alone made them capable of passing into the possession of someone else.[154]

This may assume a compartmentalization of one's moral and spiritual life that is unconvincing to some.[155] Of course, MarCus does not have to square his quest with Hegel, nor argue that in doing so he demonstrates one path by which Hegel may be read as not necessarily espousing universal commodification while allowing commodification of one's personality. The problem for anticommodifiers and evolutionary pluralists alike is that MarCus's attainment of "freedom" through commodification looks a lot like Radin's notion of human flourishing.

Yet, Radin's arguments fail to adequately appreciate the almost revolutionary or subversive character of MarCus and his quest regarding the concept of human flourishing. A recurring quality of African-American semiotic tradition and vernacular is to turn the oppressor's tricks back upon him, to signify a false sense of inferiority that deludes the oppressor into a confirmed sense of superiority. As Patricia Williams wrote, in a different context, "[T]he theft of one's own body is a kind of trickster's inversion of one's life reduced to a chattel status."[156] Historically, direct approaches have rarely worked well for black people.

THE PHILOSOPHY OF RIGHT, *supra* note 135, at 29 ¶ 66.

[153] Hegel writes: "Examples of the alienation of personality are slavery, serfdom, disqualification from holding property, and so forth." *Id.* at 29 ¶ 66. Even these types of categories do not seem to encompass the propertization of personality through trademark.

[154] THE PHILOSOPHY OF RIGHT, *supra* note 138, at 29 ¶ 66.

[155] At a minimum, MarCus would have to try to insulate himself from very public foibles that could sully his image and thereby tarnish or detract from the selling power of his mark.

[156] Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG.L. REV. 913, 919 (1994).

Degrading as it was, by the false front and "y'assa boss" theatrics of decades ago, the "perpetrating" black subordinate successfully adapted in order to protect her autonomous personality from constant physical and psychological attack. The past is mostly different by degree, but what joins it now is *the importance of manipulating signs.* Further, the idea that the descendent of slaves could one day quite literally own himself would be the purest irony. Here, the freedom is in the fraud.

D. The Problem of Transition

Yet, the fraud is not necessarily so harmless or easy to contain. One problem with MarCus's rejoinder is its self-centeredness at the expense of the whole. Of course MarCus will experience ego satisfaction if his trademark is deemed a strong and distinctive manifestation of his labor and ingenuity, as well as from the sheer financial wealth in owning a legally protectable asset in himself. But, the turn would represent a profound expansion of trademark rights, possibly perverting the system of trade regulation the Lanham Act was enacted to provide.[157] The consequences of using the Lanham Act to protect racial signifier identities may preclude other uses of racial signifiers in the marketplace, thus overprotecting MarCus and contracting the public domain. The criticism here reflects the concerns voiced in the dissent by Judge Kozinski in *White v. Samsung*: "Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain."[158]

Even if such expansion concerns prove overstated, MarCus's freedom to commodify himself will undoubtedly impinge on similar freedoms for others. It will put into the hands of a relative few the ability to define themselves alone publicly and, as such definitions saturate hyperreality,

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[157] "Purpose of this chapter is to protect public from confusing and deceptive trademarks and to provide security against misappropriation for trademark owners who have invested resources in presenting their products to the public and exploiting whatever goodwill the merits of their products warrant." 15 U.S.C. § 1127 (2000).

"The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations." *Id.*

[158] White v. Samsung Elec. Am. Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinsky, J., dissenting).

fix racial meanings against alternative signifiers. Because the trademark system is not a free marketplace of ideas, locking up racial meanings necessarily constrains other personas from truly free expression. As the system moves toward universal commodification of things personal, those people unable to harness the immense financial resources MarCus possesses will find their freedoms eroding.[159] Furthermore, given the expanding protections for "famous" marks under the Lanham Act's dilution provision,[160] MarCus could aggressively seek to enjoin dissenting voices whose positions possibly "tarnish" his established commercial meanings. That MarCus roots his freedom quest in deliberately unspoken racial terms does not save it from wreaking moral mayhem.

Radin is not without some response to the subtext of a case like this. She readily acknowledges non-ideal circumstances such as the reality of historically sedimented power inequalities. "In that world it may sometimes be better to commodify incompletely than not to commodify at all."[161] Hence, she occupies the position of interim pluralist, recognizing that commodification and human flourishing exist in a moving context.

> [T]he evolutionary approach, interim pluralism, recognizes the necessity of working within existing market structures of capitalism to achieve universal noncommodifcation . . . [Together with revolutionary pluralism, the] two approaches exemplify a pervasive dilemma for social progress: whether and how existing conceptions and structures, such as commodification, can be used now to ensure they will no longer be used in some better future. This is the problem of transition.[162]

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[159] Further, it is difficult to imagine that MarCus, isolated, billionaire ad mogul, can represent black personhood in the messianic way he describes. He ceases to have much in common with anybody.

[160] 15 U.S.C. § 1125(c) (2000).

[161] Radin, *supra* note 1, at 1903.

[162] *Id.* at 1875 (footnotes omitted). A note of caveat: this may not reflect a full Hegelian understanding in the strictest, philosophical sense, but the analogies are instructive. For example, in the *Philosophy of Right* from which so much of this analysis comes, Hegel's difficult descriptions of the three moments of the will are themselves the basis for his characterizations of ethical life. Thus, in the first moment's abstract, universal will is equated with "family," the second moment, particularization, is the basis for his idea of "civil society," and the unity of both, the third moment, is associated with the ultimate freedom, the "state." THE PHILOSOPHY OF RIGHT, *supra* note 138, at 20 ¶ 33. The analysis here borrows from these concepts for a more individualistic purpose and, as such, insufficiently represents the broader implications of Hegel's thought, including his notion of freedom.

Depending on the dialectic of forces working one way or another on commodification, particularly in the realm of intellectual property law, the problem of transition may present a satisfactory response to the differences MarCus asserts in his quest compared to others. It certainly recognizes the complexities he raises without assuming to offer absolute truths. While all of this seems pragmatic, it nonetheless promotes commodification trends already underway in our laws and culture rather than a transition to something else. The market is left to resolve the issue of whether an advertising mogul should be the appropriate first case for human trademark status and the social "messiah" who will use his market power to support positive outcomes beyond himself, or whether, as a normative matter, we as a society would be better off without such a savior. Universal commodification may not be the inevitable result of a victory for MarCus, yet it is not clear that he particularly cares if it is. Therefore, I believe the strongest arguments against the quest for trademark status challenge both his implicit belief that registration poses no psychic constraints on him as well as his assumptions about colorblindness. These beliefs are the subject of the next part.

IV. JAMES BALDWIN AND THE MYTH OF REDESCRIPTION BY SELF-AUTHORED COMMODIFICATION

Some conclusions that rebut MarCus's quest for trademark status have arisen implicitly within the discussion thus far, and it is worth discussing them before continuing to the larger, race-implicating rejoinder. The reasons run from the legal to the normative, and on to the personal. First, as a legal matter, the expansion of both trademark and rights of publicity has a clearly negative effect upon the size and vitality of the public domain. This is especially true as the culture draws more and broader meanings from entertainment media, advertising, and other forms of popular culture. Together with an increasingly lax concern for preserving First Amendment freedoms, courts have allowed intellectual property law to become an enabler of increased propertization for no consistent reason. That is, the often ambiguous opinions granting enlarged private property rights to claimants rest on no clear doctrinal

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Another problem acknowledged but not resolved here is that Hegel, following Kant, did not conceive of the exercise of the will as the same as the exercise of desire or individual preference (though for Hegel they are at least related in intelligence). Try as MarCus may to assert otherwise, his will seems entirely bound up with his desires, which again could destabilize his notion of freedom.

footing (e.g., Lockean labor; sweat-of-the-brow; anti-free-riding; efficient resource allocation; fundamental fairness; privacy). Indeed, these opinions frequently conflate traditional trademark rationales, such as the prevention of consumer confusion or maintaining a deception-free marketplace. All that is clear, perhaps, is that the ambiguities tend to favor claims that seek monopoly commodification of some sort or another.

Second, and related to the problem of exclusive rights, is the damage to others or collective harms caused by short-sighted grants of exclusive control. Despite his messianic claim to protect black people from stereotyping, MarCus gets for himself something that will be decidedly more difficult for any other black person to get. Moreover, becoming a rare (black) human trademark reinforces some of the distributive harms associated with commodification in general. As Michael Madow points out, market capture raises the price of endorsed or trademarked merchandise, much of which is popular among teenagers and poor people. Thus, higher prices reinforce current trends in wealth inequality by filtering more revenue upward while draining wealth disproportionately from those consumers with the fewest resources.[163]

From a normative standpoint, and a more introspective gaze, MarCus, or any candidate for human trademark protection, bears the risk that his externalized persona may intrude upon his "real" or underlying self. The ambiguities and contradictions of a postmodern culture notwithstanding, trademark law itself is demanding. The distinctiveness of a human trademark relies upon consumer perception and valorization. Its strength is gauged by stark market measures (such as sales volume and contracts for services), not merely market rhetoric. Even if the psychic weight of image management does not eventually diminish the sense of freedom MarCus enjoys, the pressure to please a fickle public (or effective pressure from competitors) ultimately may devalue the asset in a version of fleeting fame.

Perhaps most importantly, however, trademark law prevents MarCus from *changing* himself as a valid signifier. If he alters his fixed meanings in any substantial way, he risks diluting public associations with his services, thereby eliminating some or all of the traditional rationales for trademark protection. This, in turn, devalues his hard-earned goodwill. If his persona changes, he may slip toward abandonment, even though

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[163] Madow further argues that, with respect to the right of publicity, overprotection may result in "the disparate impact the right of publicity may have on the motivations and career aspirations, and hence life-chances, of the members of certain minority groups." Madow, *supra* note 77, at 218.

as a human individual he may simply be aging. If he cannot change as a persona, he cannot learn and grow as a human being. A trademark necessarily knows all there is to know about itself at its moment of market conception; it can only "bridge gaps" and expand into new market lines. For all its signifying dignity, it cannot admit mistakes or introspect or dramatically improve itself. Yet, for human beings, change always offers the possibility of growth, of struggling toward a more integrated self. The trademark's doctrinal aversion to change, therefore, becomes the lynchpin of the direct racial critique of MarCus's crucial colorblind claim that follows.

A. Whiteness as Property and the Myth of Colorblindness

> There ain't a white man in this room who'd trade places with me . . . and I'm rich![164]

It is no great surprise that a discourse on commodification and signification in a consumption-obsessed culture should be able to draw on the examples of so many African-American men. Martin Luther King, Jr.,[165] Kareem Abdul-Jabbar,[166] Tiger Woods,[167] and, to a lesser degree, former Black Panther Bobby Seale,[168] provide endless hours of legal analyses of human propertization by the cases named for them.[169] Our fixation is just as lavish in cultural studies discussions of Michael Jordan, Michael Jackson, or the latest hip-hop mogul. They are powerful symbols as well as men, and their contested meanings have great moment in understanding how Americans think and interact. MarCus explains that he has no desire to disavow these meanings or their status; he simply believes his identity goal is met by an efficient embrace of colorblindness.

Putting aside the famous, it is also not surprising that MarCus might be tempted to distance himself from — if not forever alter — common perceptions about the great number of American black men who are less

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[164] Chris Rock, *Bigger & Blacker* (HBO cable broadcast, July 13, 1999).

[165] Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982).

[166] Kareem Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407 (9th Cir. 1996).

[167] ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915 (6th Cir. 2003).

[168] *See* Seale v. Gramercy Pictures, 964 F. Supp. 918 (E.D. Pa. 1997), *aff'd*, 156 F.3d 1225 (3d Cir. 1998) (showing plaintiff failed at trial to present sufficient evidence of violations); Seale v. Gramercy Pictures, 949 F. Supp. 331 (E.D. Pa. 1996) (finding triable issues of fact regarding plaintiff's claims that unauthorized use of his name and image on merchandising for film about Black Panther Party violated his commercial interests).

[169] For that matter, so might the career of Supreme Court Justice Clarence Thomas.

fortunate than he. Inequalities, deprivation, derision, and bad luck are rife among the American population. However, as a statistical matter at least, many of the indicators of a difficult life experience coagulate among black men.[170] Consider the facts that black men have the shortest life expectancy of any demographic group;[171] they suffer disproportionately from debilitating diseases, especially HIV/AIDS, tuberculosis, diabetes, hypertension, and obesity;[172] and they smoke at rates much higher than other groups.[173] Moreover, black male unemployment rates are routinely the highest in the nation,[174] and their

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[170] *See* C. Cordes, *At Risk in America: Black Males Face High Odds in a Hostile Society*, APA MONITOR, Jan. 1985, at 9, 10, 11, 27; David J. Dent, *Readin', Ritin' and Rage: How Schools Are Destroying Black Boys*, ESSENCE, Nov. 1989, at 54–59, 114–16. *See generally* NATHAN MCCALL, MAKES ME WANNA HOLLER: A YOUNG BLACK MAN IN AMERICA (Random House 1994).

[171] *See* J.M. Johnson & B.C. Watson, *Stony the Road They Trod: The African American Male*, Runta: The Nat'l Urban League Research Dep't Fact Sheet, June 1990, *reprinted in* The Plight of African-American Men in Urban America: Hearings Before the Comm. on Banking, Hous., and Urban Affairs, 102d Cong. 61 (1991). White male life expectancy at birth is 73.1 compared to black male life expectancy which hovers at around 64.6. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. NO. 92. LIFE EXPECTANCY BY SEX, RACE, AND HISPANIC ORIGIN (1998). This is because black men are much more likely to be victims of violent crime than white men or women of any race. For males aged 14–17 the black victimization rate is 65.9 per 100,000, the white rate is 8.5. "The proportion of the population represented by . . . young black males has remained at about 1%, while the proportions of homicide victims and offenders who were young black males have increased dramatically. . . ." U.S. DEP'T OF JUSTICE, FBI SUPPLEMENTARY HOMICIDE REPORTS 1976-2000 (2001).

[172] *See* U.S. DEP'T OF HEALTH AND HUMAN SVCS., PUBLIC HEALTH SERVICE, CENTERS FOR DISEASE CONTROL AND PREVENTION (NATIONAL CENTER FOR HIV, STD AND TB PREVENTION), U.S. HIV AND AIDS CASES REPORTED THROUGH DECEMBER 2001 (year-end ed. Vol. 13, No.2 2002); CENTERS FOR DISEASE CONTROL, PREVALENCE OF DIABETES, STATISTICS DIABETES SURVEILLANCE SYSTEM, AGE-STANDARDIZED PREVALENCE OF DIAGNOSED DIABETES PER 100 POPULATION, BY RACE/ETHNICITY AND SEX, UNITED STATES, 1980-2000 (2001); NATIONAL CENTER FOR HEALTH STATISTICS, SOCIOECONOMIC STATUS AND HEALTH CHARTBOOK: 1997 BEHAVIORAL RISK SURVEILLANCE DATA ESTIMATED PREVALENCE AND RELEVANT STATISTICS FOR BODY MASS INDEX GREATER THAN/EQUAL TO 25.0 (1998) (on file with author).

[173] *See* NATIONAL CENTER FOR HEALTH STATISTICS SOCIOECONOMIC STATUS AND HEALTH CHARTBOOK, 1997 BEHAVIORAL RISK SURVEILLANCE DATA ESTIMATED PREVALENCE AND RELEVANT STATISTICS FOR NO HEALTH INSURANCE (1998); NATIONAL CENTER FOR HEALTH STATISTICS SOCIOECONOMIC STATUS AND HEALTH CHARTBOOK, 1997 BEHAVIORAL RISK SURVEILLANCE DATA ESTIMATED PREVALENCE AND RELEVANT STATISTICS FOR CURRENT SMOKERS (1998).

[174] Hiring discrimination and a shift in the domestic labor market has increased unemployment among black males to a rate 2.3 times higher than white males (about 12% compared to about 5.2%). *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR (2003). An "internalized negative self-image on the part of many Black males and the negative attitudes of authority figures toward them along with increased violence and drug abuse results in a disproportionate involvement of Black males with the criminal justice system." COURTLAND C. LEE, SAVING THE NATIVE SON: EMPOWERMENT STRATEGIES FOR YOUNG

incarceration rates consistently dwarf their participation in higher education (as well as the rates for any other demographic group).[175] The combination of persistently poor educational opportunities,[176] joblessness, illness, and incarceration results in the extraordinarily high poverty rates[177] and constant outflux of the already minimal wealth among black men.[178] Whether or not one agrees with MarCus's means, his desire to distinguish new symbolic meanings of black male identity has some objective appeal.

As I mentioned in the Introduction to this Article, race, specifically the old black and white binary, is used here primarily as a device to challenge anticommodification positions with a hard, though fictitious, case. I could have chosen a different device, even other races. But, for example, Patricia Williams' experience adopting a child many years ago provides the kind of cruel clarity about the market effects of human marginalization that both clarify and defeat MarCus's essential point. Williams knew nothing about adoption procedures before she started the process, and she was surprised when confronted by a questionnaire

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BLACK MALES (ERIC/CASS Publ'n 2003).

[175] There are now 39.8% more black men in the criminal justice system than in higher education. *See* M. MAUER, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM, (The Sentencing Project ed., 1990). For identical offenses black males are six times more likely to be convicted than white males and serve an average of 61 more days in prison. *See* EILEEN POE-YAMAGATA & MICHAEL A. JONES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME (2000), *available at* www.buildingblocksforyouth.org/justiceforsome/jfs.html. Similarly, 62.7% of all new state prisoners incarcerated for drug offenses are black, despite the fact that there are five times as many white drug users. *See* HUMAN RIGHTS WATCH, WORLD REPORT 2000 (2000), *available at* www.hrw.org/wr2k (last visited Feb. 2, 2005).

[176] The general system of public education in the United States has failed adequately to reach black men. The high-school graduation rate, enrollment rate, and gifted-placement rate are the lowest of any group. *See* THE NATIONAL BLACK CHILD DEVELOPMENT INSTITUTE, THE STATUS OF AFRICAN-AMERICAN CHILDREN: TWENTIETH ANNIVERSARY REPORT 1970–1990 (1990). The proportion of black males who have attended college is 15.0% as compared to white males at 26.7%. U.S. DEP'T OF COMMERCE, EDUCATIONAL ATTAINMENT IN THE U.S., MARCH, 1998 (1998).

[177] The poverty rate for non-elderly black men was about 27% in 1999; for white men, it was about 8%. About 56.3% of black families worry about having enough to eat; for white families the figure is 17.1%. *See* SARAH STAVETEIG & ALYSSA WIGTON, URBAN INSTITUTE, 1999 SNAPSHOTS OF AMERICAN FAMILIES II (2000), *available at* www.urban.org.

[178] *See* ROLAND DAEUMER & MARK HAYWARD, SELF-EMPLOYMENT AND WEALTH DISPARITIES BETWEEN BLACK AND WHITE HOUSEHOLDS APPROACHING RETIREMENT (noting that 8.4% of black households receive inheritance as compared to 30.7% of white households (averages of $7,500 versus $58,000)); POPULATION RESEARCH INSTITUTE, THE STATE OF WORKING AMERICA, 1998-99, (Cornell Univ. Press 1999); HARRY HOLZER, CAREER ADVANCEMENT PROSPECTS AND STRATEGIES FOR LOW-WAGE MINORITY WORKERS (The Urban Institute, 2000) (noting that black and white high school graduates earn respective hourly wages of $10.56 and $13.12)

seeking to know her "preferences." She indicated none.

> And with that magical stroke of the pen, the door to a whole world of plentiful, newborn, brown-skinned little boys with little brown toes and big brown eyes and round brown noses and fat brown cheeks opened up to me from behind the curtain marked, "Doesn't Care."[179]

Soon after Williams' black baby boy arrived to begin a life with her, she was confronted by another facet of contemporary American adoptions: a dual fee schedule. The "standard" and "special" prices reflected the premiums paid for white and other desirable children and the discount available for "older, black and other handicapped children," respectively.[180] "Although it is true that, as the agency asserted, this system was devised to provide 'economic incentives' for the adoption of 'less requested' children, it is perhaps more than true, in our shopping mall world, that it had all the earmarks of a two-for-one sale."[181]

Williams' real-life adoption scene reflects the metaphor of racially disparate human trademarks once described by Alex Johnson. In Johnson's view, the racial binary in America has signified blackness as a weak mark and whiteness as a strong mark, artificially deflating and inflating social value according to assumptions about corresponding attributes.[182] In this view, the economic rationales for trademark protection, such as reduced search costs, disadvantage blacks because they paint with such a broad brush and deny nuance, difference, or individuality.[183] Offering a kind of "shade confusion" by ethnicity as an antidote, Johnson argues that the current dynamic is fueled both by black color consciousness and white competitive interests.[184]

Both the Williams and Johnson examples illustrate a problem for the black commercial signifier that Cheryl Harris explored so powerfully a decade ago in *Whiteness as Property*.[185] This seminal article, written from

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[179] Williams, *supra* note 156, at 918.

[180] *Id.* at 918-19.

[181] *Id.* (Williams declining to make that choice); *id.* at 920 ("I was unable to choose a fee schedule. I was unable to conspire in putting a price on my child's head.").

[182] Alex M. Johnson, Jr., *Rethinking the Process of Classification and Evaluation: Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 914 (1996); *id.* at 891 ("By defining our racial categories as simply black and white, with white viewed as normal or good and black viewed as different or bad, whites and blacks have relied on ostensibly stable racial categories that have the effect of benefiting whites at the expense of persons of color and blacks in particular.").

[183] *Id.* at 910-11.

[184] *Id.* at 903-06, 922.

[185] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

a critical race theory viewpoint, posited that American law has long classified people into property hierarchies that they cannot easily transcend, with the plaintiff's unsuccessful assertion of rights in his partial whiteness in *Plessy v. Ferguson* as a prime example.[186] For our purposes, however, Harris's analysis suggests two important pragmatic conclusions about MarCus. First, the value of whiteness as property *to whites* should not be assumed away too easily, making any claim to colorblind identity tenuous. Second, even if MarCus could somehow succeed on such a front, he would occupy a species of "new property." Indeed, MarCus would become a new stereotype, again gambling on the problem of transition to increase the value of his personhood, rather than to diminish it.

MarCus, we have said, is attempting to turn on its head the whole American scheme of racial classification that began with slavery by claiming ownership rights in himself as a race-neutral trademark. He must, therefore, re-make the first model of human commodification.

> In the form adopted in the United States, slavery made human beings market-alienable and in so doing, subjected human life and personhood — that which is most valuable — to the ultimate devaluation. Because whites could not be enslaved or held as slaves, the racial line between white and Black was extremely critical; it became a line of protection and demarcation from the potential threat of commodification, and it determined the allocation of the benefits and burdens of this form of property. White identity and whiteness were sources of privilege and protection; their absence meant being the object of property.[187]

Given its tremendous power to organize relationships, the literal bifurcation of humanity and privilege that slavery wrought between blackness-as-property and whiteness-as-the-property-of-freedom did not end there. Proving or performing whiteness was critical to citizenship claims during the first decades of this century.[188] Further, whiteness provided, and in some cases continues to provide, both *de jure* and *de facto* eligibility to participate as a property owner in the land-use protected, government-subsidized organization of communities throughout nearly every part of the United States. At the same time,

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[186] Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting); *see* Harris's discussion, *supra* note 185, at 1747-48.

[187] Harris, *supra* note 185, at 1720-21 (citation omitted).

[188] Ian F. Haney-Lopez, *White by Law: The Legal Construction of Race* (1996). It certainly did not work for Mr. Plessy. *See Plessy*, 163 U.S. 537; *see also* Harris, *supra* note 185, at 1748-49.

blackness has nearly always operated as the signifier of ineligibility and the sign of economic waste.[189] Harris explains:

> Whiteness is not simply and solely a legally recognized property interest. It is simultaneously an aspect of self-identity and of personhood, and its relation to the law of property is complex. . . . The law's construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and, of property (what *legal* entitlements arise from that status). Whiteness at various times signifies and is deployed as identity, status, and property, sometimes singularly, sometimes in tandem.[190]

These observations are relevant to MarCus in a practical way: Why should such a system of classification confer the benefits of whiteness on a black man, all in the name of colorblindness? It is one thing to be a successful black man and to enjoy the unfettered fruits of one's labor, but quite another to get it by deliberately disclaiming one's identity. If Harris and others are right — and I think they are — whiteness is too valuable in law and colorblindness too impossible in society for MarCus's fraud to succeed for long. Colorblind identity is a farce in that only nonwhites would seek seriously to claim it, and whites would be irrational to disclaim the economic privileges and sense of social normalcy that follows their white identity.[191] Colorblindness has no meaning, or at least no value in the marketplace; and trademark law, with its manipulation of commercial signifiers and dependence upon popular consumption, offers no reliable substitute.

Yet, MarCus claims he can give colorblindness meaning, perhaps for the first time. He must argue that his quest represents "new property" in intangibles, as Harris acknowledges,[192] which is best represented precisely by recent trends in intellectual property law. The goodwill of his public persona, and the controlled meanings it projects through perpetual advertising, represents the possibility of new dynamics in

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[189] *See generally* Jon Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993) (arguing that low-income black communities have been systematically denied protective zoning rules which are prevalent in white areas); David Dante Troutt, *Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427 (2000) (arguing that antimarket concept of black neighborhoods represents antithesis of regulated middle-class neighborhoods).

[190] Harris, *supra* note 185, at 1725.

[191] *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-blind,"* 44 STAN. L. REV. 1 (1991).

[192] Harris, *supra* note 185, at 1728-29.

racial identity, albeit built on past inequalities. This is, in essence, a different problem of transition than the one Radin identified. It is a gamble that the last several hundred years amount to a continuing transition, with black identity accorded greater and greater mastery over itself as well as over public consciousness. Consumption has facilitated the speed with which new meanings of race are accepted, and such deeper acceptance is part of the continuing problem of transition. Commodification, then, is the key to such a movement, MarCus argues. It will enhance, rather than impair, his freedom. As a "new property" persona, however, MarCus must concede that his psychic and commercial success, as well as the culture's transformation, relies on the vehicle of stereotype — a new stereotype perhaps, but a stereotype nonetheless.

B. James Baldwin and the Psychic Struggle for an Integrated Self

Long before scholars repeated the mantra that race is a socially constructed reality and close to the time when stereotypes in social life were being widely discovered, James Baldwin struggled to make sense of "identity." In an essay entitled *Many Thousands Gone*, Baldwin offered a penetrating, even scathing critique of his friend and fellow novelist Richard Wright's popular work, *Native Son*. Despite the context for his remarks, Baldwin's insights about what it means to be an American, to be an individual, and to be a stereotype are profoundly relevant to MarCus's attempt at self-integration through colorblind redescription in another era. Early in the essay, Baldwin presents a thesis, which is oddly voiced in the first person and clearly from the perspective of a white American. His thesis may sound dated to contemporary readers, if taken too literally:

> The story of the Negro in America is the story of America — or, more precisely, it is the story of Americans. It is not a pretty story: the story of a people is never very pretty. The Negro in America, gloomily referred to as that shadow which lies athwart our national life, is much more than that. He is a series of shadows, self-created, intertwining, which now we helplessly battle. One may say that the Negro in America does not really exist except in the darkness of our minds.[193]

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[193] James Baldwin, *Many Thousands Gone*, NOTES OF A NATIVE SON, 19 (1955). Page numbers here refer to *Baldwin Collected Essays*, Toni Morrison, ed. (Library of America 1998).

Throughout the work, Baldwin takes aim at Wright's fictional black character Bigger Thomas as well as the theme of colorblindness which, according to Baldwin, Wright mistakenly introduces as a palliative at the story's end. The result is a small analytical fury that roams between the place of the character in the book and the place of the book in American culture, between the qualities of blackness and colorblindness, and finally, and most importantly, between being a helpless stereotype and a struggling human being. Before addressing these final points, I briefly outline Wright's *Native Son*.[194]

The realist American classic tells the disturbing story of one of the most famous angry black men in fiction, Bigger Thomas, as his rage and frustration with society increase at the pace of the racist deprivations it rains down on him as a young man in 1930s Chicago, South Side. As a character, we know mainly his circumstances: that he grew up in excruciating poverty, knowing white people only by institutional acts of oppression, afraid to enter their world and tempted by crime against other black people. His interior life, his thoughts and feelings, remain hidden from us. Yet, his inexpressiveness holds clues to the desperate actions that tragically turn the plot. Speechless and surprised to find himself in a compromising situation with the very young white woman whose car he chauffeurs, Bigger kills her, smothering her screams under a pillow to keep from being heard in the house. He then chops up her body to burn her remains.

From then on, Bigger Thomas is a fugitive, marked for death. Trying to take advantage of the rich victim's parents' contempt for communists (the woman's lover was one), Bigger and his black girlfriend first seek a ransom. When Bigger's girlfriend withdraws from the plan, he violently kills her in her sleep. In the end, he is caught, tried, convicted, and sentenced to death after a lengthy trial, whose outcome is already known. Although Bigger discovers much about his life and his worth on death row, the climax arrives when his lawyer, Boris Max, delivers an impassioned speech about the importance of recognizing how a society indifferent to Bigger's suffering made him indifferent to his victims and himself. These themes, plot twists, dialogue, and characterizations

[194] The summary that follows admittedly attempts no justice to one of the finest novels in the English language. It is not necessarily balanced either (as Baldwin's critiques were not). Many of Baldwin's criticisms of Wright do not resonate with me as a reader, but that is irrelevant for our purposes. This is not the space for an adequate literary analysis of Richard Wright's work or James Baldwin's critique. Instead, Baldwin's critique and thus the summary of *Native Son* is provided as an analogy to the arguments MarCus asserts. In that vein, we are primarily interested in reading Baldwin's insights about black male symbolism.

remain staples of undergraduate liberal arts education in the United States. At the time of its publication in 1940, *Native Son* was a stunning success.

Baldwin was not so impressed, primarily because he felt that Bigger Thomas directly, and Richard Wright indirectly, was incapable of carrying the semiotic load he had been dealt. Baldwin argued that to choose between a merely symbolic representation of blackness — the one-dimensional Bigger Thomas character or stereotype — and a colorblind alternative as a means of resolving the historic black-white tension, is to choose to forsake identity altogether. Another way of stating Baldwin's argument is that without actively living the struggle to reconcile the sometimes violent tensions at the core of American experience, the black person risks his personality. He may be known, but he becomes anonymous. He may be popular, but he is invisible. This, of course, has great implications for MarCus.

The failure common to Bigger Thomas as symbol and MarCus as trademark is categorization, both in its acceptance as well as its insistence. Such fixed and immutable definitions of personhood violate humanity by leaving no possibility of growth or room for transcendence to some other way of being. This is, in essence, a critique of Bigger Thomas as black stereotype, "the incarnation of a[n American] myth."[195] MarCus may less obviously satisfy the criteria of black stereotype, at least of any well-known image. But he remains similarly stuck in a set of fixed meanings about his persona, and the main difference is that he believes he can control those meanings and keep them from being debased. Indeed, in direct reference to a Bigger Thomas character, MarCus might argue that this control is what prevents him from becoming someone's "nigger."

Baldwin's critique of colorblindness responds to this concern, too, and comes in the context of Wright's impetus as a writer to inject colorblindness just when "liberal" readers may need it. Indeed, Baldwin reads Max's closing argument as an unconvincing ode to colorblindness and Wright's moral. Baldwin sympathetically mocks the speaker's urge, addressed to people of "good will." This analysis concludes Baldwin's essay; it is its own kind of summary of the difficult and, in his view, half-finished, themes presented unsuccessfully by a brilliant, angry author. It is not a critique of Wright so much as it critiques where this seminal novel ought to fit in the culture that claims it as its own. At the time of

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[195] Baldwin, *supra* note 193, at 27. Page numbers here refer to *Baldwin Collected Essays*, Toni Morrison, ed. (Library of America 1998).

its publication in 1940, and for decades afterward, *Native Son* represented something authentic, powerful, and unavoidable about the meaning of race in America. Baldwin argues forcefully throughout his essay that the character through whom we are all to know these meanings, Bigger Thomas, is too flawed for the role. Here, again in the first person voice of a white speaker, Baldwin explains how Max's summation contributes to an inferior understanding of identity:

> [W]e will set our faces against them and join hands and walk together into that dazzling future when there will be no white or black. This is the dream of all liberal men, a dream not at all dishonorable, but nevertheless, a dream. . . . Our good will, from which we yet expect such power to transform us, is thin, passionless, strident: its roots, examined, lead us back to our forebears, whose assumptions it was that the black man, to become truly human and acceptable, must first become like us. This assumption once accepted, the Negro in America can only acquiesce in the obliteration of his own personality, the distortion and debasement of his own experience, surrendering to those forces which reduce the person to anonymity and which make themselves manifest daily all over the darkening world.[196]

Baldwin's critique of colorblindness is broader than Max's speech. To Baldwin, the colorblind aspiration is not just fraudulent, it is a fraud meted out on blacks alone as a means to distance them from their experience in America. "Time has made some changes in the Negro face," Baldwin writes.[197] He continues:

> Nothing has succeeded in making it exactly like our own, though the general desire seems to be to make it blank if one cannot make it white. When it has become blank, the past as thoroughly washed from the black face as it has been from ours, our guilt will be finished — at least it will have ceased to be visible, which we imagine to be much the same thing.[198]

An important rejoinder is that, precisely *unlike* the rage-filled black male character Wright authored, MarCus is not interested in being the quintessential representative of black identity. He claims he could care less. Therefore, he cannot engender the same liberal plea for colorblindness out of some morally desperate attempt to reconcile

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[196] *Id.* at 34.

[197] *Id.* at 20.

[198] *Id.* at 20.

historical conflicts. Instead, he simply exploits the fact that at times the culture reflexively clings to such hopes. He cannot be flawed as such a racial representation because he expressly disclaims any attempt to be one. He is self-made and only as meaningful as public taste makes him valuable. Of course, here, perhaps, really is the postmodern difference: MarCus may disclaim all he wants. He may deny any similarity in authorial intent between himself as trademark and Bigger Thomas as Wright's literary icon. But not everything is within the author's control, and MarCus knows or should know that.

The burden of personhood is simply greater than MarCus imagines, in racial, collective, and individual terms. When Baldwin states that the meaning of black American identity also contains the meaning of American identity, this premise alone implies a complete rebuttal to colorblindness, beyond merely calling it a one-sided myth. The acquiescence to colorblindness by black Americans would swiftly amount to the malnourishment of American identity, period, to serve it up as mere myth, a giving away of the self. As Baldwin observes:

> The ways in which the Negro has affected the American psychology are betrayed in our popular culture and in our morality; in our estrangement from him is the depth of our estrangement from ourselves. . . . What we really feel about him is involved with all that we feel about everything, about everyone, about ourselves.[199]

The point is that there is an independent good reason to believe that race matters and to acknowledge and affirm it if you are black, despite the notion (as Johnson argues, for instance) that to help maintain the black-white dichotomy is to sustain both the oppression and the white advantage. The point is also that "human flourishing" (that grammatically and substantively awkward term), means something worth protecting, but it is not a flowering, a tranquil lake, or a joyous epiphany. Baldwin calls it a struggle. To struggle every day is to be human, to affirm one's humanity against competing urges, and to create the opportunity to learn and grow. The racial struggle for black people, as Baldwin indicates in the particular context of Bigger Thomas, is to live and thrive in the daily questions of one's potential humanity *in spite* of the occasional desire to smother a white person to death (or another black person, for that matter), to restrain oneself against the often understandable desire to act out of rage.[200] Why continue to identify this

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[199] *Id.* at 19.

[200] This is the problem with Johnson's somewhat utopian solution to racist oppression in America: people in societies find ways to subordinate each other, and they find

struggle as associated with racial identity? Baldwin's answer is that in American culture, the black persona, body, and history serve as the conduit for innumerable important realizations. This is one underlying imperative for "the race issue" in American culture: it is a unique and complex social construct with power enough over individual development and social consciousness to facilitate psychic growth. Similarly, the racial struggle for white people is to strip away the projections of inferior difference and to find oneself in the nonwhite "Other." Hence, talk of "the Negro is America" means that the culture cannot be understood or maintained without her. Therefore, *all* Americans' flourishing as humans tends to be subject to struggle through the truths and distractions of race. It further means, as it always has, that "progress" in race relations and equality must resist designs based implicitly on tangible property interests in whiteness and where colorblindness remains available mainly as a one-sided ruse. Finally, it means struggling through all of this and returning to one's very individual self again, the self for which one is truly responsible and in which one is totally and seriously invested.

All of this dictates the conclusion that, like the Bigger Thomas character of Baldwin's critique, MarCus fails even as an individual. Obviously, the trademark quest raises considerable problems for other black people going forward by creating group disadvantages flowing in, or directly from, MarCus's selfish filling-of-the-field ambitions. But, by this analysis, his individual "interior world" is diminished, too, by becoming a trademark, largely because the ongoing struggle for a humanity whose best efforts amount to human flourishing is antithetical to the work he sets out for himself. If he is a trademark, his novelty will eventually wear off, and MarCus the persona will join the stable of other stereotypes: of a famous person, of an unrelenting capitalist, and, ultimately, of a black man. The law requires that he keep working and expending resources to ensure that he remains relevant to the public, no matter how things change. As discussed, he cannot afford to change, nor can he risk becoming a generic mark one day. Therefore, he must keep investing in the mark, protecting it, feeding it, looking for new opportunities for its exploitation, aggressively suing entities whose marks come too close and never, ever changing it. That is not a struggle within the lives of people, but rather a concession to legal and market

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divisions to mythologize and exploit for psychic and material advantage. What Johnson does not explain by his notion of "shade confusion" is whether once it is attained some other basis for institutionalized oppression — indeed a dichotomous one — would not simply rise up to take the place of race, perhaps on the basis of ethnicity.

rules. And that is what happens when history, psychosocial tension, and the forging of individual relationships with a difficult world are too easily subordinated to commodification.

EPILOGUE

This Article has been an exercise in a hard case scenario for legal opponents of intellectual property overprotection and its contribution to commodification in United States culture. The fictional human trademark applicant, MarCus, challenged legal concerns about expanding rights in so-called cultural property by drawing on recent, ambiguous Lanham Act interpretations that favor the extension of more lenient right of publicity analyses into section 43(a) claims. The primary arguments against broader protections, First Amendment considerations and a shrinking public domain, remain strong but marginally relevant in the context of MarCus's claims to self-authorship. Few theoretical attacks on increased commodification seem to reach MarCus's claim directly, especially when his application for registration is coupled with his deliberate self-description as a "colorblind" mark out for a kind of market revenge. This strategy implicates a somewhat Hegelian view of freedom with which he challenges Radin's interim pluralism position. As compelling as Radin's views on commodification are, I conclude that they are less convincing when confronted by a racialized view of human flourishing. Finally, MarCus's racial strategy, and false claim to colorblind identity specifically, was challenged directly by resort to research on whiteness as property as well as a literary analysis of how self-redescription affects identity in context. That analysis, drawing heavily on James Baldwin's work, suggests that MarCus cannot be who he claims to be through a registered persona, that his colorblind claim defrauds even himself in the end, and that the first work of identity is the kind of struggle that commodification only delays.

The quest, I hope, was worth pursuing for the problems that it raised about the interaction between intellectual property law, the ethics of commodification, and the challenge of identity. Though only a fictitious character, MarCus, like all characters, must die eventually. His demise seems an appropriate place to conclude. All of his hard work to become an asset would now be subject to Lanham Act timetables. Within years, he would be a signifier memory and free to the world for redescription again. Of something like this cruel reality, Richard Rorty, describing Freud, said that:

> [E]very human life is the working out of a sophisticated

> idiosyncratic fantasy, and as a reminder that no such working out gets completed before death interrupts. It cannot get completed because there is nothing to complete, there is only a web of relations to be rewoven, a web which time lengthens every day.[201]

[201] RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 42-43 (1989).

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