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# THE PRIVATE OWNERSHIP OF PEOPLE

## The private ownership of the celebrity's image

ALONG WITH NUMEROUS OTHER changes in the nature of fame in the twentieth century, a pivotal transformation in the way the celebrity is constructed was enabled by a new type of property law. The "right of publicity," essentially, has enabled celebrities to privately own and control the use of their image within the marketplace. I do not argue that the celebrity's image was never commodified in previous centuries — it certainly was. But commodification coupled with legal protection has altered fame in ways that have changed the nature of fame dramatically. Today, a celebrity's image generates economic value for industries that produce news, gossip, biographies and interviews that are highly sought after by the media and the public. There is a huge market for the merchandising of celebrity images, and celebrity appearances in advertisements enhance the marketability of the products with which they are associated.[1]

An entertainer makes a significant amount of income from appearing in advertisements and from licensing his or her image for T shirts, posters, etc.[2] Obviously, this was not always so, something I will illustrate with an example. The Berkeley Pop Culture Project documents that "Mickey [Mouse]'s image is the number one most-reproduced in the world, with over 7,500 items bearing his cheerful little image. Jesus is number two, and Elvis is number three."[3] Disney aggressively guards against the appropriation of Mickey Mouse's image and protects its trademarks in court, as does the Presley estate on behalf of Elvis's image.[4] But no single corporate entity collects royalties from the reproduction of Jesus' image in the same manner Disney and the Presley estate do, even though Jesus', like Elvis's, has been commodified in many ways, such as in those mass-produced black velvet paintings.

As much as some televangelists may have desired it, Jesus Christ cannot be trademarked. Without any intellectual property protection for Jesus' image, churches

cannot prevent the presentation of artist Andres Serrano's *Piss Christ* — the controversial photograph of a crucifix submerged in a glass of urine — in the same way that Disney can legally enjoin an offensive work of art that appropriates its trademarked characters. Just as it is impossible for churches to trademark the image of Jesus Christ, it is unthinkable that the Bible could be copyrighted. The Church of Scientology — a religion that emerged in the age of intellectual property law — copyrighted its religious writings, and it has filed numerous copyright infringement lawsuits throughout the past few decades to maintain control over the context in which those writings are presented.[3]

In recent years, the Internet has been a place where Scientology dissidents have organized and traded information, and many of the online critiques that have used Scientology's copyrighted and trademarked images have prompted intellectual property lawsuits.[4] For instance, in 1996 a judge ruled in favor of the Church of Scientology when a critic of the church published copyrighted Scientology writings on the Internet as part of an ongoing discussion among church dissidents. Citing the example of a person who wants to engage in a critique of Christian religious beliefs needing Bible text to work from, one defendant's lawyer unsuccessfully argued that the use of the copyrighted documents were necessary to engage with the Church of Scientology's ideas.[5]

The Church of Scientology has won numerous copyright cases against those who critique the church, and its court battles pertaining to the Internet helped set the first precedents concerning copyright and cyberspace.[6] The Internet is an increasingly significant venue for individuals to use celebrity images to help make meanings and build communities among people with common interests. It is also a site where celebrities have intervened to shut down uses of their image of which they do not approve. I will return to the way intellectual property law is used ideologically to manage celebrity images, but first I will give a brief history of the reproduction of celebrity images.

## Early stages of the commodified celebrity image

The mass dissemination and sale of famous people's images are commonplace in capitalist societies, but before the twentieth century there was little to no litigation surrounding what is now considered unauthorized appropriation. Perhaps the earliest examples of the mass production of famous people's likenesses are coins. The likenesses of Roman emperors were common on coins and in sculptures throughout the empire — Caesar, Alexander, Augustus and others took advantage of the publicity value this gave them. For instance, Alexander the Great's image was featured in numerous public objects during his lifetime (sculptures and coins included) and after his death Alexander's image was appropriated by his successors in an attempt to suggest the late emperor's sanction of the current ruler's regime. Augustus took note of Caesar's program of publicity and made his likeness virtually omnipresent throughout the empire, something that later political rulers did as well, especially on coins.[7]

Images of famous people that appeared on various consumer-related items were common in centuries previous to the twentieth, especially in the years following the invention and proliferation of the printing press in the late fifteenth century. Elizabe

Eisenstein documents that sixteenth-century mass-produced portraits of Erasmus and Martin Luther were duplicated frequently. At the same time, she noted, "the drive for fame moved into high gear; the self-portrait acquired a new permanence, a heightened appreciation of individuality accompanied increased standardization, and there was a new deliberate promotion by publishers and print dealers of those authors and artists whose works they hoped to sell."[10]

During this period, the economic status of the artist and engraver was in the process of shifting from control by the patronage system funded by members of the aristocracy to the need for an audience of individual buyers in a marketplace system. Out of economic necessity, the printer now sought to please mass audiences, helping to develop new tastes in hero-worship that no longer solely belonged to people in traditional positions of power.[11]

The sale and distribution of the likenesses of celebrities had become big business by the second half of the eighteenth century in America – especially during and after the American Revolution.[12] For instance, in 1774 businessman Josiah Wedgwood began a line of portrait-medallions called "illustrious moderns" aimed at a more popular, less affluent audience, and by 1779 the medallions outsold the tea services that had been Wedgwood's primary business. His 1779 catalogue included numerous different heads for sale, including classical music composers, popes, monarchs, poets and artists, as well as Ben Franklin and George Washington.[13] In the nineteenth century, Madow writes:

> We can again find manufacturers making widespread use of the names and faces of famous and prominent persons. For example, after John Brown was hanged by the State of Virginia for his role in the raid on Harper's Ferry, entrepreneurs marketed lithographs, prints, busts, and photographs of him. During Sarah Bernhardt's 1880 American tour, manufacturers and merchants "cashed in with Sarah Bernhardt perfume, candy, cigars, and eyeglasses." Two years later, when Oscar Wilde visited the United States on a much-publicized and controversial lecture tour, advertisers put his image on trade cards for such products as Marie Fontaine's Moth and Freckle Cure.[14]

To use another comparative example, it would have been inconceivable for Martin Luther (the religious zealot who nailed his "Theses" to Wittenberg's church door back in 1517) to regulate the reproduction of his image in the same way that the estate of black leader Martin Luther *King Jr.* regulates his. Phillip Jones, president of the firm that manages the King estate and searches for possible infringements, stated: "King may belong to the public spiritually, but King's family is entitled to control the use of his image and words."[15]

The image of Ben Franklin, who promoted himself throughout Europe after the American Revolution, quickly appeared on fans, perfume bottles, and over a hundred other items of fashion. By the time Franklin was an old man, "his own face was displayed all over Europe in the shape of engravings, busts, statues, paintings, and even little statuettes and painted fans that looked like souvenir keepsakes."[16] Although Franklin could capitalize on his high visibility, he could not directly profit from the sale of his image on a perfume bottle in the same way that Elizabeth Taylor (who

flatly acknowledged "I am my own commodity") does today with her line of perfumes.[17]

Nevertheless, Franklin's face *certainly was* a commodity that was exchanged in the marketplace, but without the extensive juridification of this sphere of cultural production it could not be privately owned and controlled by a single entity. It was perceived, instead, as being in the public domain. At this time, and even up until the early twentieth century, there was no conceptual framework to even conceive of one's own image as private property. The merchandising and commodification of the celebrity image continued through the twentieth century with little public outcry and virtually no litigation.[18] Harris writes:

> During previous centuries fads and manias had often swept large masses of people, caught up in enthusiasm for a cause, a hero, or a work of art Actors, generals, opera singers, politicians, artists, ballerinas, novels, all had demonstrated a capacity to influence daily fashions, social customs, or habits of consumption. From Jenny Lind to Georges du Maurier's Trilbymania, from Louis Kossuth to Lillian Russell, celebrities stood at the center of temporary epidemics. Hats, dolls, canes, bicycles, theaters, toys, dinnerware, furniture, cigars, liquors bore the likenesses, names, or special symbols of various personalities. . . . Yet all this stimulated little litigation. Some unspoken assumption made famous people and literary characters a species of common property whose commodity exploitation required little control.[19]

It was during the last 2 decades of the nineteenth century that the assumption that the celebrity's image is common property was challenged in the courts and criticized in legal journal editorials. Around this time were the first reported lawsuits initiated by well-known people who were disturbed by the fact that their likenesses had been used in commercial products without their approval. Although it was increasingly considered wrong to appropriate these images, the courts were undecided and confused as to what legal right, if any, could protect a celebrity's image. Some courts believed that the use of a celebrity's likeness constituted an invasion of privacy, and some rejected that argument, while other courts couched these ideas in different legal concepts.[20]

A 1907 ruling on the unauthorized use of Thomas Edison's image on a medicine label framed the issue in terms of "property," and it represents what is likely the first such judicial recognition of a person's image. The court stated, "If a man's name be his own property, as no less an authority than the United States Supreme Court says it is, it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it."[21]

## The emergence of celebrity image ownership

In the early twentieth century, protection from the commercial appropriation of one's image was far from a universally protected right, but contracts began to emerge that

attempted to exclude others from freely appropriating a celebrity's likeness. Perhaps because the movie star emerged from a highly visual medium, it is logical that this was one of the first realms of fame that recognized the commercial value of the image. Contracts enabled movie studios to use a star's name, voice and likeness to promote the film, and more underhandedly, it allowed for the use of a star's image to be licensed for product endorsements, even in the most questionable and tangential circumstances.

Movie studios could use a star's image as it related to a particular film, and could license that image to businesses that produced greeting cards, toys and a myriad of other kinds of products in exchange for a royalty payment to the star image's owner, the studio. In fact, studios vehemently policed the unauthorized use of their property by outside businesses. By the 1940s a few stars who had the power to negotiate with the studios succeeded in contractually limiting the use of their image only to areas directly related to the promotion of a film, but these cases were extremely rare. Even Betty Davis's contract enabled a producer to use her image without any connection to the movies in which she appeared.[22]

At the height of her fame in the 1930s, Shirley Temple was able to secure merchandising arrangements that were disconnected from the studio she worked for in order to personally profit from the sale and distribution of her image.[23] Another exceptional early case was Roy Rogers – a pioneer in the licensing and merchandising of one's own image. His 1940 contract allowed him to create his own separate business completely independent of the production house that employed him. This laid the foundation for a merchandising empire in which Rogers appeared in advertisements endorsing Wheaties cereal and began promoting such items as electric ranges and dog food. Rogers licensed thousands of products – from records and comics to cowboy hats and harmonicas – that reaped millions of dollars in revenues during, and after, his lifetime.[24]

In 1953, the U.S. Court of Appeals for the Second Circuit handed down an opinion that defined a type of legal protection – the "right of publicity" – that celebrities could invoke in the face of unauthorized commercial appropriation. This court ruled on *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, a breach-of-contract case involving two competing baseball card manufacturers that both printed a card with the same player's photograph. Haelan Laboratories argued that the right to privacy did not prevent their company from using that baseball player's image, regardless of any exclusive contract the player signed with another company.

The court's opinion stated that "a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else."[25] The court suggested "right of publicity," which grants "a person the exclusive right to control the commercial value and exploitation of his name, picture, likeness, or personality, and to prevent others from exploiting that value without permission, or from unfairly appropriating that value for their commercial benefit."[26]

The "right of publicity" has been enthusiastically embraced by the legal community; over half the U.S. states recognize the right of publicity, and that recognition has expanded to foreign jurisdictions as well.[27] Numerous court cases since the 1953 *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* decision have expanded what is

considered to be legally protected – far beyond one's likeness. For instance, in the 1950s a U.S. appeals court ruled in a suit brought by Ed Sullivan that the name "Ed" could not be adjoined to "Sullivan" when the likelihood of confusion might occur.[28] The "right of publicity" case law has developed to include not just one's name but other characteristics unique to a particular person such as certain traits, characteristics, mannerisms or paraphernalia.[29] For instance, in 1996, basketball star Dennis Rodman sued the manufacturer of a long-sleeved T-shirt that bore replicas of his tattoos as they appear on his own body.[30]

There are many areas that fall under the domain of "right of publicity." Coombe writes, "It is no longer limited to the name or likeness of the individual, but now extends to a person's nickname, signature, physical pose, characterizations, singing style, vocal characteristics, body parts, frequently used phrases, car, performance style, and mannerisms and gestures, provided that these are distinctive and publicly identified with the person claiming the right."[31] For instance, Johnny Carson successfully sued a company that appropriated the famous opening phrase used to introduce Carson – "Here's Johnny" – in conjunction with the promotion of its portable toilets. In this case the court held that "Carson's identity may be exploited even if his name or his picture is not used."[32]

As far back as 1974, the U.S. Court of Appeals for the Ninth Circuit deemed actionable the use of a well-known race car driver's car in a cigarette advertisement. It was successfully argued that the use of the car was intended to associate that driver with the product – even though the driver was unseen.[33] More recently, in the *Vanna White v. Samsung Electronics America, Inc.* case, the U.S. Court of Appeals for the Ninth Circuit expanded publicity protection even further to include any commercial appropriation of the distinctive features of a celebrity. In that case, a Samsung commercial featured a robot wearing a blonde wig, jewelry, and an evening gown that stood in front of a display board that resembled the set of the game show – *Wheel of Fortune* – that featured Ms. White. The court decided that the commercial infringed on White's right of publicity, even though the commercial clearly employed parody.[34]

"Right of publicity" has expanded to protect a singer's voice from *imitation*. Previous to 1988, courts had rejected the notion that vocal style could be protected under a right of publicity theory, but today there are two significant precedents that have expanded that right.[35] In 1988, pop star Bette Midler brought suit against Ford Motor company and its advertising agency for the deliberate imitation of a Midler song by another singer for a television commercial. In *Midler v. Ford Motor Co.*, the California court held that "Midler had a legitimate claim under the common law right of publicity."[36]

This is quite different from the outcome of an earlier, similar case in which Nancy Sinatra's biggest hit, "These Boots Are Made for Walkin'," was performed by a female vocalist who was directed to imitate Sinatra in a Goodyear Tire commercial that also featured four women dressed in 1960s "mod" fashions (i.e., short skirts and high boots). In *Sinatra v. Goodyear Tire & Rubber Co.*, the U.S. Court of Appeals for the Ninth Circuit decided that "imitation alone does not give rise to a cause of action."[37] But when Midler's lawyers couched their arguments in terms of "property," she won.

After the Midler decision, Tom Waits successfully sued Frito-Lay for using a singer who imitated his raspy style for a radio commercial. The Ninth Circuit reaffirmed the Midler decision and awarded $2 million in punitive damages to the

plaintiff. Stamets points out that this decision "represents a dramatic expansion of the publicity right defined in Midler. In the Midler case, Ford's advertising agency admitted trying to imitate Midler in a version of a song she made a hit. . . . Unlike Ford, however, Frito-Lay's sound-alike was given an original tune to sing, a tune never associated with the plaintiff."[38]

## The right of publicity and celebrity image management

Elvis Presley is a quintessential American celebrity who means many things to many people, and the history of the struggles over the use of his image is representative of the way a celebrity's image is managed today. Even though Elvis is no longer alive, his image remains tightly controlled by his estate, which went so far as trademarking "Elvis," "Elvis Presley," "Elvis in Concert" and "Graceland," among other things. Not only has the King's epitaph been copyrighted, but so has the inscription on Grandma Minnie Mae Presley's tombstone.[39] Since it was founded in 1979, Elvis Presley Enterprises (EPE) has filed hundreds of lawsuits pertaining to the unauthorized use of Elvis's image in a variety of contexts.

Recently, in 1998, a U.S. Circuit Court of Appeals barred a tavern from using the name "The Velvet Elvis." The establishment's owner argued that it parodied 1960s kitch, more generally, but the court rejected the argument, stating: "Without the necessity to use Elvis's name [to target the 1960s], parody does not weigh against a likelihood of confusion in relating to EPE's marks. It is simply irrelevant."[40] Despite this and many other successes, EPE has not been universally successful in court (it hasn't been able to stop Elvis impersonators). Nevertheless, it has won numerous court battles – enough to create the perception that, for Elvis's image to be used in any sort of commercially oriented artistic product, permission must be granted by EPE and the image must be licensed.[41]

To give a few examples, the 1980s television sitcom *Cheers* sought the permission of EPE for a planned episode in which a character had a dream about Elvis, and EPE made sure both the actor who portrayed Elvis and the script met with its approval. Similarly, before the ghost of Elvis was used in the movie *True Romance*, producers sought the permission of EPE. Elvis Presley Enterprises so emphatically protects the use of the King's image that it seriously considered suing the company that distributed the book *Elvis Alive?*, which came with an audiocassette that supposedly contained a conversation with the deceased Elvis Presley. As ludicrous as this sounds, because EPE owns Elvis's "performance rights," EPE lawyers felt justified in claiming that if this truly was a recording from *beyond the grave*, its reproduction infringed on the estate's proprietary rights. The idea was dropped after the book sold poorly.[42]

In addition, the threats contained in EPE's intimidating letters, combined with EPE's financial muscle, convinced the producers of a play, *Miracle at Graceland*, which was being staged at a small community arts center, to drop the word "Graceland" from the title and remove all images of Elvis from the set. While EPE's charges might not have held up in court, as is the case with many intellectual property lawsuits (or threats of suits), the producers complied because they lacked the resources to sustain a court battle.[43] As "right of publicity" has expanded to allow celebrities (and their families) more power to control the use of their images, it has at the same time

affected the way everyday people appropriate celebrity images to generate meanings within their own lives and communities.

## Celebrities and audiences

Madow argues that, in their everyday lives, people "make active and creative use of celebrity images to construct themselves and their social relations, to identify themselves as individuals and as members of subcultural groups, and to express and communicate their sense of themselves and their particular experience of the world."[11] One of many examples of this use of celebrity images is Dyer's analysis of how 1950s urban gay culture reinterpreted the image of Judy Garland as a symbolic icon whose ambiguous masculine/feminine coding provided a way for gay men to engage in a dialogue about themselves and others.[12]

Because mass media audiences are not lifeless sponges, it is no surprise that people draw on these images and texts to actively make sense of their own lives and the world that surrounds them. But "right of publicity" law centralizes the celebrity's decision making power in determining what he or she "means" to an audience by allowing that celebrity the ability to decide what parts of his or her image to magnify, what parts to distort, and what parts to delete. This contemporary legal climate makes it more difficult for an audience to actively engage with star texts, let alone to produce and distribute alternative readings that generate effective, resistive cultural practices.

Before I examine the way the management of celebrity images affects the celebrity fan relationship, I want to discuss the line of thinking that asserts audiences are not passive consumers who soak in media images without thinking. De Certeau,[13] Silverstone,[14] Jenkins,[15] and Fiske[16] argue that people actively "read" media texts using celebrity images, among other things, to actively create shared meanings within communities of fans.

De Certeau, who focuses on book reading rather than other media, reminds us that we must not take people for fools. He attacks the perception that book reading audiences are passive "sheep" who are content to graze in the pastures of a field they did not participate in creating. He finds this notion unacceptable, taking the stance that, far from being passive, reading is a productive act that is as creative as that of the novelist. De Certeau positions the reader as a nomad who occupies and wanders into different territories, "poaching" meanings that are perhaps unintended by the author and the elite class who "police" preferred meanings through a variety of social mechanisms.[17]

Silverstone, in his fondness for militaristic metaphors, takes de Certeau's arguments as a call to arms. He claims that what is considered mundane, daily life is a kind of guerrilla war that is waged by the subjugated against oppressors in the field of everyday life, and he sees a revolutionary potential in the seemingly trivial practices of watching television. Rather than being a passive activity, television viewing, according to Silverstone, is the site of an enormous amount of cultural work on the part of both the producers and the receivers. He notes studies that demonstrate how television watchers integrate its texts within their own lives in a variety of ways, and he argues that even though the cultural power of institutions is deeply imbedded in

the texts and the writer-reader relationship is unequal, there is still room for movement and some freedom.[71]

Similarly, Fiske argues that fans are extremely creative and active. He points out that the notion of a productive audience does not necessarily provide the basis for a movement that can change society; he conceptualizes resistance, instead, as producing a form of consciousness. Fiske argues that just in the act of listening to or watching a mass-media venue, fans are engaged in constant symbolic meaning formation. Audiences also talk about music or television shows with others, creating shared and constantly metamorphosizing communal meanings. Finally, fans engage in productive behavior when they create fanzines, videos, songs and other cultural products that are shared within their community.[72]

In one case, a fan video incorporated Jimmy Buffet's song "Leaving the Straight Life Behind" as the narrative that held together carefully selected clips of television cops Starsky and Hutch, edited to portray them humorously in a homoerotic relationship. The clips include images of the officers playing chess in their bathrobes, disco dancing together, embracing each other and jumping into bed together. Jenkins suggests that the activities of fans should be viewed as "poaching" rather than mindless consumption, and maintains that fandom is "a vehicle for marginalized subcultural groups (women, the young, gays, etc.) to pry open space for their cultural concerns within dominant representations."[73]

By generating alternate readings of mass-culture materials, Jenkins claims, these groups can transform the products of the media to serve their interests. His empirical study focuses on the participatory fan (re)writings of *Star Trek* storylines by largely female fans, which were written in a way that recognized and validated the authors' (and their audience's) experiences. He argues that resistance comes not from the original media texts themselves, but from the *practice* of writing new texts, distributing the fanzines and community building. Jenkins concludes:

> Nobody regards these fan activities as a magical cure for the social ills of postindustrial capitalism. They are no substitution for meaningful change, but they can be used effectively to build popular support for such changes, to challenge the power of the culture industry to construct the common sense of a mass society, and to restore a much-needed excitement to the struggle against subordination.[74]

The positions of de Certeau, Silverstone, Fiske and Jenkins are, to a certain extent, polemical – a reaction against Frankfurt School theorists such as Adorno who saw the products of mass culture as nothing but oppressive. Even if their arguments may be exaggerated, they were a necessary tactical move away from the deeply ingrained notion that everything is determined, that there is no opening that allows for social transformation. The above mentioned authors were attempting to give agency back to social actors who had been stripped of it by critics of mass culture. But, as is often the case, polemics do not translate well into empirical research, and some of the more extreme claims made by the authors do not hold water.

I believe that in choosing to study the specific practice of *Star Trek* fanzine writing, Jenkins paints a much more optimistic picture of this type of cultural activity than actually exists because, as he acknowledges, Paramount (*Star Trek*'s copyright owner)

tended to treat these unauthorized materials with "benign neglect" if they were nonprofit and relatively low profile. Most corporate owners of mass distributed and highly profitable cultural texts *do not* react with "benign neglect" over the distribution of materials that use their privately owned property without permission.

There are many areas of mass culture (Disney and Lucasfilm are only the tip of the iceberg) in which this kind of fan activity is made very difficult and financially hazardous for the producers of texts who incorporate copyrighted and trademarked images. Because a large portion of the same type of cultural activity that fans engage in has moved from the medium of reproduced photocopies quietly mailed through the U.S. Postal Service (in the form of zines) to the very public forum of the Internet, this difficulty has intensified. The products of the fanzine trading community were more difficult to detect by intellectual property holding companies when they were distributed through the mail, simply because this community was more underground and difficult to keep track of.

While photocopied, hand stapled fanzines certainly still exist, now much of the same kind of fan production has shifted to the Internet in the form of web sites, something that is easy to monitor with a simple keyword query on an Internet search engine [. . .]. Again, I agree with the above mentioned authors that receivers of media texts are productive and that people use these texts in meaningful ways. But it is difficult to use these texts to build support for social change and, in Jenkins' words, to "challenge the power of the culture industry" when owners religiously use intellectual property law to suppress the uses of texts that challenge dominant ideologies."

## The ideological management of celebrity images

When a T-shirt manufacturer began selling shirts that appropriated images of Mr. Rogers juxtaposed with the captions "Pervert" and "Serial Killer," Rogers sued the company, invoking "right of publicity" and trademark infringement. In addition, Rogers sued another company that allegedly sold a T shirt of Rogers holding a gun. His lawyers stated, "It is antithetical to Rogers' and FCI's philosophy, image and business practice to be associated with the corrupted depiction of Rogers shown in defendant's shirt."[16] Similarly, Muhammad Ali successfully sued under "right of publicity" when *Playgirl* magazine published a drawing, subtitled "the greatest," of a nude black man seated in the corner of a boxing ring.[17]

Yet another case that highlights the way "right of publicity" is invoked in an ideological manner is the following. When the New York state legislature held hearings on a bill that would make the right of publicity something that can be passed on to one's descendents, John Wayne's children cited a greeting card sold primarily in gay bookstores that featured a picture of the late actor with the caption, "It's such a bitch being butch." While they objected to the card on the grounds that it siphoned off money that should go to the estate, more importantly, they saw the card as "tasteless" and believed it worked against their father's conservative image.[18]

John Wayne carries a lot of semiotic baggage; he is for many people the archetype of the ultimate American tough guy, representing a certain ideal of masculinity. But against this "preferred reading" can exist a resistive reading, such as what is embod-

in the greeting card (which was considered so subversive by his family that they took their exception to it to the halls of New York state legislature). This resistive reading recodes popular conceptions of masculinity and heterosexuality in a way that many might find offensive, and is obviously something that Wayne Enterprises wanted to silence.[59]

The success of celebrity icons depends, in part, on their reworking of previous celebrity images and other resonating signifiers. For instance, Coombe rhetorically asks how much Elvis Costello owes to Buddy Holly, or Prince to Jimi Hendrix. Madonna reconfigured many twentieth-century sex goddesses and ice queens, including (but not limited to) Marilyn Monroe, Jean Harlow, Greta Garbo and Marlene Dietrich.[60] But, Coombe argues:

> If the Madonna image appropriates the likenesses of earlier screen goddesses, religious symbolism, feminist rhetoric, and sadomasochistic fantasy to speak to sexual aspirations and anxieties in the 1980s and 1990s, then the value of her image derives as much, perhaps, from the collective cultural heritage on which she draws as from her individual efforts. But if we grant Madonna exclusive property rights in her image, we simultaneously make it difficult for others to appropriate those same resources for new ends, and we freeze the Madonna constellation itself. Future artists, writers and performers will be unable to creatively draw upon the cultural and historical significance of the Madonna montage without seeking the consent of the celebrity, her estate, her descendants or her assignees, who may well deny such consent or demand exorbitant royalties.[61]

"Right of publicity" law has opened up another area of culture to privatization, allowing for celebrities and their lawyers to police representations they do not approve. As cultural production and creative activity takes place more and more in the sphere of the marketplace, it becomes increasingly difficult to argue that the appropriation of celebrity images falls under "fair use," particularly because, like trademark law, it contains no developed "fair use" statute or exception. Moreover, "right of publicity" law is more ambiguous and inconsistent than trademark law, and it has even more potential to silence a number of different expressions having to do with celebrity images. When certain types of cultural production are engaged within the marketplace, the owners of privatized cultural texts – in this case, celebrities – have greater power to (if not win court cases) exert enough financial muscle to wipe out appropriations that are not to their liking.

## Conclusion

The three primary examples of the private ownership of people in this chapter – via gene patenting, proprietary consumer databases, and "right of publicity law" – are extremely different. In each case, there are varied articulations of labor relations, battles between large corporations, notions of authorship, and government policy, among other things. As we have seen, the consequences of privatization vary quite a

bit throughout the above-mentioned contexts, and this illustrates that the privatization of culture is not a highly determined, ahistorical process that generates uniform actions.

One advantage of using articulation theory is that it allows us to make connections across disparate areas of cultural production [. . .]. Perhaps most importantly, these connections all are articulated differently with intellectual property law because there are conflicting operating notions of *what* is being authored, *how* it is authored and *who* is doing the authoring. These distinct concepts, which have arisen out of situated historical circumstances, have helped construct who has control of the means of production, and control of the means of production has worked to enforce a definition of authorship in each particular area. Database owners most certainly define themselves as authors because they own the software and hardware that can organize information relating to consumer behavior. To many, this fact makes ascribing authorship and ownership of these data images to a corporation that has invested lots of money an obvious choice.

But, from another perspective, it was the labor of the consumers (i.e., in their trips to the shopping mall) that enabled the information to exist in the first place. When individuals work 40 or more hours a week to be able to consume the things they want or need, they also work as laborers for the corporations that collect data on their purchasing behavior, data that is in turn used to try to persuade them as consumers to buy more. The companies merely trace and map the data trails that consumers leave, organizing that information in particular ways that allow for the useful and profitable manipulation of that data.

Consumers *don't* control the means of production of their data image, nor are they considered the authors of their data image. Moreover, very little legislation has been passed to empower American consumers in any way, and for them certainly nothing like "right of publicity" law exists that would allow consumers the right to similarly control their own electronically stored consumer profiles within the marketplace. The privacy laws that do exist protect individuals from a variety of invasions of privacy, but they do little to prohibit the collection of personal information – nor are they intended to. Large corporations not only recognize the economic power that access to consumer data images gives; they have successfully secured their control of the means of production over the construction of consumer data images, though they have yet to secure a type of intellectual property protection.

Because the methods of organization used by consumer database companies are not considered to be very inventive, database owners have not won full copyright protection for their property in recent court battles. In the 1991 *Feist Publications, Inc. v. Rural Telephone Service* U.S. Supreme Court decision, the court ruled: "There is nothing original in Rural's white pages. The raw data are uncopyrightable facts, and the way in which Rural selected, coordinated, and arranged these facts is not original in any way."[62] Because they lack originality, according to the court, the companies that own these databases do not qualify for authorship status and, therefore, the materials are not copyrightable. Another important reason for this lack of protection was the lobbying efforts of very powerful companies that would be negatively impacted by tighter database protection.

Just as noncelebrity individuals, as they exist as consumers, are alienated from the data image that they labored to produce, individuals are also deprived of the control of

their own flesh as it is used by medical and scientific researchers. The case of John Moore – the man whose spleen provided the basis for a medicine that has generated over $3 billion in revenues -- is instructive. As was discussed earlier, the California Supreme Court decided that John Moore had no right to claim any proprietary rights over his own body. Other exploited non-Western, noncelebrity people enjoy even fewer rights than a U.S. citizen like Moore because of Eurocentric intellectual property laws that perpetuate colonialist relations between the First and Third Worlds.

The precedent established by the successful patenting of plant and human genes has ensured that biological material is considered a legally protectable form of intellectual property. Because the notion of private property is hegemonic, groups who hold economic power have more control in defining *who* is considered an author, and, therefore, an owner. This particular definition of authorship and ownership has been employed by the U.S. court system and the Patent and Trademark Office, and that definition has increasingly shaped the content of the international trade treaties forced on foreign countries. Owning the means of production of scientific knowledge establishes author rights for companies that can afford the technology that isolates and analyzes genes. This provides a rather clear-cut example of how the balance of power is further shifted in favor of wealthy individuals, rich companies and the more powerful Western economies, all at the expense of powerless individuals and countries with few economic resources.

The battle between studios and film stars was first and foremost a labor struggle, one that actors won, in part, because of the leverage their relative economic privilege gave them. After movie stars and other celebrities successfully altered the contracts between themselves and their employers, they lobbied to expand the legal protection of their images from commercial appropriation. "Right of publicity" developed to meet the celebrities' desire to control their own images within the marketplace in order to profit from it, and this law recognizes that celebrities own the means of production of their own image. Elizabeth Taylor acknowledged this to a certain extent when, in discussing the marketing of her own line of "Liz Taylor" perfume, she asserted, "I am my own commodity."[63]

The celebrity can be seen as the singular author of his or her image, but, as Dyer argues, the celebrity image is constructed from multiple discourses originating from a variety of sources.[64] In *Heavenly Bodies*, Dyer traces the intersections of ways of talking about a celebrity persona, and he reminds us that film stars' images are not simply created directly by them or by the films in which they appear. The star's image is also created from texts relating to the promotion of the films (press photos, pin-ups, public appearances), as well as interviews, biographies, and the press coverage of a star's "private" life. The star's image is also comprised of what critics and commentators write or say about him or her in the media, as well as the way a star's image is used in "advertisements, novels, pop songs, and finally the way the star can become part of the coinage of everyday speech."[65]

In other words, in a critical sense the celebrity is no more the author of his or her image as it is reconstructed within popular culture than is the fan, whose intertextual associations work to construct meaning for an individual and a community. But through the labor battles between actors and studios that occurred in the first half of the twentieth century, and then through numerous lawsuits that created a strong body

of case law, celebrities were able to gain control of the means of production of their own image. This form of ownership legitimizes the argument that the celebrity is the sole author of his or her image and, in turn, the establishment of the celebrity's authorship justifies his or her complete control over the valuable cultural product that is his or her image. Personal economic power allowed celebrities to gain control, through a long series of court battles, of the means of production. The same is true of the fields of genetics and consumer data collection.

The economic power of large corporations gave them the power to influence the way TRIPS was written, therefore helping to define authorship in ways that privilege corporate owners. But given the hegemony of the idea of private property in our culture, it is hard to argue against the logic that underpins the notion that database owners, scientists and celebrities should enjoy the fruits of their labor. As the president of the Sequana stated: "Gene discovery is just the first step in a 1,000-mile journey to find a therapy. It's a process that costs us millions and takes years of work. So how much does somebody who gets his arm pricked deserve?"[6] My intention here, more generally, is to complicate this common sense, ideologically charged notion of authorship and ownership by showing how power and access to capital have been key factors in the way various spheres of cultural production have become differently (and similarly) articulated with intellectual property law.

Celebrities, consumers and individuals whose genetic materials have been appropriated are all differently articulated with intellectual property law in a fundamental way. As I have argued in regard to the copyrighting of world music, and with plant and human genetic patenting, intellectual property law only recognizes certain types of authorship. So, for instance, under Western intellectual property laws, indigenous peoples who have their music or their blood "sampled" do not have the right to claim ownership over what they produce (be it their songs or their own genetic material). But those who have the capital to purchase a recording device or piece of scientific equipment – but who merely press the record button or run genetic data analysis programs – are recognized as authors and therefore as owners of these cultural products. Intellectual property law, like any property law, handicaps those who have few material resources and no access to the means of production, and it works to maintain unequal power relations.

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