

1-1-2013

## Stars in Their Eyes: The Dominance of the Celebrity Brand and Intellectual Property Norms Protection through Fan Goodwill

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### Recommended Citation

Naeha Prakash, *Stars in Their Eyes: The Dominance of the Celebrity Brand and Intellectual Property Norms Protection through Fan Goodwill*, 35 HASTINGS COMM. & ENT.L.J. 249 (2013).

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# Stars in Their Eyes: The Dominance of the Celebrity Brand and Intellectual Property Norms Protection through Fan Goodwill

by  
NAEHA PRAKASH\*

## Abstract

The widespread celebrity culture in today’s society has signaled a shift from celebrity product endorsers to celebrity brands. Right of publicity and trademark laws leave a gap that does not adequately protect a brand as a whole. Rather, these laws make a distinction between the celebrity identity and the product, limiting protection of a brand that includes both components. Social norms found in the interaction between celebrities and fans can provide an alternate form of protection that reinforces ownership rights found in pure intellectual property. This article argues that a celebrity brand should foster fan goodwill to build a brand community that provides both consumers and social norms protection. Furthermore, intellectual property laws should take into account existing norms to determine ownership rights and to enhance the co-creation of value found between fans and celebrity brands.

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## I. Introduction

A slim, blonde woman turns her inability to understand the phrase “Chicken of the Sea” into a billion dollar fashion-empire. Sound familiar? Herein lies the Jessica Simpson brand: where a former singer-turned-actress-turned-reality television star became known for her shoes, hats, and denim cutoffs—that even you can buy at the nearest Macy’s. Simpson’s brand is nothing to scoff at; last year her fashion empire was valued at \$750 million, and as the brand continues to expand, its value is projected to exceed the billion-dollar mark.<sup>1</sup> Jessica Simpson is one of many celebrities attempting to create a brand—one that capitalizes on the celebrity’s identity and popularity to catapult into commercial products, further enhancing the celebrity’s economic value. The appeal of Simpson’s brand rests on her “down to earth” public appearances.<sup>2</sup> By marketing this “down to earth” appeal through interviews with Oprah and a reality television show about cross-cultural notions of beauty, Simpson has been able to filter her relatable nature to consumers.<sup>3</sup> As Simpson states: “Everybody doesn’t want to just look like the celebrity, because they can’t. They just want one element of that style.”<sup>4</sup>

This quote captures the underlying nature of the celebrity brand, where celebrity fame translates into products that resonate with fans who later become consumers. The changing notion of celebrity has shifted from endorsements to pure branding. This article explores

1. Amy Larocca, *The \$1 Billion Girl*, N. Y. MAG., Feb. 13, 2011, at 46–49.

2. *Id.* at 48 (“We got to know her better when she married the best-looking member of a boy band, Nick Lachey, and documented her charmingly clueless life as a newlywed in a reality show on MTV. She’d talk about farting, reveal her ability to burp the alphabet, and wonder how poultry could be seafood (‘Chicken of the Sea’).”).

3. *Id.* at 49.

4. *Id.*

this change and seeks to understand how the law can protect a celebrity brand rather than just a product or an individual. Specifically, this article draws on trademark and right of publicity laws as a foundation, but also looks at how both fail to adequately protect an “identity” and a “product.” In doing so, this article argues that the changing nature of celebrity moves too quickly for the law to keep up, and that protecting a celebrity brand can alternatively rest on social norms protection between celebrities and fans. While not a fully developed form of non-intellectual property protection in the context of celebrity branding, goodwill between fans and celebrities provides social norms protection that ought to be strengthened.

Part I discusses the emergence of celebrity branding, including the current notions of celebrity and the shift from endorsements to brands. Part II looks at the framework of trademark and right of publicity laws surrounding celebrity protection and whether this protection is sufficient. Part III looks to the vitality of celebrity branding and how fan goodwill and social norms serve as a protection for celebrity brands. Part IV discusses pros and cons of enhancing celebrity legal protection and how courts can utilize social norms protection in claims of trademark and right of publicity laws.

## II. The Emergence of Celebrity Branding

Though the concept of celebrity has changed over time, celebrities constitute a large part of modern society. Celebrities dominate contemporary culture and their “ubiquitous presence in the mass media, their commercially valuable reputations are often widely exploited.”<sup>5</sup> Thus as we look to celebrity branding, the first thing to understand is how the power and nature of celebrity furthers creation of the celebrity brand.

### A. The Contemporary Conception of Celebrity

Celebrities have a separate status in our society because they have achieved success as actors, musicians, athletes, models, chefs, or as reality television stars.<sup>6</sup> In these various occupations, celebrity “operates as a way of providing distinctions and definitions of

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5. David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L. J. 913, 914 (2007); see also GRAEME TURNER, UNDERSTANDING CELEBRITY 4 (2004) (arguing that the pervasiveness of celebrity exists because modern mass media has expanded the celebrity’s contemporary cultural visibility).

6. Tan, *supra* note 5, at 914.

success.”<sup>7</sup> Celebrities possess certain qualities that enable their success and visibility. The identities they convey are compelling, but it is a deeper archetypal meaning that persuades the public to keep them a part of their lives.<sup>8</sup> Celebrities relay certain archetypes that signal “the fulfillment of basic human desires and motivations [that] release deep emotions and yearnings.”<sup>9</sup> Understanding a celebrity through archetypes like “hero” is not only a part of a celebrity’s success but also a way of understanding why society holds them in such esteem.<sup>10</sup>

The recognition and fame a celebrity receives is a way of celebrating his or her importance and significance.<sup>11</sup> In some “generally agreed-upon way,” society has granted them the means to use this position of fame to influence aspects other than the initial basis of their celebrity.<sup>12</sup> For example, Bono of U2 fame is known for his philanthropy and social activism as well as his music. Bono has expanded his reach into aiding development in Africa, attending the World Economic Forum in Davos, starting a clothing brand called Edun, and supporting Project RED.<sup>13</sup> Bono’s expansion into other areas embodies a philanthropist archetype, which correlates with his success as a musician in the public’s eyes.

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7. P. DAVID MARSHALL, *CELEBRITY AND POWER: FAME IN CONTEMPORARY CULTURE* 185 (2004).

8. MARGARET MARK & CAROL S. PEARSON, *THE HERO AND THE OUTLAW: BUILDING EXTRAORDINARY BRANDS THROUGH THE POWER OF ARCHETYPES* 12 (2001). Mark and Pearson argue that the continuing popularity of brands does not just hinge on the quality or success of the celebrity endorser. “Rather, it depends on creating, nourishing, and continuously reinterpreting a unique and compelling identity or ‘meaning.’” *Id.* at 1. Under this theory, “forms or images of a collective nature which occur practically all over the earth as constituents of myths and at the same time as individual products of unconscious origin” constitute an archetype. *Id.* at 3. Archetypes can take the form of the “Rebel,” “Hero,” “Outlaw,” “Lover,” or “Regular Guy.” *Id.* at 3–4. Mark and Pearson assert that brands that capture this symbolic and constant meaning dominate the market. *See id.*

9. *Id.* at 14.

10. *See id.*

11. *See id.*

12. *See id.*

13. Heribert Dieter & Rajiv Kumar, *The Downside of Celebrity Diplomacy: The Neglected Complexity of Development*, 14 *GLOBAL GOVERNANCE* 259, 260 (2008) (stating that development allowed Bono to expand his social activism, which has included meetings with a variety of powerful politicians including Tony Blair, George W. Bush, and Bill Gates); EDUN, <http://www.edun.com/about-edun> (last visited Nov. 11, 2012); *The Real Deal: An open letter from Bono*, ELLE (Feb. 7, 2009), <http://www.elle.com/pop-culture/reviews/the-real-deal-286382>. For purposes of this paper, Bono illuminates how celebrities can use their fame to push them into other areas of society, including philanthropy.

The expanded definition of celebrity translates into commoditization of the individual. Because of their success, celebrities enjoy substantive commercial value and goodwill.<sup>14</sup> In this respect, celebrity has become a type of currency, conferring additional economic value.<sup>15</sup> Generating this type of “celebrity commodity” is apparent: media and consumers are organized around the production and dissemination of images, products, and staged events.<sup>16</sup> Thus, the celebrity persona is made through a compendium of “advertising, marketing, public relations, and journalism.”<sup>17</sup> The interaction of media and celebrity fuels the consumer “to consume both the ‘mediated image and the material product.’”<sup>18</sup> As a result, celebrity means more than just an actor or musician, but an entrepreneur encapsulating a variety of hats.

### **B. Celebrity Endorsements and the Road to Branding.**

Celebrity endorsements capitalize on the commoditization of the individual. Endorsements are a widespread form of advertising, as well as a symbiotic way for celebrities to increase their publicity while corporations increase sales of their products.<sup>19</sup> Fourteen to nineteen percent of advertisements in the United States use celebrity endorsements; in some foreign markets it is as high as forty-five percent.<sup>20</sup> Celebrity endorsements are described as “aid[ing] in the recognition of brand names, creat[ing] a positive attitude towards the brand, and creat[ing] a distinct personality for the endorsed brand.”<sup>21</sup> Ultimately, the use of the celebrity ensures that consumers are more likely to choose that brand.<sup>22</sup> In doing so, the endorsement generates

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14. Tan, *supra* note 5, at 955–56.

15. *Id.* at 959–61.

16. *Id.* at 956; see also JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 8-10 (1991)(arguing that intellectual property and our culture perpetuate the concept of humans as goods).

17. Tan, *supra* note 5, at 956.

18. *Id.*

19. See Jagdish Agrawal & Wagner A. Kamakura, *The Economic Worth of the Celebrity Endorsers: An Event Study Analysis*, 59 *J. MARKETING* 56, 56 (1995) (“Findings show that celebrities make advertisements believable and enhance message recall. Furthermore, celebrities aid in the recognition of brand names, a positive attitude towards the brand, and create a distinct personality for the endorsed brand.”).

20. See Julie Creswell, *Nothing Sells Like Celebrity*, *N.Y. TIMES*, June 22, 2008, at BU1 (“Stars showed up in nearly 14 percent of ads last year, according to Millward Brown, a marketing research agency. While that number has more than doubled in the past decade, it is off from a peak of 19 percent in 2004. (Hey, it could be more extreme: Celebrities appear in 24 percent of the ads in India and 45 percent in Taiwan).”).

21. Agrawal & Kamakura, *supra* note 19, at 56.

22. See *id.*

both an emotional and social response from the consumer.<sup>23</sup> The power of celebrity endorsements for product sales thus occurs “only when consumers feel that whatever cultural meanings attached to the celebrity can shift along unimpeded paths from the celebrity to the product.”<sup>24</sup> For example, an individual will purchase Chanel Coco Mademoiselle perfume because of the idealized “glamour” associated with Keira Knightley riding a Ducati motorcycle.<sup>25</sup> The economic value of the celebrity endorsement is formed only when the consumer’s emotional and social response results in increased sales and customer devotion.<sup>26</sup>

Based on this consumer response, the celebrity persona can command greater economic value than the endorsed product. Thus, in examining the transition from celebrity endorsements to the celebrity brand, the next step is to understand how current changes in technology, media, and modern consumer culture have contributed to the expansion. The main purpose of a celebrity brand is to increase the economic value of the celebrity. Endorsing products provides an opening for celebrities to move to their own clothing, perfume, or beverage line. To ensure continuing fame, a celebrity brand can capitalize on current notoriety by building his or her own brand to reap financial benefits. Similar to Nike or Coca Cola, the celebrity brand rests on strategic brand management and capitalizes on the psychological goodwill of consumers.<sup>27</sup>

The modern culture of celebrity consumerism directly contributes to the increase in the economic value of celebrity. One aspect of this culture is the collapse between celebrities’ private and public selves, a notion that celebrities exploit when creating a personal brand.<sup>28</sup> The

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23. See Tan, *supra* note 5, at 961–62. The aim of advertising with celebrity endorsers is to produce consumer desire to physically resemble that idealized image. *Id.* at 961. The consumer identifies with the celebrity through the consumption of the product and this heightens the consumption values of the advertised product. *See id.*

24. *Id.* at 960.

25. Prettynetworky, *Chanel Coco Mademoiselle with Keira Knightley*, YOUTUBE (Dec. 12, 2011), <http://www.youtube.com/watch?v=TiO2o1NChAU&noredirect=1>.

26. See Tan, *supra* note 5, at 960–61; see also MARK & PEARSON, *supra* note 8, at 12.

27. JEAN NOEL KAPFERER, STRATEGIC BRAND MANAGEMENT: CREATING AND SUSTAINING BRAND EQUITY LONG TERM 18–19 (1992). Strategic brand management refers to manufacturers and distributors thinking of themselves as brands, while integrating new brand and business models that incorporate sustainable advantage and added value for customers. *See id.* at 12–13.

28. See JEFFREY LOUIS DECKER, MADE IN AMERICA: SELF-STYLED SUCCESS FROM HORATIO ALGER TO OPRAH WINFREY 112 (1997) (“In an era of infomercials and the celebrity, narratives of self-made success foreground the body rather than the soul and, in doing so, collapse the distinctions between image and reality, private and public selves.”).

advent of technology has aided this collapse.<sup>29</sup> Technology furthers visibility and allows the celebrity to take control of his or her economic value, while also granting the use of this identity for brand purposes.<sup>30</sup> In this sense, a celebrity brand requires publicizing private lives in order to gain mass appeal for the brand, to increase the authenticity of the brand and the products, and to make consumers feel that they possess some of that celebrity.<sup>31</sup> Celebrities use technology as a way to opine on products through mediums like Twitter or Facebook. Twitter has been a vehicle for celebrity endorsements and a tool to build the celebrity brand. In 140 characters or less, individuals can capitalize on their marketability by attracting followers and fans alike.<sup>32</sup> Kim Kardashian, who makes ten thousand dollars per Twitter endorsement, has used her Twitter account to shill her own fragrance collection in less than 20 words: “Calling all my dolls in the UK! My signature fragrance gift set is now exclusively available online at Boots!”<sup>33</sup>

Modern consumer culture also uses the media to further consumption. Comparing the way audiences consume material products to consumption of mediated images, celebrities have become “common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and a collective memory.”<sup>34</sup> Using this as a basis for understanding the transition from endorsements to brands, the ability to draw the line between consumer consciousness of celebrity and celebrity identity is understandable. Having the means to gain some of that celebrity status through interaction with a product, television show, or technology builds the celebrity brand from more than just entertainment to entrepreneurship.

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29. See IRVING REIN, PHILIP KOTLER & MARTIN STOLLER, *HIGH VISIBILITY: THE MAKING AND MARKETING OF PROFESSIONALS INTO CELEBRITIES* 7 (1997).

30. See *id.* at 10.

31. Cf. Erik Hunter, Per Davidsson, & Helen Andersson, *Celebrity Entrepreneurship: Insights for New Venture Strategy*, 27 *FRONTIERS ENTREPRENEURSHIP RES.*, 1, 2 (2007) (maintaining that celebrity involvement, trustworthiness, attractiveness, and expertise in their brand increases their ability to influence customers).

32. See TWITTER.COM, <http://www.twitter.com> (last visited Apr. 28, 2012).

33. Kim Kardashian, TWITTER (Dec. 12, 2011), <http://twitter.com/KimKardashian>; see also Joe Piazza, *How Much Can a Celebrity Make for Tweeting*, *VULTURE* (Jan. 28, 2012, 11:17 AM), <http://www.vulture.com/2012/01/how-much-can-a-celebrity-make-for-tweeting.html>.

34. JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION* 163 (1991).



NBA star LeBron James provides a character study for the transition from endorsements to branding. LeBron James commands a salary of roughly \$16 million with the Miami Heat, yet his endorsements surpass that amount with over \$34 million per year.<sup>35</sup> James has contracts with a variety of companies, including Nike, Coca-Cola, McDonald's, Audemars Piguet, and State Farm.<sup>36</sup> His seven-year contract with Nike is worth \$903 million.<sup>37</sup> Rather than restricting himself to being a celebrity endorser, James expanded his economic value by becoming a brand. In 2005, James fired his agent and took control of his brand by forming a partnership with several friends called LRMR Marketing.<sup>38</sup> James's decision and formation of LRMR revolved around control: "...[W]e like to control. . .we like to be involved in every aspect of the brand we're partnered with. We really strive on the management side once a deal is done, so it becomes a *partnership*, [not just an endorsement]."<sup>39</sup> Moreover, James has a minority share in several companies through LRMR, including Cannondale and the Liverpool Football Club.<sup>40</sup> All of this, of course, is contingent on James's fans across the globe. After all, "if you're popular in China, you could be unpopular everywhere else, and you're still gonna be huge."<sup>41</sup> The LeBron James brand expansion across the globe is possible because his image, his fans, and his products tie directly to him.

### III. Legal Framework and Protection of the Celebrity Brand

Celebrities enjoy significant substantive economic value and goodwill in the market, and the laws that seek to protect them revolve

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35. Kurt Badenhausen, *LeBron Leads NBA's Endorsement All-Stars*, YAHOO! SPORTS (Jun. 6, 2011), [http://sports.yahoo.com/nba/news?slug=ys-forbes-lebron\\_tops\\_nba\\_endorsements\\_060611](http://sports.yahoo.com/nba/news?slug=ys-forbes-lebron_tops_nba_endorsements_060611); *NBA Valuations: Miami Heat*, FORBES.COM, <http://www.forbes.com/teams/miami-heat/> (last visited Nov. 10, 2012).

36. Badenhausen, *supra* note 35.

37. Darren Rovell, *LeBron Signs New Deal with Nike*, YAHOO! SPORTS (Mar. 31, 2010), <http://sports.yahoo.com/nba/news?slug=ys-cnblebronnike033110>.

38. See Lisa Taddeo, *LeBron James's Magnum-sized, Ultrashiny, Nike-powered Lawn Mower to the Next Century*, ESQUIRE, Oct. 1, 2008, at 165.

39. *Id.*; cf. Hunter, Davidsson & Andersson, *supra* note 31, at 8. Hunter, Davidsson, and Andersson's study looks at celebrity entrepreneurs and new ventures. *Id.* at 1. The study concludes that "[f]or new ventures faced with a choice of whether to hire or partner with a celebrity, the smart money may be on partnership." *Id.* at 8.

40. Taddeo, *supra* note 38.

41. *Id.*; cf. Hunter, Davidsson & Andersson, *supra* note 31, at 8 ("Under the celebrity entrepreneur experimental condition, celebrities were viewed as more involved with the new venture than in the celebrity endorser or control conditions. Specifically, our results show that the increasing levels of *perceived celebrity involvement* has a positive effect on attitudes towards new ventures and advertisements.").

around the notion of consumer choices.<sup>42</sup> David Tan argues that consumers tend to prefer one celebrity over another, and that the preferred choice acquires a higher economic value.<sup>43</sup> The law thus protects the value that generates the preferred choice.<sup>44</sup> What is missing in this analysis, however, is the non-monetary conceptualization of the celebrity identity. In other words, by focusing exclusively on the celebrity's economic value or source signaling function, the law may not adequately protect the interests of consumers and the celebrity's brand.<sup>45</sup> Before assessing this issue, it is necessary to turn to the current laws that offer celebrity protection.

#### **A. Trademark Law and the Protection of the Celebrity Brand.**

Substantive economic value and goodwill are traits common to trademark law, and this makes trademark law one avenue of protection for a celebrity brand.<sup>46</sup> Trademark law protects the source signaling function of a company's mark, and its ultimate goal is to protect the consumer.<sup>47</sup> Under the Lanham Act, a trademark is defined as including "any word, name, symbol, or device or any combination thereof" used by a person to "identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."<sup>48</sup> To prevail in a trademark infringement claim, the plaintiff must establish that the symbol is a "valid, legally protectable trademark," and that the defendant's use of a similar mark is "likely to create confusion as to [the] origin of the goods."<sup>49</sup> Trademarks are not a property right, but instead give the right to use the mark as a way to demonstrate authenticity and origin of the product.<sup>50</sup>

The Lanham Act, which is the statutory basis for trademark claims, provides a cause of action against a false "affiliation, connection, or association" with a trademark holder that is likely to cause confusion regarding the "origin, sponsorship, or approval of his or her goods, services, or commercial activities."<sup>51</sup> Plaintiffs who

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42. See Tan, *supra* note 5, at 974.

43. *Id.* at 960.

44. See *id.*

45. See *id.* at 977.

46. See *id.* at 915.

47. See *id.* at 978–79.

48. Lanham Act §45, 15 U.S.C. §1127 (2006).

49. *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 582 (2d. Cir. 1990).

50. See Tan, *supra* note 5, at 978.

51. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2006).

bring claims under section 43(a) of the Lanham Act generally argue false endorsement or unfair competition to supplement a right of publicity claim.<sup>52</sup> The difficulty with using the Lanham Act to protect an individual, or a celebrity, is that it does not protect “the person or the entity that originated the ideas or communications that [the] ‘goods’ embody or contain.”<sup>53</sup> As a result, claims for false endorsement or unfair competition may fail because of statutory and nominative fair use defenses, a lack of likelihood of confusion, and a lack of protectable rights.<sup>54</sup>

1. *Use of False Endorsement Claims to Protect Celebrity Rights.*

False endorsement claims have been upheld in some cases dealing with unauthorized commercial use of a celebrity’s likeness. In such cases, the false endorsement claim functions as a type of false association claim.<sup>55</sup> The claim likens the celebrity’s identity to the misuse of a trademark, where the use of “a visual likeness, vocal imitation, or other uniquely distinguishing characteristic” is likely to confuse the consumer regarding the celebrity’s approval of the product.<sup>56</sup> Claims for false endorsement do not require the use of a strict likeness to create liability, and even a device or symbol can constitute infringement.<sup>57</sup>

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52. See, e.g., *Jackson v. MPI Home Video*, 694 F. Supp. 483 (N.D. Ill. 1988) (finding video tape of Jesse Jackson would confuse consumers into believing tapes were approved or produced by him); *Amazon, Inc. v. Cannondale, Inc.*, No. 99 N 571, 2000 U.S. Dist. LEXIS 17864 (D. Co. Jul. 19, 2000) (determining that Glove, a professional mountain biker, did not have false endorsement claim under Lanham Act § 43(a)); *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 688 F. Supp. 2d 1148 (D. Nev. 2010) (finding defendants use of “Bob Marley” was not actionable under trademark law because plaintiff’s pictures were not used as source indicator).

53. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 32–38 (2003) (determining that the Lanham Act § 43(a) does not require attribution to creators with respect to the origin of goods); see also Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN L. REV. 1161, 1193 (2006) (arguing that confusion about affiliation or sponsorship is more similar to right of publicity cases because celebrities typically do not sell products themselves).

54. See Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity*, 94 TRADEMARK REP. 1202, 1206 (2004).

55. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992), cert. denied, 506 U.S. 1080 (1993).

56. *Id.*

57. *Allen v. Nat’l Video, Inc.*, 610 F. Supp. 612, 628 (S.D.N.Y. 1985). The court made the distinction between the right of publicity and the Lanham Act, stating that the Lanham Act extends beyond the misuse of a strict likeness and also covers the misappropriation of a general persona. *Id.*

Despite this extension, courts have had difficulty in applying false endorsement to the use of a celebrity's identity. Some courts have used "likelihood of confusion" factors, which include, *inter alia*, the strength of the mark, the similarity of the goods and the marks, and evidence of actual confusion.<sup>58</sup> For example, a "mark" refers to the celebrity's likeness or persona, and the "strength" refers to the strength of the celebrity's fame, especially among consumers of that specific product.<sup>59</sup> Ultimately, however, courts look to whether consumers perceived the use as falsely suggesting approval.<sup>60</sup>

In *Kournikova v. General Media Communications*, Anna Kournikova brought suit against General Media Communications for publishing semi-nude pictures of another woman resembling her in Penthouse magazine.<sup>61</sup> Kournikova presented a false endorsement claim under section 43(a) of the Lanham Act contending that General Media infringed her endorsement and sponsorship rights by publishing the photographs.<sup>62</sup> The court agreed that Kournikova raised the possibility of commercial injury through the wrongful use of her name and likeness to promote a product.<sup>63</sup> Nonetheless, the court ultimately concluded that Kournikova failed to show that the average reader believed she voluntarily associated herself with Penthouse magazine, or otherwise approved the use of her name and likeness.<sup>64</sup> The court also rejected Kournikova's claim on the basis

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58. See Solomon, *supra* note 54, at 1214. The Second, Sixth, and Ninth Circuits apply the "likelihood of confusion" factors test. *Id.* The Third Circuit instead categorizes false endorsement claims by requiring a plaintiff to prove that the use of the celebrity's likeness sends a false message. *Id.*; see, e.g., *Seale v. Gramercy Pictures*, 964 F. Supp. 918, 930 (E.D. Pa. 1997), *aff'd*, 156 F.3d 1225 (3d. Cir. 1998). This is similar to a false advertising case, where the plaintiff must show that the message communicated to the consumers is false. *See id.*

59. See Solomon, *supra* note 54, at 1214; see, e.g., *Amazon*, No. 99 N 571, 2000 U.S. Dist. LEXIS 17864, at \*21–27 (using "likelihood of confusion" factors to determine strength of cyclist's mark because bike consumers knew her well).

60. Solomon, *supra* note 54, at 1215.

61. *Kournikova v. Gen. Media Comm'ns, Inc.*, 278 F. Supp. 2d 1111, 1113 (C.D. Cal. 2003).

62. *Id.* at 1114–15.

63. *Id.* at 1120.

64. *Id.* at 1129–30. The court used the following factors found in *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007–08 (9th Cir. 2001): "(1) the level of Plaintiffs recognition among the segment of society for whom GMC's product is intended; (2) the relatedness of Plaintiffs fame or success to GMC's product; (3) the similarity of the likeness used by GMC to Plaintiff; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) GMC's intent in selecting Plaintiff; and (8) likelihood of expansion of the product lines." *Id.* at 1120–21. The court concluded that Plaintiff had failed to show evidence of actual confusion by consumers, even if there

that the First Amendment protected the Penthouse cover and subsequent pages because they were not simple advertisements and displayed no actual malice.<sup>65</sup>

In contrast, the Ninth Circuit case of *Waits v. Frito-Lay* found for plaintiff Tom Waits on his false endorsement claim against Frito Lay.<sup>66</sup> Waits, a famous singer and songwriter, brought suit against Frito-Lay for misappropriating the likeness of his voice in a Doritos commercial.<sup>67</sup> By having an imitator sing in the commercial, Waits asserted that Frito-Lay's use amounted to a false endorsement under the Lanham Act.<sup>68</sup> The court determined that it was unnecessary to prove that Waits was a direct competitor with Frito-Lay to establish false endorsement.<sup>69</sup> Rather, all that was needed for Waits to prevail was that Frito-Lay had "an economic interest akin to that of [Waits] in controlling the commercial exploitation of his or her identity."<sup>70</sup> The court determined that actual consumer confusion occurred since several witnesses testified that they actually believed it was Waits singing in the commercial.<sup>71</sup> On this basis, the court concluded that consumers were likely to be misled into believing that Waits was endorsing the product.<sup>72</sup>

These two examples show that consumer confusion plays a critical role in false endorsement claims. For cases like *Waits*, where clear infringement occurs, evidence of actual confusion is easier to prove and allows a celebrity to prevail. On the other hand, in instances where a celebrity's likeness is only tangentially implicated, proving false endorsement becomes difficult. In these circumstances, bringing a false endorsement claim under Lanham Act section 43(a) fails to offer adequate protection for a celebrity brand—especially one in which the celebrity's likeness, persona, and products all need to be protected.

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was similarity of the marks by the fact that GMC had actually used Kournikova's name in the pictures. *Id.* at 1128.

65. *Id.* at 1128–29. The First Amendment limits Lanham Act suits. See Solomon, *supra* note 54, at 1222–28. The First Amendment bars a public figure's false endorsement claim that is related to non-commercial speech, "unless the plaintiff produces clear and convincing evidence that the defendant acted with actual malice in creating the false impression of endorsement." *Kournikova*, 278 F. Supp. 2d at 1128.

66. See *Waits*, 978 F.2d at 1111.

67. *Id.* at 1097.

68. *Id.* at 1106.

69. *Id.* at 1108.

70. *Id.* at 1110.

71. *Id.* at 1111.

72. *Id.*

2. *Use of Trademark Infringement Claims to Protect Celebrity Rights.*

A more direct line for celebrity protection is infringement of a traditional trademark right. Under Lanham Act section 43(a), a celebrity may sue for infringement because of an economic interest in his or her identity, which resembles a typical trademark.<sup>73</sup> A celebrity asserting this claim must prove a valid trademark right in his or her likeness, and that “the likeness identifies and distinguishes that person’s goods from those of others.”<sup>74</sup> The protected likeness must have meaning distinct from the person, and it must refer to the individual and the goodwill of the commercial enterprise.<sup>75</sup> For the purpose of celebrity brands, infringement of trademark rights can be a viable form of protection in cases where the celebrity’s name, likeness, and persona have acquired a commercial nature.

The difficulty, however, lies in proving that the celebrity’s likeness has acquired a meaning beyond identifying the individual.<sup>76</sup> A likeness can be protected as a mark only if the appearance symbolizes a particular business, product, or company.<sup>77</sup> Few celebrities prevail on infringement claims because of an inability to show protectable rights in their likeness.<sup>78</sup> For celebrity brand purposes, a celebrity may be able to establish trademark rights over the long run because the identity or images used to specify products have a source signaling function.<sup>79</sup>

Celebrities have asserted trademark infringement claims with varying success. In *Estate of Presley v. Russen*, Presley’s estate sought to enjoin the defendant from using the image, likeness, or persona of Elvis Presley in connection with any good, entertainment, or promotional service.<sup>80</sup> The defendant produced a show entitled “The Big El Show,” which featured an individual who impersonated Elvis

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73. See *Parks v. LaFace Records*, 329 F.3d 437, 445 (6th Cir. 2003) (“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. The parties have stipulated to her international fame and to her prior authorization of television programs and books. We have already established. . .that courts routinely recognize a property right in celebrity identity akin to that of a trademark holder under §43(a).”).

74. Solomon, *supra* note 54, at 1215. Essentially, it states that the celebrity’s likeness will be akin to the property being protected under the valid trademark right. See *id.*

75. *Id.*

76. *Id.* at 1216.

77. *Id.* at 1222.

78. See *id.* at 1215–16.

79. See *id.* at 1221.

80. *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1344 (D.N.J. 1981).

Presley in mannerisms, costume, and character.<sup>81</sup> In one of the few cases finding for a celebrity's trademark infringement, the court held that the different "Elvis Poses" could all be considered as one service mark.<sup>82</sup> The court stated, "a change which does not alter [a mark's] distinctive characteristic represents a continuity of trademark rights."<sup>83</sup> The court's holding was narrow and only applicable to those specific images of Presley wearing a jumpsuit, not to all images of Presley.<sup>84</sup>

In contrast, the later cases of *Pirone v. MacMillan* and *ETW Corp. v. Jireh Publishing, Inc.* found no basis for liability under trademark infringement. In *Pirone*, Babe Ruth's family objected to the use of photographs published in a calendar, and asserted that this infringed on trademark rights in the name and image of Babe Ruth.<sup>85</sup> The court held that a photograph of a human being is not inherently distinctive, and that "it cannot be said that every photograph of Ruth serves this origin indicating function."<sup>86</sup> Similarly in *ETW*, the court held that the images and likenesses of Tiger Woods used in the paintings at issue were not protectable because they did not perform the trademark function of designation and did not identify the source of the goods.<sup>87</sup>

*ETW* also supports the proposition that "a person's image or likeness cannot function as a trademark."<sup>88</sup> This holding establishes a barrier to celebrity trademark infringement claims and subsequent cases have upheld this notion.<sup>89</sup> Furthermore, the defenses of fair use

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81. *See id.* at 1348.

82. *See id.* at 1363–64.

83. *Id.* at 1364 (quoting *Ilco v. Ideal Sec. Hardware Corp.*, 526 F.2d 1221, 1224 (C.C.P.A. 1976) ("[W]here the distinctive character of the mark has not changed, the mark is the same and all the rights obtained by those earlier uses inures itself to the newer form.")).

84. *See Nova Wines, Inc. v. Adler Fels Winery LLC*, 467 F. Supp. 2d 965, 976 (N.D. Cal. 2006) (determining that *Estate of Presley* was narrowly applicable to that case).

85. *See Pirone*, 894 F.2d at 581.

86. *See id.* at 583 ("The purpose of a trademark is to designate the source of a product and it has no existence apart from the trade in connection with which the mark is employed.").

87. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 918 (6th Cir. 2003). *ETW*, the licensing agent of Tiger Woods, brought suit against the defendant Rush for using several original images of Woods in his commemorative painting. *Id.* at 918–19.

88. *Id.* at 922.

89. *See, e.g., Fifty-Six Hope Rd. Music*, 688 F. Supp. 2d at 1159. The court refused to extend trademark protection to all depictions of "Bob Marley." The court explicitly stated that, consistent with the case law in *Pirone* and *ETW*, plaintiffs' registered mark "Bob Marley" did not grant a trademark in any and all photographs of Marley—it was only limited to the registered word mark "Bob Marley." *Id.*

and First Amendment protection also limit the ability of celebrities to protect their identity or persona using trademark claims of infringement.<sup>90</sup> Trademark law thus provides inadequate protection for a celebrity brand unless a celebrity has promoted the brand using a specified image or images in regard to the business or product. A brand that furthers a celebrity's identity or persona will preclude enforcement.

### **B. Right of Publicity Laws and the Protection of Celebrity.**

The right of publicity gives the celebrity the right to damages and other relief for the unauthorized commercial appropriation of that celebrity's identity.<sup>91</sup> The right of publicity is a common law action, and the right's current form consists of an amalgam of state law doctrine.<sup>92</sup> This results in varied definitions of identity, and what constitutes infringement. For example, the Sixth Circuit held that a famous phrase constitutes a celebrity identity, whereas the Ninth Circuit extended the concept of a celebrity's identity to a distinctive voice or a robot resembling Vanna White.<sup>93</sup>

Courts are willing to extend the definition of identity in part for social and economic reasons. First, the visibility of a celebrity hinges on the recognition of that individual's fame, popularity, or exposure.<sup>94</sup> Second, the identities of popular celebrities are attractive to advertisers and generate significant economic value.<sup>95</sup> In recognizing a right of publicity, courts have ultimately looked at whether "the [infringer]'s primary intent [is] to obtain a commercial benefit from

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90. See Solomon, *supra* note 54, at 1216–28. Fair use is often used to block a celebrity's misappropriation of identity or likeness claim. *Id.* at 1216. Statutory fair use provides that if the defendant makes "a use, otherwise than as a mark . . . of a term or device which is descriptive and used fairly and in good faith only to describe the goods or services of [the infringing] party," fair use will be found. *Id.* at 1217. Nominative fair use has three prongs and the defendant must prove: "(1) The product in question is not readily identifiable without use of the trademark; (2) [o]nly so much of the mark is used as is reasonably necessary to identify the product; and (3) [t]he user of the mark does nothing that would suggest sponsorship by the trademark holder." *Id.* at 1218. Finally, First Amendment protection is applicable in cases where the celebrity's likeness is used as part of an expressive work, which includes parody, comment, or criticism. *Id.* at 1222.

91. Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d. Cir. 1953).

92. See Tan, *supra* note 5, at 920.

93. See Carson v. Here's Johnny Portable Toilets, Inc., 810 F.2d 104 (6th Cir. 1987) (protecting the phrase "Here's Johnny" from Carson's days as the host of "The Tonight Show"); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (holding Midler's distinctive voice sufficient to invoke her identity); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (determining that robot resembling White was a likeness).

94. See White, 971 F.2d at 1399.

95. *Id.*



the use of the [celebrity]’s identity.”<sup>96</sup> As the United States Supreme Court stated, “[t]he rationale for [the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of goodwill.”<sup>97</sup>

Celebrities bring right of publicity claims for two reasons. The first rests on publicity rights as a “property.”<sup>98</sup> In this sense, the right of publicity protects the image or identity as a property right that may not be exploited without the celebrity’s consent.<sup>99</sup> The second way in which celebrities bring right of publicity claims is related to appropriation of personality, or a form of invasion of privacy.<sup>100</sup> Thus, the right of publicity functions either in an exclusionary way to grant the celebrity the control to exploit their persona or as a way to limit that personality to a certain image.

The primary hurdle to the right of publicity is the First Amendment, which precludes a right of publicity claim if the material in question is either newsworthy or has entertainment value for the public.<sup>101</sup> In *Parks v. Laface Records*, for example, the Sixth Circuit held that whether Rosa Parks’ right of publicity was infringed was a genuine issue of material fact.<sup>102</sup> Parks contended that the musical

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96. Tan, *supra* note 5, at 923.

97. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977). The Court further held that, “[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.” *Id.* Furthermore, the Court found “the State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his *act* in part to encourage such entertainment.” *Id.* at 573 (emphasis added). The holding in *Zacchini* is limited in application to most right of publicity cases, because the holding did not concern the appropriation of identity, but rather the appropriation of the initial reason that the celebrity became famous. *See* Tan, *supra* note 5, at 923–24.

98. GILLIAN BLACK, *PUBLICITY RIGHTS AND IMAGE: EXPLOITATION AND CONTROL* 28 (2011).

99. *Id.*

100. *See id.* at 16–27.

101. *Zacchini*, 433 U.S. at 565, 574 (“It is evident, and there is no claim here to the contrary, that petitioner’s state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner’s act.”); *see also* Daniel E. Wanat, *Entertainment Law: An Analysis of Judicial Decision-Making in Cases Where a Celebrity’s Publicity Right is in Conflict with a User’s First Amendment Right*, 67 ALB. L. REV. 251, 253 (2003).

102. *Parks*, 329 F.3d at 461. The Sixth Circuit stated that Parks’ property right in her own name should be balanced with the freedom of artistic expression. *Id.* Furthermore, the court found “use of another’s identity in a novel, play, or motion picture is . . . not ordinarily an infringement [of the right of publicity, unless] the name or likeness is used solely to attract attention to a work that is not related to the identified person.” *Id.* (internal citation omitted). The court disputed the district court’s finding stating that more evidence was needed to show that the song was not a “disguised commercial advertisement.” *Id.* at 460–61.

group Outkast profited from her fame by using her name for a commercial purpose in the title of the song “Rosa Parks.”<sup>103</sup> Parks bolstered her claim by offering evidence of the lyrics of the song, press clippings, and Outkast’s comments about the message of the song.<sup>104</sup> Outkast responded that the choice was artistic in addition to commercial, and that a valid First Amendment defense existed.<sup>105</sup> Despite Outkast’s assertion, the court concluded that the song may have violated Parks’ right of publicity.<sup>106</sup> *Parks* showcases how the First Amendment defense works with a right of publicity claim. Nonetheless, in many cases, any form of non-commercial use or commercial use in an expressive form can greatly restrict a celebrity’s right to protection.

Policy justifications also limit a celebrity’s right to publicity claims. The threshold issue is whether the celebrity in question has actually been exploited. Courts and commentators have expressed reluctance to allow for unjust enrichment claims because such claims fail to consider that entertainers depend on the work and talent of their predecessors.<sup>107</sup> Furthermore, unjust enrichment claims rest on the assumption that appropriators do not exercise creativity of their own.<sup>108</sup> For example, the dissenting opinions in *White* stated that the mere fact that “an actor or actress became famous for playing a particular role has, until now, never been sufficient to give the performer a proprietary interest in it.”<sup>109</sup> In his dissent, Judge Kozinski argued that intellectual property rights should have specific limitations, and because Samsung created something new and funny in its advertisement, it was enough to garner protection.<sup>110</sup> These policy justifications for limiting celebrities’ right of publicity claims

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103. *Id.* at 459–60.

104. *Id.* at 460.

105. *Id.*

106. *Id.* at 461.

107. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125127, 196–97 (1993) (“A celebrity, in short, does not make her public image, her *meaning for others*, in anything like the way a carpenter makes a chair from a block of wood. She is not the sole and sovereign “author” of what she means for others. Contingency cannot be entirely erased. The creative (and autonomous) role of the media and the audience in the meaning-making process cannot be excised.”). *Id.* at 195 (emphasis in original).

108. *Id.* at 200.

109. *White*, 971 F.2d at 1407 (9th Cir. 1992) (Alarcon, J., dissenting).

110. *Id.* at 1517 (Kozinski, J., dissenting); see also GAINES, *supra* note 16, at 12 (“Juridical discourse, for instance, will hold forth on the strict legal definition of ‘original work’ as nothing more than a work produced by an originator. But it may then abruptly lapse into value judgments that betray a preference for elite culture’s dismissal of anything that is ‘imitative’ of something ‘genuinely original.’”).

run contrary to the need to control a celebrity's economic interest. Depending on the context, a celebrity's right of publicity claim will fail in cases where accusing the defendant appropriator of unjust enrichment seems patently unfair or even unnecessary.<sup>111</sup>

#### **IV. Social Norms Protection of the Celebrity Brand**

The basic presumption of a celebrity brand is that “[celebrities] need to control...their images and make decisions based on a thorough understanding of all the aspects operating in the marketing of a person in the celebrity industry.”<sup>112</sup> By gaining control, celebrities can use their brand to their benefit. This is an important concept because such control can serve as additional or gap-filling protection in areas the law neglects. Vehicles such as technology, media, and public relations can fuel intimacy and brand loyalty, as well as aid a celebrity in protecting a brand through his or her fan base.

Therefore, another way of viewing the protection of celebrity brands is through the social norms context. Celebrities may act as role models in a way that can bring about changes in attitudes and beliefs in the audience.<sup>113</sup> Those individuals “who identify with [the] celebrity want to be like the celebrity and thus are prone to adapt the celebrity's attitudes, beliefs, and behavior.”<sup>114</sup> This draws into a larger group context, because for those individuals who do not identify directly with the celebrity, the celebrity can still have an influence upon them as a reinforcement of what society already believes.<sup>115</sup>

##### **A. Fans and the Celebrity Brand Community.**

A large part of social norms protection rests on the celebrity's relationship with fans. By building a substantial fan base, celebrities instantly gain consumers for their brand.<sup>116</sup> Building brand loyalty is not a new thing. Corporations build brand loyalty to ensure that consumers purchase their goods.<sup>117</sup> Part of building loyalty is building

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111. Todd J. Rahimi, Comment, *The Power to Control Identity: Limiting a Celebrity's Right to Publicity*, 35 SANTA CLARA L. REV. 725, 735-44 (1995).

112. REIN, KOTLER, & STOLLER, *supra* note 29, at 11.

113. Siegwald Lindenberg, et. al., *The Norm-Activating Power of Celebrity: The Dynamics of Success and Influence*, 74 SOC. PSYCHOL. Q. 98, 99 (2011).

114. *Id.*

115. Even if the individual cannot identify with the celebrity, the celebrity is still an archetype reinforced by society, though it may be contrary to what that specific individual believes. *Id.* at 100; *see also* MARK & PEARSON, *supra* note 8, at 13-14.

116. *See* discussion *supra* Part I.B.

117. *See* KAPFERER, *supra* note 27, at 15-18.

a “brand community.”<sup>118</sup> Brand literature conceptualizes one facet of brand community as “invisible new communities created and preserved by how and what [is] consumed.”<sup>119</sup> Another opinion on brand community sees it as a “specialized, non-geographically bound community based on a structured set of social relationships among users of a brand.”<sup>120</sup> For celebrity fans, cohesive participation with the celebrity constitutes a community. This can be utilized as a consumer base for a celebrity brand.

Celebrities create their own brand community in a variety of ways, most notably through technology such as Facebook, Twitter, and fan or celebrity websites.<sup>121</sup> As a result, stardom is no longer confined to Hollywood but instead becomes a part of Middle America.<sup>122</sup> Online fan or celebrity websites can facilitate consumption of the celebrity brand, because they give the appearance of being a more direct form of dialogue between the celebrity and fans.<sup>123</sup> Furthermore, a celebrity’s official website functions as a way to provide products like t-shirts, jewelry, and photographs.<sup>124</sup> Another method of celebrity interaction with fans includes blogging or Twitter. Blogs become a part of the celebrity’s marketing and publicity strategy,<sup>125</sup> as they not only give fans access to the celebrity, but also provide information such as the celebrity’s appearances on television, movies the celebrity might be in, or what brands the celebrity wears.<sup>126</sup> Moreover, blogs allow for further intimacy through the comments feature, where fans can give their input or adoration of the celebrity.<sup>127</sup> Twitter provides a similar platform for celebrities. The term “Twitter marketing” refers to the product placement that

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118. James H. McAlexander, et al., *Building Brand Community*, 66 J. MARKETING 38, 38 (2002).

119. *Id.* at 54.

120. Albert M. Muniz Jr. & Thomas C. O’Guinn, *Brand Community*, 27 J. CONSUMER RES. 412, 419 (2001).

121. See Peggy Orenstein, *The Good Girl, Miranda Cosgrove*, N.Y. TIMES MAG., Mar. 23, 2011, at 32–36.

122. *Id.* at 34.

123. Paul Theberge, *Everyday Fandom: Fan Clubs, Blogging, and the Quotidian Rhythms of the Internet*, 30 CANADIAN J. COMM. 485, 485–86 (2005).

124. This functions particularly well for celebrity musicians who can use such official websites to hawk merchandise (CDs, t-shirts, photos, calendars, sandals, jewelry, and a host of other products), provide advance promotion on upcoming releases and concert tours, and trumpet the artist’s commitment to various charitable causes. *Id.*

125. Bertha Chin & Matt Hills, *Restricted Confessions? Blogging, Sub-cultural Celebrity and the Management of Producer-Fan Proximity*, 18 SOC. SEMIOTICS 253, 255 (2008).

126. See *id.* at 258.

127. *Id.* at 259.

companies and individuals use to bolster their brand.<sup>128</sup> Through Twitter, celebrities can control their image, increase access and relate to fans, disseminate information about their products, and advertise their brand.<sup>129</sup> The only caveat to this type of access is the potential for dilution; if the celebrity becomes over saturated in social media, fans may lose interest or trust in the celebrity.

Celebrities increasingly use television as another means of providing access. For Jessica Simpson or Kim Kardashian, having a reality television show substantiates their celebrity while allowing intimacy with viewers.<sup>130</sup> By inviting viewers to participate in their daily lives, these programs portray celebrities as regular people.<sup>131</sup> For example, Kim Kardashian's show, *Keeping up with the Kardashians*, allows viewers to be a part of her tight knit family as they wake up, travel, model, and even get married.<sup>132</sup> By opening up her private life, Kim Kardashian capitalizes on this publicity, increasing her notoriety. At the same time, her daily exploits become the fan's exploits as they follow her from photo shoots, dinner, and dates. These methods of access for the fan establish the belief that the celebrity is the viewer's friend.<sup>133</sup>

The reciprocity and participatory culture fostered by the celebrity plays a critical role in how the fan views the celebrity brand. Intimacy between the celebrity and the fans offers certain benefits. First, it shows the similarity between the celebrity and the fan, rather than detachment in terms of wealth, fame, or status.<sup>134</sup> Second, it generates loyalty by proving to the fans that the celebrity actually cares about the fans' wellbeing. Third, fans are given the opportunity to emulate the celebrity lifestyle through specific interactions like watching, dressing, acting, or buying certain products.<sup>135</sup> All of these actions greatly increase the likelihood of success of a celebrity brand because they garner loyalty, goodwill, and a larger consumer-fan base.

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128. See Hara K. Jacobs & Steven D. Kim, *IP Twitter-Style: Understanding Practical and Legal Risks in Promoting a Brand through Social Media*, 81 PA. B. ASS'N Q. 81, 81-82 (2010).

129. See *id.* at 82.

130. See Hugh Curnutt, *A Fan Crashing the Party: Exploring Reality-Celebrity in MTV's Real World Franchise*, 10 TELEVISION & NEW MEDIA 251, 255 (2009).

131. See *id.*

132. Harriet Ryan & Adam Tschorn, *The Kardashian Spell; Defying Odds, Their Pop Culture Empire Keeps Growing*, L.A. TIMES, Feb. 19, 2010, at A1.

133. See Orenstein, *supra* note 121, at 35.

134. See *id.*

135. See Tan, *supra* note 5, at 957.

Considering celebrity brand protection, such a consumer fan base can function as a means of protecting the celebrity's identity and the celebrity's product in an alternative way to trademark and right of publicity law. Unlike a standard corporation, a celebrity's fan base is inherently stronger because of loyalty, intimacy, and the draw of celebrity culture. Additionally, spreading a specific image to a celebrity's fans garners further control of the celebrity's identity, and more importantly, the celebrity's brand.

### **B. Social Norms Enforcement of the Celebrity Brand.**

One way of understanding fan goodwill and its link to celebrity brand protection is through a system of social norms. Social norms are defined as “informally enforced rules about which there is at least some consensus.”<sup>136</sup> The sociological understanding of social norms is contingent upon individuals reacting in a negative fashion to any norm transgression.<sup>137</sup> A norm is in place if “any departure of real behavior from the norm is followed by some punishment.”<sup>138</sup>

While some scholars argue that norms can sometimes be used in place of the law, law and norms can also operate in support or subversion of each other.<sup>139</sup> This is an important concept for purposes of this article because it strengthens the notion that fans can operate as a community to protect a celebrity brand. In the context of intellectual property protection, social norms regulate issues such as ownership, authorship, and imposition of sanctions for norms violators.<sup>140</sup> Sanctions (or social discouragement) may be enforced using gossip, social networks, and commercial exclusion.<sup>141</sup>

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136. Lindenberg, *supra* note 113, at 100; *see also* Emmanuelle Fauchart & Eric Von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 *ORG. SCI.* 187, 188–89 (2008) (“Social norms are pervasive and powerful structural characteristics of groups that summarize and simplify group influence processes.”).

137. Fauchart & Von Hippel, *supra* note 136, at 188–89. Under social norms theory, if a social norm is violated, punishment *must* be extended to third parties if the norm is to remain stable. *Id.* at 189. This facilitates a community to build the norms, enforce the norms, and provide stability to the norms. *Id.*

138. *Id.*

139. Social norms operate in support or subversion either in various forms of intellectual property protection, and may include informal known-how trading as a mechanism for exchanging secret information or the opportunity for collective invention. *See id.* at 191. Literature surrounding social norms as intellectual property tends to revolve around smaller groups of individuals, including French chefs. *See id.* 192–201. This diverges from celebrities, who operate on a much larger scale.

140. Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 *V.A. L. REV.* 1787, 1790 (2009).

141. *See id.* at 1790–91.

Dotan Oliar and Christopher Sprigman discuss social norms regulation in the comedian community.<sup>142</sup> Oliar and Sprigman demonstrate how, in stand-up comedy, social norms are a substitute for intellectual property law because they protect a comedian's expression and ideas.<sup>143</sup> Since copyright law does not protect ideas, a comedian's joke may be compromised when another comedian steals an idea.<sup>144</sup> Social norms in the comedian community protect ideas by boycotting a joke thief, using gossip to harm a comedian's reputation, or by refusing to appear with the joke thief.<sup>145</sup> Other articles have explored social norms regulation for magicians and French chefs.<sup>146</sup> In all three cases the internal regulations between community members function as a substitute or an alternative for legal intellectual property protection. Additionally, the small and tight knit nature of the group brings cohesiveness in the group's directive and an ability to regulate against transgressions.<sup>147</sup>

Fans can protect a celebrity brand through enforcing sanctions. For celebrities, copying can pose concerns not only for the celebrity's image but also for any products sold under his or her name. Unlike a community of magicians or comedians, celebrity do not require attribution norms for brand protection because the fame itself provides that protection.<sup>148</sup> However, use norms are important in the context of celebrity branding. Analogous to the use norms of magicians or comedians, use norms for celebrity brand purposes can function in certain distinct ways.<sup>149</sup> First, a celebrity may use his or

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142. *See id.* at 1787–1867.

143. *Id.* at 1811–12.

144. *Id.* at 1795–98.

145. *Id.* at 1815–18.

146. *See generally* Fauchart & Hippel, *supra* note 136 (detailing social norms intellectual property protection among French Chefs); Jacob Loshin, *Secrets Revealed: How Magicians Protect Intellectual Property without Law*, in *LAW AND MAGIC: A COLLECTION OF ESSAYS* (Christine A. Corcos ed., 2008), available at <http://ssrn.com/abstract=1005564>.

147. *See* Oliar & Sprigman, *supra* note 140, at 1813–14.

148. For magicians and comedians, attribution norms are more important because a joke or a magic trick facilitates credit where credit is due, as well as encouraging innovation or improvements of previously shared works. *See* Loshin, *supra* note 146, at 29–30; Oliar & Sprigman, *supra* note 140, at 1828–31. Celebrity brands, however, do not require this attribution because the inherent fame, recognition, and desirability function as a protection in and of itself.

149. *See* Loshin, *supra* note 146, at 29. Loshin describes four use norms for magicians: “(1) If a secret method or dramatic presentation has not been widely shared, published, or sold, nobody else can use it; (2) [i]f a secret method has been widely shared, published, or sold, it may be used freely; (3) [i]f a dramatic presentation has been widely shared, published, or sold, it may be used, but using it will be considered bad form; and (4) [i]f a

her fame to disseminate information, products, and access to fans. Second, a celebrity's fame allows fans to communicate with others about the celebrity and the product, benefitting the brand as a whole. Third, non-celebrity users who widely share, sell, or market the celebrity with permission are looked upon favorably. Fourth, non-celebrity users who widely share, sell, or market the celebrity in opposition or conjunction to the celebrity may not use the celebrity's image or products.<sup>150</sup> The main backbone of these norms is that any bad exposure or damage to the celebrity cheapens the power of the celebrity.

Of course, celebrity brands require protection under intellectual property law, because strong attribution rights contribute to innovation in this area.<sup>151</sup> Social norms can be a fragile network that is easily destructible. Since the basis of social norms protection is contingent on a brand community, the essential element is that the community functions in a tight cohesive unit, otherwise it will fail to protect the brand.<sup>152</sup> One problem with social norms brand protection occurs when a brand community increases in size, and detection cost increases and the efficiency of enforcement techniques decreases.<sup>153</sup>

A lack of homogeneity may also create problems for social norms protection.<sup>154</sup> In the celebrity brand context, this can happen when fans diverge in their opinions of a celebrity. For example, Miley Cyrus, the Disney Channel star of Hannah Montana fame, created controversy after she was seen smoking salvia—a hallucinogenic drug — on several celebrity gossip websites.<sup>155</sup> While some fans found this to be an expression of a young woman growing up, other fans, including parents, found Cyrus's actions to be distasteful as a role

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trick was originally published or shared but has not been used for a long time, the person who re-discovers it should be treated as if she invented it." *Id.*

150. *See id.* These four social norms criteria are derived from observations of celebrity interests and interaction with fans and the public, but is based on a similar model as Loshin conceives for magicians.

151. Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 *CARDOZO L. REV.* 1437, 1449 (2010). Cooper states that open projects are dependent on traditional intellectual property rights, and eliminating such rights would make it impossible to bind users far removed from the product. *See id.* This works similarly in the context of celebrity brands, because in order to maintain control of the brand intellectual property protection through licensing is necessary.

152. *Cf.* Oliar & Sprigman, *supra* note 140, at 1813.

153. *See* Dreyfuss, *supra* note 151, at 1458.

154. *Id.* at 1459.

155. *Miley Cyrus Parties with a Bong (VIDEO)*, *HUFFINGTON POST* (Dec. 10, 2010, 9:22 AM), [http://www.huffingtonpost.com/2010/12/10/miley-cyrus-parties-with-n\\_794848.html](http://www.huffingtonpost.com/2010/12/10/miley-cyrus-parties-with-n_794848.html).



model.<sup>156</sup> Such a split in fan loyalty makes it difficult to use social norms as a means of protection for the celebrity brand because the brand community is no longer cohesive. Divergent interests in terms of age, race, and gender may also play a role in whether social norms function as an enforcement mechanism.<sup>157</sup> Finally, if some members of the community are paid participants while other members are voluntary, the existence of monetary rewards will limit the benefit of being a part of the community as a whole.<sup>158</sup>

The next step in understanding these norms is to consider how they could be enforced. In contrast to a tight knit community, such as magicians, chefs, or comedians, celebrity fans are a wide and dispersed group. This complicates enforcement of the social norms between fans and celebrities, and may perpetuate both a homogeneity and a benefits problem. In this sense, technology builds and preserves the community. Technology allows fans to interact with one another by dispersing valid information about the celebrity and dismissing false or denigrating information. More significantly, it allows the celebrity to utilize his or her fan base and generate animosity against the individuals who infringe upon the celebrity's brand. Another effect of infringement can be backlash against the infringer through increased support of the celebrity and her brand. Here, fans retaliate by purchasing the celebrity's product or by endorsing the brand to fellow fans.

The Jessica Simpson brand provides a clear example of a social norms system protecting a celebrity brand. In 2009, Jessica Simpson embarked on a music tour that sparked controversy, particularly

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156. Leslie Gornstein, *Miley Cyrus Ain't a Stoner, but Who'd Care if She was?*, E ONLINE (Nov. 28, 2011, 6:00 PM), [http://www.eonline.com/news/ask\\_the\\_answer\\_bitch/miley\\_cyrus\\_aint\\_stoner\\_whod\\_care\\_she/277192](http://www.eonline.com/news/ask_the_answer_bitch/miley_cyrus_aint_stoner_whod_care_she/277192).

157. Differing opinions on a celebrity based on race, gender, or age can impact how individuals view the celebrity over time. For child stars, age plays a large role in their fan base, and can alienate many fans and create disloyalty as the child stars age. This can work similarly in terms of gender or race. Alienating those fans on the basis of these factors may result in breaking the fan base and subsequently breaking the brand community that holds together the social norms of that group. Cf. Brian D. Till & Terence A. Shimp, *Endorsers in Advertising: The Case of Negative Celebrity Information*, 26 J. ADVERTISING 67, 72 (1998) (finding that negative celebrity information detracts from consumer perception of a brand and the celebrity).

158. Dreyfuss, *supra* note 151, at 1459. Dreyfuss says that monetary payment may crowd out the benefits that are more psychic or hedonic. *Id.* Essentially, "contributors would feel foolish for donating their time to be a part of the community when others are being paid, or they may derive less pleasure for their effort because they know that the output is commercially motivated." *Id.*

because she gained weight.<sup>159</sup> Many websites, news organizations, and celebrity gossip magazines publicized Simpson's weight gain using taunting words, pictures, and messages.<sup>160</sup> The hurtful remarks generated outrage from many of Simpson's fans, prompting an outpour of support for the celebrity.<sup>161</sup> Several fan websites indicated their approval of Simpson's new body, going so far as to remark "[n]o matter what size Jessica Simpson is she is gorgeous."<sup>162</sup>

By policing the detrimental weight comments through fan support, Simpson was able to establish herself no longer as the ditzy skinny blonde, but instead as a relatable individual who faced weight problems.<sup>163</sup> Simpson's brand grew in part because women similarly related to her clothing and designs.<sup>164</sup> In this context, social norms functioned in a protective way by asserting a right of publicity, whereby the celebrity was protected from disparaging remarks and images. Additionally, Simpson's fans provided a mechanism whereby her brand could continue to grow by spreading the word that she was in fact more than a celebrity.<sup>165</sup>

Social norms enforcement depends on "the maintenance of the clearest possible rules regarding ownership."<sup>166</sup> Thus, for social norms protection to function properly, a celebrity must control his or her image in the eyes of fans and consumers. Any dilution or expansion of the brand may create uncertainty and disloyalty. As is the case in other informal systems, social norms protection limits property rights to a sole owner; to have effective enforcement, the brand cannot be controlled by anyone but the celebrity.<sup>167</sup> By exerting this control, celebrities may capitalize on their interaction with fans, and, in turn further the social norms protection of their brands.

## V. Incorporating Social Norms Protection into Intellectual

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159. Esther Haynes, *Jessica Simpson has a Reason to Smile*, LUCKY.COM, (Dec. 2011), <http://www.luckymag.com/magazine/2011/12/jessica-simpson#slide=1>.

160. Michael Inbar, *Jessica Simpson: Poster Girl for Weight-ism?*, TODAY.COM (Jan. 29, 2009, 11:54 AM), [http://today.msnbc.msn.com/id/28912522/ns/today-today\\_health/t/jessica-simpson-new-poster-girl-weight-ism/#.TsKsu\\_Hm9Nw](http://today.msnbc.msn.com/id/28912522/ns/today-today_health/t/jessica-simpson-new-poster-girl-weight-ism/#.TsKsu_Hm9Nw).

161. See Haynes, *supra* note 159.

162. *Id.*

163. *Id.*

164. *Id.*

165. See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1688, 1691 (2006) (arguing that copying may offer a means to promote innovation and benefit originators).

166. See Oliar & Sprigman, *supra* note 140, at 1865.

167. *Id.*

## Property

Social norms protection provides an insight into the gaps between trademark and right of publicity laws as it relates to celebrity branding. Social norms can provide important protection outside the bounds of the law. However, the question is whether this type of protection is something the law should provide, rather than consumers and fans. Even broader is the question as to whether the law should protect celebrity brands at all.

Opinions on the purpose of celebrity legal protection vary. Commentators argue that celebrity protection has gone too far by criticizing the loose terminology that courts use in defining “celebrity,” “identity,” or “unfair competition.”<sup>168</sup> Professor David S. Welkowitz asserts that courts fail to distinguish between “calling to mind” a celebrity and “making one believe that it *is* the celebrity.”<sup>169</sup> He argues that commercial use and commercial value should not be considered as the same thing.<sup>170</sup> The purpose of pushing a product should not be conflated with the celebrity identity because the celebrity acts merely as a point of reference.<sup>171</sup> For Welkowitz, celebrity protection should only extend to cases of deception because otherwise it will impede public expression.<sup>172</sup>

Welkowitz’s argument is similar to the First Amendment limitation, where the public interest in news and entertainment trump celebrity rights. The importance of the First Amendment permeates every right of publicity or trademark claim, since any limitation on freedom of speech or expression weighs against the public interest.<sup>173</sup> The purpose of the First Amendment is to ensure public access to information so that people can make informed choices in socially important areas without undue interference.<sup>174</sup> Commercial speech receives the least amount of protection under the Constitution, despite an exception for information provided for private economic decisions.<sup>175</sup> Most applicable here is the basic premise that the First

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168. David S. Welkowitz, *Catching Smoke, Nailing Jell-o to a Wall: The Vanna White Case and the Limits of Celebrity Rights*, 3 J. INTELL. PROP. L. 67, 76–77 (1995).

169. *Id.* (emphasis added).

170. *Id.* at 79.

171. *Id.* at 80.

172. *Id.* at 83.

173. *See Tan, supra* note 5, at 924–26.

174. *See id.*

175. *See id.* at 926–27. Under the First Amendment, the use of an individual’s identity for informational or newsworthy purposes is protected under the constitution. *Id.* at 926. However, unpermitted use in advertising or commercial products triggers infringement. *Id.* at 927.

Amendment protects “self-expression.”<sup>176</sup> For example, daily language includes phrases from company trademarks, such as “Barbie doll” or “Just do it.”<sup>177</sup> Similarly, celebrities connote certain images or have their own catch phrases. Limiting use of terms such as “Winning” or “That’s hot” infringes on an individual’s right to free expression, simply because a celebrity has coined the term.<sup>178</sup> Furthermore, restricting certain forms of commercial items, like celebrity memorabilia or products, through increased legal protection could diminish a consumer’s choice of expression through his or her purchase.<sup>179</sup> Thus, the First Amendment provides protection as a matter of public policy to restrict a celebrity brand on grounds of freedom of expression.

Another argument against celebrity legal protection is that celebrities are well-compensated and stronger legal protections would only increase their wealth and control. Becoming a celebrity also opens an individual up to criticism and use, because of the assumption of risk associated with being a public figure. If this is the case, legal protections such as the right of publicity or trademark law are unnecessary. Protections would be unnecessary because celebrities have implicitly accepted that their image and goodwill are in the public domain and do not require protection. Additionally, encouraging creativity through legal protection may lead to undesirable results because it tends to value fame as a separate economic value from the underlying celebrity talent or activity.<sup>180</sup> Thus, protecting celebrity as a whole distorts competition because it enhances the production of money rather than artistic talent.<sup>181</sup> Legal protection also neglects to acknowledge that celebrity is a by-product of talent, media, and the audience. In this context, a normative question arises: Should celebrities be held to a higher standard in the eyes of the law, rather than any other components at play?

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176. See *Procnier v. Martinez*, 416 U.S. 396, 427 (1974).

177. See Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 400–01 (1990).

178. See *id.* at 405.

179. See Lee Goldman, *Elvis is Alive, but He Shouldn’t Be: The Right of Publicity Revisited*, 1992 BYU L. REV. 597, 621 (1992); see also Tan, *supra* note 5, at 974.

180. See *id.* at 604–05.

181. *Cf. id.* Goldman’s argument differs slightly in that he argues that the public may enjoy collateral uses of celebrity’s identity rather than the celebrity’s talents. *Id.* at 604. As a result, the secondary benefits of fortune can lead to over-investment in the original talent. *Id.* He gives an example where “the most artistic or highest quality producers of T-shirts may not prevail in the marketplace if they do not get the support of the ‘hot’ celebrity.” *Id.* at 605.

The arguments opposing legal protections for celebrities directly apply to celebrity brands. While right of publicity laws focus on the use of the celebrity identity and trademark law protects the celebrity product from infringement or unfair competition, increased protection in either form may detrimentally cause distortions or revalue artistic talent. A celebrity brand that incorporates both a product and an identity may justify artistic merit solely on the basis of economic value and detract from actual talent. Furthermore, the proliferation of celebrity brands encourages individuals without talent to build a brand solely for economic benefit. A celebrity brand has the potential to filter a false or misleading representation to individuals who buy into the brand, and could detract from better-suited products that lack a celebrity connection. Thus, increasing legal protection for celebrity brands could restrict competition in the marketplace and limit free expression for participating fans and consumers.

Nevertheless, the importance of protecting a celebrity brand does not rest upon economic or artistic benefits. Instead, it depends on the co-creation of value between fans and the celebrity. Celebrity has evolved to have cultural and contextual meaning bolstered by the media, the audience, and others.<sup>182</sup> Direct interaction with a celebrity creates fan goodwill, and these social interactions are a form of freedom of expression through an individual's identification with a celebrity. This creates a brand community, which is important in shaping celebrity identity to reflect fan and consumer ideals. The goodwill between fans and celebrities functions as a cooperative process, where fans engage in direct interaction with the celebrity.<sup>183</sup> The result is a celebrity brand that connotes certain fan ideals and packages them into "products and services that realize those desired outcomes."<sup>184</sup> Kate Bosworth, an actress, model, and designer, launched a website called *Jewelmint*, where fans of her style can

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182. Madow, *supra* note 107, at 195.

183. Robert J. Forster, *The Work of the New Economy: Consumers, Brands, and Value Creation*, 22 *CULTURAL ANTHROPOLOGY* 707, 715 (2007). Co-creation of value is the "interaction between the firm and consumer [as] becoming the locus of 'co-creating' value." *Id.* Essentially, consumers no longer merely purchase offerings autonomously created by a company, but engaged in personalized interactions to create products and services. *Id.*

184. *Id.* Forster discusses the co-creation of value in the context of firms and consumers, but this is applicable in the context of a celebrity brand. *Id.* Like a company, celebrities toe a fine line between commoditization and co-creation. *See id.* Celebrities that engage in co-creation will use fan interaction to facilitate how they manage their brand and what image they convey through their products and services. *Cf. id.* at 715–16.

interact with her and purchase her jewelry designs.<sup>185</sup> Customers purchase jewelry based on their style, and jewelry is made and rotated through the site based on sales and customer input.<sup>186</sup> Bosworth's brand utilizes brand community and co-creation of value to enhance the use of her website and to ensure that pieces are designed to meet customer needs, respectively. Together, co-creation of value and brand community allow individuals to participate and feel as though they belong to something. From a public policy standpoint, promotion of individual participation is a valuable outcome of any incurred economic benefit and should be fostered.

Additionally, co-creation of value and brand community are important in furthering a participatory culture. The key question is whether the law can accommodate these characteristics when it protects celebrity brands. Currently, gaps in intellectual property law allow fans free expression through association with a celebrity. Strengthening celebrity legal protection may limit such fan expression. Instead, the law should take into account brand community and co-creation of value when considering trademark or right of publicity claims. Rather than providing for a more expansive definition of "celebrity," "image," or "likeness," the law should consider the consumer base, fan goodwill, and social norms protection in understanding how to define "likeness" or "image" in a particular case. By using already implemented social norms protection, a court may, for example, find evidence that the celebrity has acquired a meaning past their image in a trademark infringement claim. Given that trademark and right of publicity laws do not protect a celebrity brand as a whole, considering social norm protection that already exists can ensure a more cohesive interpretation of the current legal patchwork in existence.

## VI. Conclusion

The world of celebrity has only broadened the influence it has on fans and the public. This article has sought to understand how celebrities have moved past endorsement to a branding, and in the process highlighted the "negative spaces" in intellectual property relating to celebrity brand protection and innovation.<sup>187</sup> An alternative intellectual property regime, such as social norms, can

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185. JEWELMINT.COM, <http://www.jewelmint.com> (last visited Apr. 25, 2012).

186. *Id.*

187. See Chris Sprigman, *The Negative Space of Copyright*, U. CHI. L. FAC. BLOG, Nov. 15, 2006, [http://uchicagolaw.typepad.com/faculty/2006/11/the\\_negative\\_sp.html](http://uchicagolaw.typepad.com/faculty/2006/11/the_negative_sp.html).

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organize relationships between celebrities and fans in order to enforce these unique rights.<sup>188</sup>

While celebrities have harnessed their fans to buy into their image, a well-defined social norms structure has not emerged to protect a celebrity brand. Social norms in this context are fragile because celebrity fans are diverse and dispersed. Nonetheless, the concepts of brand community and co-creative value are effective tools for celebrities. Allowing further access to fans can also limit access to those individuals who seek to usurp the celebrity brand. Accordingly, a celebrity should ensure that fans are granted access, but not so much access that the celebrity's fame is diluted.

Both trademark and right of publicity laws are contingent on the strength of the celebrity's fame. Since neither law adequately protects celebrity brands, courts should look to the current social norms protection within the brand community to evaluate the claim.<sup>189</sup> Furthermore, such social norms protection may eventually push intellectual property law to combine trademark and right of publicity law with regard to branding.

As celebrities multiply and invite themselves into our daily lives, their brands will play a greater role in how we view fame and success. Yet, within the celebrity universe, we find a way for society to identify itself, further interaction and participation, and maybe even get a little piece of the fame pie. Perhaps being part of the celebrity universe just functions as a mirror for what we wish we were.

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188. See Loshin, *supra* note 146, at 35. Norms, rather than law, can be a source of creativity that facilitates interaction and community in a better way than pure intellectual property protection. See Oliar & Sprigman, *supra* note 140, at 1857–58.

189. See *id.* at 36–37.