# POSSESSING STAR QUALITIES
## Celebrity Identity as Property

*Kirsten J Anker*[*]

This article discusses the legal protection of celebrity identity in Australia and the US in the context of post-modern critiques of intellectual property and cultural production. In the US, the Californian legislation, through its resemblance to schemes for copyright protection, clearly characterises the celebrity image as an 'artistic work'. Courts in Australia have avoided an explicit property characterisation but allow celebrities an action in passing off, a tort traditionally associated with trade mark law. The article questions the implications of an intellectual property paradigm for the protection of celebrity rights, and is particularly critical of the role of law in the creation of property value.

Copyright law is founded on liberal notions of personal authorship and free speech which are problematic in an era of mass production and communications, but trade marks further channel the ownership of cultural images into the hands of corporations and away from the public. The article concludes that the Australian approach may give some flexibility however: in focusing on the *effect* of the use of celebrity images in the mind of the public, the potential exists to acknowledge the place of these images in popular culture and the public domain.

## Introduction

In a gothic twilight of cold stone and vaulted ceilings, a dark shape looms on the screen and caped arms part, batlike, to reveal an inhumanly pale face, cruel fangs, an expression of blood lust. He strikes and, as fangs sink into delicate, vulnerable neck flesh, the rich arterial blood coursing the length of Count Dracula's throat sustains his life, while draining the victim of hers; blood and death are the price of immortality.

In another less filmic setting, the widow of Dracula's most iconic interpreter, Bela Lugosi, holds the cross of possessory rights up against his film company. She characterises the use of Lugosi's Dracula image in merchandising by Universal Pictures as blood-sucking and free-loading; she feels that the things which have given Lugosi cultural immortality — that made Lugosi's Dracula unique; that made it *his* Dracula character — actually belong to him as property.

The concept that people can have property rights in 'themselves' could well be seen as the inevitable culmination of a heritage of liberal individualism

* Doctoral Candidate, Faculty of Law, University of Sydney.

and the 'prodigious expansion of capital into hitherto uncommodified areas'.[1] Just what might be included in a 'self' to be owned ranges from confidential personal information and data about consumer behaviour and recreational interests[2] to genetic information[3] and human tissue.[4] This article will concentrate on the slightly more ephemeral concern of an individual's identity or persona. In practice, the issue of property in identity tends to revolve around whether a person may prevent the unauthorised use of their name, voice or likeness — the principal recognisable physical manifestations of identity — and the focus is on celebrities because of the commercial interests at stake.

I am particularly interested in questioning the rationales for these extensions of the property paradigm, and exploring the dislocations that occur when concepts with specific historical and cultural origins get stretched, in the incremental manner of common law systems, to be applied in new situations to which they have but a tenuous connection. In the United States, the law on publicity rights has been adapted from principles of the common law right to privacy. While these principles were largely born of a nineteenth century class-based ideology, they are currently relied upon by the products of a very different set of social circumstances. Celebrities, public personae and other icons who seek protection under the right of publicity are cultural phenomena — if not entirely created, then dramatically magnified by the technological advances in media and communication in the twentieth century. Together with mass production/consumption and the cult of consumerism, these changes have caused the star to become a 'commodity', another product for exchange on the market. Consequently, a law that originally related to the protection of privacy is now concerned principally with the protection of profit.

Some states in the United States have identified this right as proprietary by enacting legislation reflective of copyright law principles. This approach is consistent with a characterisation, as with artistic works under copyright, of the public image[5] as the product of the person and their labour, as a material expression created by an individual author. It also recognises the importance of celebrities as a cultural resource by allowing the subject to revert to the public domain for the purposes of 'fair use' in other artistic or public interest endeavours. Similar to copyright law, proprietary rights in image lapse after a certain period of time after the death of the individual.

In light of both the technical and cultural development of music, film and the media, and the shift from viewing the star in terms of authorship to the star

---

1 Jameson (1991), p 36.

2 Samuelson (2000).

3 See, for example, *Moore v Regents of the University of California* 793 AT2d 479 (Cal. 1990), in which genetic information taken from the spleen of a leukemia patient formed the basis of a patented cell line: in James Boyle (1996), p 22; and generally, Isabel Karpin (2000).

4 Magnusson (2000); Atherton (2000).

5 The word 'image' will be used in its broad sense denoting the characteristics of a star's persona, identity or reputation (including style, voice and manner), rather than simply a photo or likeness.

as commercial product, this article will also consider the relevance of trade mark and branding to the protection of the celebrity image. In fact, in Australia, where there is no specific right of privacy or publicity and no explicit recognition that people have a proprietary interest in their image, the misappropriation of celebrity images has been dealt with by the courts by allowing a common law action in the tort of passing off, an area traditionally linked with trade mark law. Also familiar from trade marks is the prosecution of misappropriation as 'misleading or deceptive conduct' under section 52 of the *Trade Practices Act 1974* (Cth). Although less developed theoretically than the North American regimes, the action in misappropriation allows flexible consideration of the context of the appropriation by focusing on its effect, rather than the narrow question of whether property rights exist. Further analogies with the trade mark/passing off area of intellectual property law may also allow a recognition of the cultural situation of the celebrity image, through the idea of 'genericisation' — that, after a certain level of popular usage, an image belongs to the public domain rather than its private originator.

I have chosen Madonna as a particular illustration of the characteristics of a 'persona' in pop-culture, simply because she is probably the most famous — or at least the most enduring — pop star of the MTV generation; and although she has become more media-shy since the birth of her daughter, she continues to assert a cultural presence and it is not long since she '[loomed] as large over the cultural landscape as Elvis once did'.[6]

While observers have been aware of the Madonna image as a conscious construction which is the result of a considerable amount of work and effort — and thus consistent with a Lockean account of intellectual property — the nature of the Madonna phenomenon seemed to outgrow the individualism of modernist ideas of artistic endeavour. Her image is a nostalgic pastiche, ever-changing in a an exercise of 'post-modern plasticity' or cultural schizophrenia, and seems to subsume any reference back to a 'real' Madonna as originator — even being christened Madonna at birth is a Catholic reference which she later explores in her popular image. Her persona is a two-dimensional occupant of the 'simulacra',[7] a character which transcends any fixed narrative and to which her music is only incidental. Indeed, Madonna has said that she regards celebrity itself as her art. That a celebrity's image can have moved in this way beyond being property as an artistic work to become a commodified package, endlessly involved in the promotion of itself, suggests that if one has to rely on existing intellectual property law paradigms, then trade mark, and not copyright, is the most appropriate scheme for mediating publicity rights.

## Copyright Parallels

Two main theories have long supported the legal protection of intellectual property as property, and specifically of artistic works under copyright.

---

6 Seigworth (1993), p 293.

7 The 'simulacrum' was Plato's concept of copies without originals; the term is used by Jameson and Baudrillard, in particular, to speak of a media space with no referent in reality.

Although the validity of both John Locke's theory of labour as the source of personal property rights, and modernist notions of individual expression and originality, is widely questioned, it is undeniable that they continue to inform legal discourse in the area. There are some interesting implications for the celebrity identity as property.

### *The 'Work' of Art*

An interpretation of Locke's theory — and one which is often an implicitly accepted justification for granting property in ideas — is that the production of ideas requires labour, and this ought to be rewarded — or, at least, needs to be rewarded to secure future production. More fundamentally, if a person is presumed to have property in their own body, so the work which that body (including the mind) produces is consequently also the natural property of the person.[8] It is not always clear how the application of this principle has justified allocation of property rights to some types of creative endeavour and not others — why, for example, copyright protects expression but not ideas. James Boyle suggests that this distinction is in itself tied to 'the romantic vision of authorship' which provides the conceptual basis for 'fencing in the commons, giving the author property in something built from the public domain — language, culture, genre'.[9]

The attribution of ownership in intellectual property has not always been an automatic practice, however. Foucault writes that, in earlier periods, literary texts 'were accepted, put into circulation and valorised without any question about the identity of the author'.[10] While later, in literature as in the visual arts, names became very important in the identification of works, 'authorship' did not seem to be strictly tied to either the intellectual labour in ideas, or the labour in the production of their materiality. For example, it is well known that master painters around the time of Michelangelo would often have the bulk of their painting done by apprentices, only coming in themselves to add details such as hands and faces.

This is not solely a pre-modern practice, either. The contemporary Australian painter John Young, whose most recognisable trait is canvasses covered with coloured squares, has a group of about ten students who paint, and mix colours for, these works. Jeff Koonz, famous for his 10 metre-high floral puppy, gives instructions to a group of 'artisans' who carry out the manual creation of his sculptures and installations. Within Aboriginal art, the custom of collaborative work within traditional communities based on custodianship of particular stories and designs associated with them is another practice inadequately addressed by intellectual property characterisations of authorship and originality.[11]

---

8 Hughes (1988), pp 300–02.

9 Boyle (1996), p 56.

10 Foucault (1984), p 109.

11 Gray (1996).

Similarly, the celebrity persona is often the result of a number of contributors. In the famous *Lugosi* case,[12] it was found that Bela Lugosi would potentially have been able to claim a right to the characteristics of his portrayal of Dracula which went beyond the standard vampire fare of fangs, Gothic capes and Transylvanian accents. He could own the parts of the image which were contributed by him, such as mannerisms, voice and make-up, but not his costume, which was created by studio designers, nor indeed the generic Dracula characteristics created by Bram Stoker in the original story.

What, then, of a star like Madonna, who has not only had costume designers (one of whom, Gaultier, has a style at least as distinctive as Madonna's) but also choreographers, make-up artists, hair stylists, gym trainers, photographers, press agents, producers, managers, songwriters ...? Can they be 'severed' like Lugosi's Dracula image? Even for someone who appears, in pop terms, to have as much control over her image as Madonna, it seems over-generous to award her ownership of an image which contains the work of so many other people. And attributing ownership on the basis of personhood — that she *is* Madonna — ignores the carefully constructed distinction between the image character and the real person.

Further confounding the granting of proprietary rights on the basis of labour is the fact that fame, and thus the value of the celebrity, cannot happen without an audience. Marilyn Monroe said: 'If I am a star — the people have made me a star.'[13] Indeed, the previous practice of denying privacy rights to famous people indicates 'a legal awareness that the media images or personalities exist in the minds of the public, and their value, as intangible intellectual property, derives from the public's willingness to buy copies of this image'.[14]

Now that the public nature of celebrity is not considered to preclude a star's ownership of their image, however, what happens to the role of the consumer in the creation of value? What of all the teenage girls who danced around in their rooms with hairbrush microphones and drawn-on moles creating the Madonna cult, or the women who dreamt of Madonna and published their dreams in homage to their own fantasies as much as to the 'goddess of pop' herself?[15] Again, it seems unfair to give to stars exclusive rights of control over the product of their work and our hero worship, and thereby limit the circulation of popular images 'for the preservation of our collective cultural heritage, and for our future social heritage'.[16]

### *Authorship and Originality*

Although it certainly precedes the modern era, the creation of the 'author-function', and consequently of intellectual property rights, sits very

---

12 *Lugosi v Universal Pictures* Sup, 160 Cal Rptr 823 (1979).

13 Coome (1992), p 371.

14 Lury (1993), p 73.

15 Turner (1993).

16 Coome (1992), p 373.

comfortably within the philosophy of modernism. The focus on labour discussed in the previous section is reflected in the modernist paradigm of artistic expression which lies at the heart of copyright law. Within this paradigm, the individual subject (or 'monad') creates a work which is the outward material expression of inward thoughts and feelings. As a representation of individual subjectivity, then, the work of every artist is thought to have its own unique style.

Frederic Jameson traces the ways in which these characteristics have changed with the transition to post-modernism — the subject is fragmented so that there is no longer any self whose feelings can be expressed. Objects and subjects alike are commodified, and 'the end of the bourgeois ego [means the end] of style, in the sense of the unique and the personal, the end of the distinctive individual brushstroke (as symbolised by the emergent primacy of mechanical reproduction)'.[17]

Although copyright is still based on the notion of the romantic author or artist, this seems ludicrous in light of what may attract protection under current law. Perhaps in order to avoid having judges as arbiters of aesthetics in declaring what constitutes art, 'artistic work' has to be applied broadly, and might be applicable to '[anything more expressive than] a single straight line drawn with the aid of a ruler'.[18] The concept of originality has come to mean the origin of the work, and not the unique style of the individual artist.

The same artistic expression paradigm has been used to describe the property that stars have in their personae. The personal monopoly over the image is bound up with legal (and cultural) notions of subjecthood, and the star persona is a 'collective representation that presents/re-presents itself as the private expressivity of a unique individual'.[19] The 'death' of the subject and related notions of individual expression may call into question the use of a copyright structure for the treatment of celebrities' rights.

*Nostalgia and Appropriation*

Accompanying the disappearance of the subject described in postmodern theory, artistic explorations of the last 30 years, such as the use of pastiche, or the deliberate incorporation of the work of others, which make obvious the process of appropriation, have also raised questions as to the extent to which 'true' originality exists. Most work is a cumulative synthesis of past influences and contemporary trends; as far as art is the communication of ideas, it relies on the evocation of symbols to transpire meaning, drawing on a shared cultural and historical consciousness.

Jameson and others would claim that this practice of 'looking back' — the 'random cannibalisation of all the styles of the past'[20] — has become the major way in which postmodern culture articulates the present. This has been the principal issue in the discussion over Madonna's image. While most artists

---

17 Jameson (1991), p 13.

18 *British Northrop Ltd v Texteam Blackburn Ltd* (1973), [1974] RATC 57 at 68.

19 Gaines (1991), p 186.

20 Jameson (1991), p 18.

are influenced by an unknowable number of sources, in many instances, Madonna has consciously emulated the style of past screen goddesses such as Marlene Dietrich, Greta Garbo, Mae West, Jean Harlow, but most notably Marilyn Monroe. Her favourite tabloid rumour is that she is Marilyn's reincarnation (although she was six when Marilyn died).[21]

Appropriating style is more important in the context of publicity rights than copyright because it is in the creation of a recognisable, unique style that the value lies (and as we shall see, this is central to findings by courts that celebrities have a property interest in their identity), not just in the originality of the material representation as required under copyright. However, rather than simply riding on the effect of the old image, the re-creation can also use our awareness of the old to engender new meaning. As Jameson says of the film *Body Heat* (1981):

> our awareness of the pre-existence of other versions ... is now a constitutive and essential part of the film's structure: we are now, in other words, in 'intertextuality' as a deliberate, built-in feature of the aesthetic effect.[22]

This intertextuality is the practice of evoking symbols to transpire meaning. The use of sampling in rap and hip-hop music has a similar function, often using jazz and soul artists from the 1960s and 1970s to speak to the collective musical memory of black sub-culture.

For Madonna, being a Marilyn look-alike has at times brought her a lot of media attention, but in using the symbolism of this famous 'sex-object', she has been able to play with notions of female power and sexuality. She is careful to articulate their differences, however:

> You want people to see that you have a statement of your own to make ... I am not Marilyn Monroe. I'm almost playing with her image, turning it round.[23]

and:

> Marilyn Monroe was a victim and I'm not. That's why there's really no comparison.[24]

On the other hand, many people do not consider this sort of appropriation as valid intertextual referencing. When Madonna posed for a photo spread in the April 1991 issue of *Vanity Fair* which was styled very closely on a series

---

21 Randall (1992), p 204.

22 Jameson (1991), p 20.

23 Randall (1992), p 204.

24 St Michael (1990), p 95.

of Marilyn photos, Marilyn's iconographer, Bert Stern, was so incensed that he contemplated legal action:

> Madonna is body snatching Marilyn. It goes beyond similarity. It's copying ... These people are making a lot of money from plagiarism, and it dilutes the impact of the originals.[25]

In disagreement with Stern, I would consider it fair use that Madonna 'raids the image bank of American femininity'[26] in the creation of her appeal. But by the same token, it would be hypocritical to then award Madonna exclusive rights over her image pastiche and thereby prevent others from making use of the same process in the future.

*The 'Death' of the Subject*

The disappearance of the author in Foucault and of the subject in Jameson are both linked to the technological developments of the twentieth century: the primacy of commodity production and the decline of individualisation. In literary criticism, the implication is that the text is no longer taken as the externalised emotion of the writer, but takes on signification due to its situation and context. For example, academic theorists writing on Madonna have read into her work a staggering amount of race and gender politics, feminism, semiotics and musicology to a far greater extent than she could ever have articulated herself.

It is essentially the growth of the film industry and the ability to distribute and reproduce the image *en masse* that created it as a commodity and gave rise to the phenomenon of the star. Further, the ubiquitous presence of stars in advertising and branding, the pervasiveness of the MTV rock video culture, on which Madonna was one of the first performers to truly capitalise, has led to the existence of the star as a character in an intertextual media space. 'Madonna's power is tied to her ability to have her image reproduced and distributed',[27] which conversely says something about the disempowerment accompanying a lack of access to media.

The fact that groups like the Spice Girls made no attempt to hide the market-driven strategy that brought them together — that is, music business executives creating an act specifically designed to fill a gap in the market that was likely identified through consumer research — makes the commodity aspect of popular music, and the redundancy of the individual performing artist, even more apparent than it might otherwise be.

In the case of Bardot, Australia's Spice Girls replicants, it seemed that not only were they manufactured, but the manufacturing process was the only real point to their existence. Once *Popstars*, the television show covering the auditions and the formation of the group, had ended, it was almost inevitable that the group's career was over, and so their national tour in August 2000 passed unnoticed and barely attended. The *Sydney Morning Herald*

---

25 Randall (1991), p 205.

26 Coome (1992), p 371.

27 Tetzlaff (1993), p 262.

commented that 'they were a commercial venture with built-in cultural obsolescence'.[28]

Jameson identifies the '"death of the subject" in the institution of the star'[29] in the emergence of actors such as William Hurt (and, I would add, Gary Oldman, Holly Hunter and Daniel Day Lewis) who bring to their acting a certain anonymity, rather than relying on the projection of their well-known off-screen personalities on to their roles. He cites Steve McQueen, Jack Nicholson and Marlon Brando as examples of the older generation of stars. That the new stars now allude to older styles of acting as connotors of the past (one can perhaps see in Kevin Costner a conscious reference, through Gary Cooper and Tom Nix, back to Buffalo Bill Cody and other cowboy 'stars' of the nineteenth century, and shades of Jack Nicholson in Johnny Depp and Christian Slater)[30] is consistent with the apparent growing scarcity of individual style, and the use of pastiche, in other areas of the arts.

Interestingly, Celia Lury seems to observe the opposite effect.[31] In looking at changes in the structuring of the film industry since its early days, she remarks that the decline in the popularity of the cinema with the increased domestic presence of television led to the replacement of long-term contracts with studios with hiring on a project-by-project basis. As with the use of branding to distinguish mass-produced goods from their fairly similar competing products, actors had to develop a 'history of performance results' — a distinct image of which they appear to be the natural owner — in order to compete for parts.

Consequently, acting is no longer about impersonation, but about bringing the actor's personality to the role. It is perhaps an extreme version of being type-cast: Jim Carey, for example, can only ever be cast as himself — or at least as the persona he has created for himself. Lury identifies as old stars Elizabeth Taylor, Meryl Streep, Warren Beatty and Robert De Niro; as new stars, he names Schwarzenegger and Madonna.

The contradiction between these two accounts can perhaps be resolved by considering that the nature of the personality which is relied on has changed. For the older stars, it was some referent to the real people, who were, as Jameson comments, often considered rebels and non-conformists, which came through in their acting roles. For new stars who are the 'personality' actors rather than the 'anonymous' actors, what is projected on to the role is simply another character. This character has no more sense of subject than does the nostalgia-filled vessel of the Costner ilk.

Alternatively, it is likely that there have always been different types of actors, some of whom are capable of impersonation, some of whom need to rely on another means of recognition. To be successful (and marketable), story requires character, and in the absence of quality scriptwriting, this character can be provided through the appropriation of pre-existing personality — be it

---

28 Casimir (2000).

29 Jameson (1991), p 13.

30 My thanks to Shelley Wright and Jenni Millbank for these observations!

31 Lury (1993).

based in the actor's real life, on their created image or some other external reference.

That Madonna has reinvented her image so relentlessly (indeed, she is a pop-chameleon) has caused fans and commentators to seek out the 'real Madonna'. Aware of this, Madonna comments:

> That's why I call the tour 'Who's That Girl': because I play a lot of characters, and every time I do a song or a video, people go, 'Oh, that's what she's like'. And I'm not any of them. I'm all of them. I'm none of them.[32]

Even in interviews and articles, there is little evidence given of what is behind the pop persona. David Tetzlaff says he has 'plunged into these texts in search of the "real author"',[33] but that she comes off a blank. She has been an incredibly successful icon but, as the dismal achievement of her films since *Desperately Seeking Susan* (1987) suggests, she lacks the 'three-dimensional humanity' projected by other film stars (it's also a distinct possibility that she can't act!)

Her quasi-documentary, self-revealing but essential self-promotional film *In Bed With Madonna* (1991) (*Truth or Dare* in the United States) showed a staged frankness, but no sign of an off-screen natural person. When she is asked in the film if she would prefer to do something off camera, Warren Beatty snorts:

> Why would she want to say anything off camera? She doesn't want to live off camera. What point is there in existing?[34]

The Madonna that we know is thereby only existent in the media-space: she is a creature of the simulacra. It is in part this transition of stars from subject expressions to two-dimensional (flat) icons divorced from a human origin — 'image properties' — which suggests that rights to celebrity images may now have more in common with the 'brand' paradigm of trade mark law than with the 'work' paradigm of copyright.

Connected to this is 'a conflict over social values: most generally, between authorship and sponsorship as the principle of protection; but also between rounded and flat characters'.[35] Unfortunately, this means that in recognising the star's separation from the originating person (and perhaps allowing for the stake of the public in the creation of the star), it is the sponsor, the corporate giant, who retains control. Thus, while the trade mark may represent an accurate description of the nature of the star image in an era of inter-industry exploitation and mass production, it does little to avoid the alienation of the consumer.

---

32 St Michael (1990), p 158.

33 Tetzlaff (1993), p 241.

34 Randall (1992), p 158.

35 Lury (1993), p 85.

The following sections will trace the development of celebrity rights as property rights in the United States and contrast the Californian scheme to the approach in Australia. Of particular interest to me is the way the courts' decisions (and the legislation which has followed) reflect particular aspects of the property model that has been discussed and paint a distinctive picture about the relationship between property and cultural production which obscures law's role in the creation of value.

## The Development of the Right of Publicity

### *Privacy*

The origins of the right of publicity can be traced, ironically enough, to a legal principle concerned with upholding notions of Victorian respectability. The enunciation of this 'Right to Privacy' is generally attributed to an article published in 1890 by two Boston lawyers, Warren and Brandeis, in response to their irritation with the town's gossip- and scandal-mongering press.[36]

The authors proposed four causes of action created by this right, the last of which concerns the appropriation of a person's name or likeness for another's benefit. This was the first attempt to address the commercial potential of identity under the right of privacy, and to provide the ability for individuals to control their own 'publicity'. Although in the first US litigation over the appropriation of identity in 1902, the New York Court of Appeals held that a woman could not prevent the use of her picture on the packaging of flour as there was no common law right to privacy,[37] public outrage over this decision quickly prompted the enactment of privacy legislation in New York state which prohibited this kind of appropriation for commercial purposes.[38]

Confusion over the anomalous coupling of privacy with publicity led to US courts in the first half of the twentieth century refusing to recognise a *celebrity's* right to privacy on the basis that, through their status as a public figure, they had surrendered this right.[39] This indicates that the right was still principally seen as a 'right to be let alone' rather than a right to control the use of images, and reflects the fact that many earlier cases such as the *Robertson case* mentioned above were claims by non-celebrities. The Supreme Court of Ohio appeared to resolve this in *Zacchini v Scripps-Hoard Broadcasting*,[40] a case which involved the unauthorised filming and broadcasting of a circus act performed before a public audience. While, under the traditional terms of privacy claims, no mental distress or damage to reputation had occurred, the 'privacy' which the performer sought was said to be the 'personal control over commercial display and exploitation of his talents'.[41] This is the same

---

36 Warren and Brandeis (1890).

37 *Robertson v Rochester Folding Box Co* 171 NY 538 (1902).

38 NYLC 132, Section 1, 2 (1903).

39 Gaines (1991), p 185.

40 351 N.E.2d 454 (1976).

41 351 NE2d 454 (1976), p 459.

language as is used throughout intellectual property law — namely, that the individual has the right to reap the rewards of his or her labour.

### The Right of Publicity is Born

The confusion that has surrounded the growth of a distinctive right of publicity in America, variously situated as personal right, tort and property right, was compounded by the finding in *Zacchini v Scripps-Hoard Broadcasting* that it came under state jurisdiction. Consequently, there has been a multitude of piecemeal developments both in the common law and legislation of different states in the United States.

What really clinched the transition of the right of publicity from a purely personal right to a proprietary right in some states was the acceptance by the courts that the right could be assigned to third parties, and then, more recently, in a limited number of states, that the rights survived the death of the person, and could then be passed on in succession like any other form of property.

The case cited as the 'birth' of the right of publicity is *Haelan Laboratories v Topps Chewing Gum*[42] in New York in 1953, which gave the baseball player involved in the suit an assignable 'right to grant the exclusive privilege of publishing his picture ... independent of [the] right of privacy'.[43]

In the *Lugosi case*,[44] when his heirs tried to prevent Universal Pictures from using Lugosi's Dracula character in merchandising after his death, the majority of the Californian court avoided a definitive privacy/property classification, and characterised Lugosi's right in his portrayal of Count Dracula as the personal right to convert his image value into a 'right of value'.[45] Since he had not exercised this right during his lifetime, the court found that no property right existed to pass on to his heirs.

### Legislative Developments in the United States

Interestingly, it is the minority judgment of Justice Bird in the *Lugosi case*, arguing for descendable rights, which has been adopted by the Californian legislature in the *Celebrities Image Protection Act* of 1985. The Act also specifies a time limit on the ownership of publicity rights after the person's death, in order to allow their image to return to the 'public domain'. Section 3344 of the *Californian Civil Code* now allows living persons (anyone) to claim profits from the unauthorised use of their voice, name, signature, photograph or likeness, on products or in advertising or merchandising, in an 'unjust enrichment' formulation. Section 3344.1,[46] however, allows the

42 202 F2d 866 (2d Cir 1953).

43 202 F2d 866 (2d Cir 1953), p 868.

44 *Lugosi v Universal Pictures* Sup, 160 Cal Rptr 823 (1979).

45 *Lugosi v Universal Pictures* Sup, 160 Cal Rptr 823 (1979), p 326.

46 Originally enacted as section 990, this section was renumbered on 2 February 1999.

publicity rights of a 'personality'[47] to pass in succession, with the distinct stipulation that the rights recognised are property rights. There is a time limitation of 70 years,[48] after which the right expires (similar to copyright law), and both sections grant specific exemptions founded in the First Amendment. These exemptions allow use of material in the traditional free speech zones of news, public affairs and political campaigns. For deceased personalities under section 3344.1, the exemption is specified to extend to artistic works such as television programs, books, plays and fine arts, but not to advertisements or mass produced goods (section 3344.1(2)).

Under the rubric of the freedom of the press, the criteria of 'newsworthiness' or 'public interest' had long been acknowledged as causing immunity from privacy claims. The extension of the exemption beyond the news media in section 3344.1 is a recognition that celebrities, like artistic works protected by copyright, can be a valuable cultural resource, and should be available for everyone to use in order to encourage the growth of art and culture (and presumably the industry that surrounds them). In addition, if an artist is utilising an image in good faith and 'flying under [their] own banner' by embellishing it with their own creativity, rather than riding on the work of the originator, that has been sufficient to avoid a claim in tort of misappropriation.[49]

A number of states have passed legislation which roughly follows the Californian statute. Florida, Indiana, Kentucky, Massachusetts, Nevada, New York, Oklahoma, Tennessee, Texas, Utah and Virginia allow for assignable or descendable rights in certain circumstances, and most are concerned with misappropriation for commercial purposes. Twenty-six other states recognise a common law right of publicity or privacy in tort, only three of which allow for the right to survive death.[50]

### *The Distinction Between Fair Use and Commercial Purposes*

It appears, then, that by excluding advertisements and consumer items from the exemptions, the law is distinguishing between using celebrities as part of artistic expression and news (fair use), and using them for commercialisation (stealing). While 'the legislature's position on advertising sends the message that unauthorised appropriation of celebrity is objectionable profiteering ... or "hitching a free ride"',[51] to draw such an arbitrary line ignores the huge commercial potential of the news media and entertainment industry. This is

---

47 A 'deceased personality' is defined as a natural person whose names, voice, signature, photograph or likeness has commercial value at the time of his or her death, whether or not these aspects of identity have been used on products or in advertising during their lifetime: s 3344.1(h).

48 Section 3344.1(g). This was amended from the original period of 50 years, mirroring the recent extension of the period of copyright protection in the United States from 50 to 70 years.

49 Makdisi (1989), p 519.

50 Tratos (1997).

51 Gaines (1991), p 201.

simply on the basis of the qualification of these enterprises as 'art' or the politically subject 'public interest', whereas the reality is not just that art, in all its forms, has become commodified, but that commodities and art have melded in the form of objects of popular culture (as exemplified by Warhol's Campbell's Soup piece). Jane Gaines remarks that:

> advertisements, like works that are not 'single and original', may be the only means of access, for some groups, to these charged images. The most widely circulated forms of popular culture — posters, coffee cups, lunch pails, magazine ads, playing cards, ashtrays, statuettes, postcards and mementos — have the worst reputation in the eyes of judges and legal commentators.[52]

Both high and low art forms make up the flow of signs and symbols in modern society which constitute political and cultural expression or 'speech', and most are at least partly commercial in nature; however, the exemptions based on the First Amendment show us that, in law, only some commercially produced culture is 'art', and not all speech is 'free speech'.

All this is not to say that we should relish the conversion of pop stars into soda-pop stars (to borrow a hip-hop aphorism from the Disposable Heroes of Hiphopracy) through product endorsement or star branding, or the domination of the cultural landscape by mass produced goods and the mega-companies that make them. Rather, it is a recognition that the star as a resource is only so valuable to corporations such as Pepsico because the law grants exclusive rights over his or her image as property, and the star is only available to them because they can afford to pay for celebrities.

The circularity of this relationship between value and property — that it is the law's recognition of ownership which creates the economic value of property rights — is apparent in the reasoning of the *Lugosi case*. As we have seen, Lugosi's personal right to his image did not become proprietary unless it had been exercised in his lifetime, thereby demonstrating the existence of value. The image of a star may have intrinsic economic value because of the work involved in creating and promoting that image and its resultant attraction to the public, but a company will hardly be interested in paying for use of the star's 'property' if it either can do so for free, or is unable to prevent others from using the image. So the requirement that value has been demonstrated previously ignores the fact that the effective source of that value is legal protection.[53]

## Trade Mark Parallels and Passing Off

The development of the trade mark shares with the right of publicity the fact that it also began life with a very different focus to its current one. A trade mark is a name, signature, brand — a symbol which is used essentially to enable the consumer to distinguish between the vast number of products which

52 Gaines (1991), p 201.

53 Gaines (1991), p 193.

exist in just about every sort of market. While today the trade mark may still, consciously or subconsciously, be the basis for deciding which product is 'better',[54] it originally served to communicate the goodwill of the manufacturer — a guarantee to the consumer of consistent quality. Gaines remarks, however, on 'the inversion of this principle in [the] common law, where the trade mark comes to ensure *not* that the public is protected from merchant fraud but that the merchant owner of the mark is protected against infringers'.[55] As a piece of intellectual property, the trade mark is now a fully assignable right.

The expansion of the trade mark principles into the culture industry first occurred when characters were protected as separate entities from the works — for example, films or books — of which they were a part. The turning point was probably the *Sam Spade case*[56] in 1954, in which a character in the film *The Maltese Falcon* (1941) was held to be a separate literary creation, and thus able to be used independently of the copyright in the film held by the studio. The court held that the character constituted an entire work in itself, and could be protected under copyright. This legal construction failed for characters that were not literary in origin, or did not have the complexity apparently required to be a work. Once the independence of these characters from their source became established, it was easier to fit them into trade mark requirements — namely, that they serve the function of distinguishing the goods or services of one trader from those of another.

Because a trade mark could also protect a name, as well as a character, it became the easiest way for sponsors of film and television series to claim monopolies over their separable, 'mobile' products. Of course, it is not so much the protection of characters in relation to the source itself, but the secondary applications of product licensing and character merchandising, on which the use of trade marks focuses.

The trade mark status of fictional flat characters such as Superman or Mickey Mouse is well now well established, but what of 'real' people? In Australia, as in many jurisdictions, it is possible to register famous names as trade marks? In the right context, Elle Macpherson, Boris Becker or Paul Newman are clearly as recognisable as brands of goods as are Bendon, Slazenger or San Remo.

If stars are commodities, involved in the promotion of themselves and other cultural and manufactured goods, then it seems logical that their recognisable traits should be able to be encapsulated and protected as trade

---

54 Although courts recognise the fallacy of this function: 'No one who buys a Mickey Mouse shirt supposes that the quality of the shirt owes anything to Walt Disney Productions.' *Re Holly Hobby Trade Mark* (1994) IPR 486 at 488.

55 Gaines (1991), p 211.

56 *Warner Bros Pictures Inc v Columbia Broadcasting Co* 216 F.2d 945 (9th Cir., 1954).

marks.[57] In fact, it is the potential for celebrities to license the use of their likeness or name in this way that has grounded actions in passing off.

Trudie Atherton writes about the pressure celebrities may feel to 'harvest their image', through carefully managed product endorsement, while their image has public appeal, since their fame — and thus the value of their image — might only last a few years.[58] In a case involving the actor Paul Hogan, the court indicated that one reason an advertisement which made a reference to his famous *Crocodile Dundee* character was held to constitute passing off was that it had the potential 'to detract from Mr Hogan's own opportunities of making money'.[59] No mention is made of the possibility that additional exposure may in some cases greatly *contribute* to the star's opportunities for making money by raising their profile, increasing their popularity and making them even more saleable. Of course, there may be non-commercial reasons for resisting imitation or appropriation, such as in the case where the sub-culturally iconic, but not generally well-known, singer Tom Waits objected to a sound-alike voice being used in advertising, as it damaged his integrity with his fans when he had made a point of avoiding all commercial endorsements.[60]

This approach to passing off also implicates culturally and historically relative understandings of imitation. Detractors of William Shakespeare condemn him as a plagiarist by pointing to plots and language 'stolen' from other writers, yet at the time this practice was widespread and accepted. It was the craft and not the originality of writing that defined the author, to the extent that, as James Boyle puts it, an Elizabethan playwright might have considered the phrase 'imitation is the sincerest form of flattery' to be entirely without irony.[61] Currently, intellectual property reformers in Indonesia claim they have difficulties, for example, in encouraging artisans to take advantage of industrial design or copyright regimes because, since copying is culturally a sign of respect, finding imitations of their designs in the markets is a boost rather than a blow to ego and reputation.

While issues of property have not been debated as such, Australian courts have recognised the financial interest that stars have in preventing the unauthorised use of their image in a manner which would represent or 'pass off' to the public that there was some sort of sponsorship connection between them, and which 'dilutes the promotional value of that celebrity who may, as a result, be denied other fee-paying sponsorship opportunities'.[62] The other party

---

57 Indeed, registration of a celebrity image is possible in both the United States and Australia if the image can be presented in a way which meets requirements such as distinctiveness. See, for example, *Alabama Code* s 8-12-7 (1984) and *Trade Marks Act* 1955 (Cth), s 24(1)(a) in Australia.

58 Atherton (1993).

59 *Pacific Dunlop Ltd v Hogan* (1989) 87 ALR 14 at 25.

60 *Waits v Tracey-Locke Inc and Frito Lay* (1992) 14 (No 6) Entertainment Law Reporter 3.

61 Boyle (1996), p 54.

62 Atherton (1993), p 8.

is seen to be unlawfully profiting from the goodwill associated with the star's image and reputation.

Some Australian cases have been based on an approach which goes beyond the classic passing off principle — that no one should pass his or her goods off as those of someone else — by recognising that misappropriation of reputation is 'an injury in itself'.[63] In other words, they have perceived that reputation is something which can be taken wrongfully — that it is something which can be owned in the first place.

It is this tort-cum-property right of misappropriation of personality which has become the fulcrum of publicity rights at common law in the United States and Canada,[64] and through which it has been recognised that 'a celebrity has a legitimate proprietary interest in his [sic] public personality ... [which] is the fruit of his labours and is a type of property'.[65]

There are a few points to raise here. The first is to return to the criticism of circularity in which an allocation of proprietary right is justified by reference to the fact that the reputation or identity is considered to already exist as property. The second is that if 'labour' is again our source of rights: how far do those rights extend beyond the labourer? For example, if I am the source of the culture waves that are my persona, then clearly those uses which replicate me exactly — that is, direct unauthorised commercial use of my name, likeness or voice — are implicated within the envelope of my labour. But how far from the source do the ripples extend? How different from me in style does something have to be before using it is not appropriating what is 'mine'? These questions lead me to an interest in exploring situations where there is a more subtle use of image — where there is merely an imitation of style, or where other indirect allusions are made to the celebrity.

Both Tom Waits and Bette Midler have pursued successful claims against the use of sound-alikes,[66] and the judgments show that a key concern of the court was that as singers, their voices had a distinctive style which was deliberately imitated to sell a product. This seems to be a 'begging-the-question' approach, by reasoning that if the advertiser wants to use this image or voice, it must be because it is sufficiently recognisable to have value in selling a product, which in turn means that it is sufficiently close to the celebrity to belong to her or him.

This issue of 'proximity' is approached from a different angle in some Australian cases, which focus more on the element of misrepresentation than on the act of appropriation. They introduce flexibility by allowing questions to

---

63 *Hogan v Koala Dundee* (1988) 83 ALR 187 at 197, referring to *Henderson v Radio Corp Pty Ltd* (1960) SR (NSW) 576 at 595.

64 Moen (1995).

65 *Cepeda v Swift Co* 415 F 2d 1205 (1969, CA 8).

66 *Waites v Tracey Locke & Frito Lay Inc* (1992) 14 (No 6) Entertainment Law Reporter 3; *Midler v Ford Motor Co* 849 F 2d 460 (9th Cir 1988); see discussion in Moen (1995), pp 39–41.

be asked about the effect of the use of the image in the mind of the public.[67] How 'close' the image is to the celebrity will affect the likelihood of a connection between the celebrity and the product being presumed, although the whole context of the usage will be relevant.[68] Potentially, it means that the element of misrepresentation may be missing where it is made clear that there is no agreement with the celebrity.[69] Likewise, the inclusion of a 'disclaimer' would cause the usage to fall outside the requirements of misleading or deceptive conduct in section 52 of the *Trade Practices Act*.

For example, in the 1980s, the Maybelline cosmetics company ran an advertisement featuring an Olivia Newton-John look-alike and the caption 'Olivia? No, Maybelline'. While clearly the effectiveness of the ad depended on a connection being made with the singer, the court found that it was not deceptive as the wording of the ad would not have led the public to assume that Ms Newton-John had been involved.[70] I would argue that, because of her popularity, her image had passed into the pop-culture domain, and that the reference made, rather than being wholesale appropriation of a privately owned image, was merely drawing on a shared cultural understanding of a particular fashionable 'look'.

In a later case, a spoof had been made in a Grosby shoe commercial of the infamous 'knife scene' in the movie *Crocodile Dundee*.[71] Again, no attempt was made to pass off the scene as being from the movie, or the actor as being Paul Hogan, the eponymous hero. In this case, however, the court found that an agreement with Hogan or the film's personnel might be assumed by the public, even though it is obvious that Hogan himself was not endorsing the product. It was here also that the court was concerned about the loss of opportunities for making money as a result of the ad.

To take issue with this decision, it seems to me that the ad's success relied on the notoriety of that scene, and my recollection is that the words the ad adapted from the script — 'That's not a knife! That's a knife!' — become so often quoted as to have become, in local idiom, a phrase to be employed in any number of situations where 'one-upmanship' was required, and as to pass the scene itself into Australian folklore. It was then this general infamy, rather than an association with the actor as such, that made the ad work.

---

67 For example, in *10th Cantanae Pty Ltd v Shoshona Pty Ltd* (1988) 79 ALR 299, the test was whether a 'significant segment' of persons seeing the advertisement would be likely to make the connection.

68 See discussion of *Gary Honey v Australian Airlines & House of Tabor Inc* (1990) 18 IPR 185, below.

69 Indeed, Gummow J included a qualification on the grant of injunctive relief at first instance in the *Crocodile Dundee case* discussed below: the advertising would be permitted if it was made clear that Paul Hogan and the makers of *Crocodile Dundee* had not agreed to the ad nor endorsed the product: *Hogan v Pacific Dunlop Ltd* (1988) ATPR 40.

70 *Newton-John v Scholl-Plough (Australia) Ltd* [1986] ATPR 40.

71 *Pacific Dunlop Ltd v Hogan* (1989) 87 ALR 14.

Further support for this emphasis on public impressions, rather than on appropriation as 'an injury in itself', came from a Federal Court decision soon after *Hogan*,[72] although this time it involved an actual photo of the celebrity (Olympic athlete Gary Honey) rather than a look-alike. Australian Airlines had produced a poster featuring Honey in mid-long jump as one in a series of posters distributed principally to schools and clubs. The trial judge held that the overall effect of the poster, in which the company logo was not prominent, and which was recognisably part of a series of posters featuring Australian sports men and women with the primary message of promoting sport, would not lead a 'reasonably significant number of persons [to assume] that the applicant was giving his endorsement to Australian Airlines'.[73] The Full Court on appeal agreed with the trial judge's conclusion that the poster would be seen as 'as art work supporting participation and excellence in sport and nothing more'[74] and so would not give rise to a claim under section 52 of the *Trade Practices Act* or in passing off.

While a consistent regime in Australia is far from apparent, it seems likely that neither appropriation nor the suggestion of a vague association between celebrity and product is sufficient to found an action in passing off or the section 52 equivalent. We can also see a concern, familiar from US legislation, for whether the image is being used primarily for commercial or advertising purposes or, in its overall effect, for artistic or public-interest purposes.

### *Trade Mark as 'Cultural Liberator'?*

If the trade mark analogy is carried to its logical conclusion, one implication might be that, like biro, aspirin and hoover, once the style becomes so commonly emulated as to become a generic, the exclusive right expires. This might have a similar, but more flexible, effect than the 'public domain' exclusions in copyright-like protection for stars. For example, 'Wannabes' (those girls who, right from Madonna's early career, dressed up in fingerless lace gloves and drawn-on mole) may have been instrumental in the conversion of the Madonna look into public property, if the 'household name' provision used to cancel trade marks which have become generic product names was adapted to publicity rights.

In supporting this argument, I do not wish to suggest that, when a celebrity's popularity has made them into a public figure or even a cultural icon, they should have no private rights in their image. This might mean that certain celebrities, such as non-professional sports stars, would be unable to make a living because they would be deprived of licensing opportunities. What I am really more concerned with is that there be some flexibility in what cultural symbols we are allowed, as a society, to 'play' with.

---

72 *Gary Honey v Australian Airlines & Another* (1990) 18 IPR 185.

73 *Gary Honey v Australian Airlines & House of Tabor Inc* (1989) 14 IPR 264 at 283.

74 *Gary Honey v Australian Airlines & Anor* (1990) 18 IPR 185 at 194.

The preferable aspect of the Australian approach outlined above is that, instead of asking initially about the question of value, and then allocating property rights as a result of that, it asks primarily about the impression that is created in the minds of consumers. This, then, has the potential to acknowledge the existence of celebrity images in popular culture as a shared resource or heritage.

## Conclusion

While some problems have been identified with the current law on publicity rights in California, it must be acknowledged that — clearly due to the impact of Hollywood — it is one of the more progressive and well thought-out schemes for protection of star images. The Californian legislation goes some way towards recognising popular stars as cultural artefacts by allowing for fairly extensive 'fair use' after the person's death; however, considering the nature of pop culture, it makes an unrealistic distinction between artistic applications and commercial products.

Both copyright and rights of publicity are founded on liberal notions of personal authorship and free speech which are either politically problematic or inappropriate in an era of mass production and communications. A trade mark paradigm for celebrity rights would reflect the current nature of the culture industry, moving away from the possibly redundant notion of authorship to an emphasis on image use in the context of production and commercialisation. While perhaps a more accurate characterisation, this move may take us even further away from the ideal of the ordinary consumer having access to free speech, expression and the power to communicate, by granting ownership of popular images to the companies which manufacture and circulate them.

Australian law has so far avoided the difficulties of a property characterisation of celebrities' interest in their images. Although, in principle, the appropriation of an image or reputation has been considered as 'an injury in itself', the focus of the courts has in some cases been on the element of misrepresentation. This allows judges to consider the effect of the appropriation on the mind of the public and, potentially, freer access to images which the celebrity has contributed to the public domain.

The regulation of the right of publicity, as with copyright and trade mark, is about the regulation of cultural signs. As Foucault comments: 'The author is the principle of thrift in the proliferation of meaning ... [the] functional principle by which one impedes the free circulation, the free manipulation, the free composition, decomposition and recomposition of fiction.'[75] In light of the economic realities of the relationship between the producers of culture and the culture industry, it is a matter of concern if the protection of celebrity rights means that the most pervasive and influential forms of signification in pop culture are to be concentrated in the hands of a few powerful organisations.

---

75 Foucault (1984), pp 118–19.

## References

### Secondary Sources

Rosalind Atherton (2000) 'Claims on the Deceased: The Corpse as Property' 7 *Journal of Law and Medicine* 361.

Trudie Atherton (1993) 'Endorsement: Harvesting the Celebrity Image' 5 *Arts and Entertainment Law Review* 1.

James Boyle (1996) *Shamans, Software and Spleens: Law and the Construction of the Information Society*, Harvard University Press.

Jon Casimir (2000) 'Politics of the Hit Parade', *Sydney Morning Herald*, 26 August, Metro, p 6.

Rosemary Coome (1992) 'Authorising the Celebrity: Publicity Rights, Postmodern Politics and Unauthorised Genders' 10 *Cardozo Arts & Entertainment Journal* 356.

Michel Foucault (1984) 'What is an Author?' in Paul Rabinow (ed). *The Foucault Reader*, Pantheon Books.

Jane Gaines (1991) *Contested Culture: The Image, The Voice and The Law*, Chapel Hill/University of North Carolina.

Stephen Gray (1996) 'Squatting in Red Dust: Non-Aboriginal Law's Construction of the 'Traditional' Aboriginal Artist' 14 *Law in Context* 29.

Justin Hughes (1988) 'The Philosophy of Intellectual Property' 77 *Georgetown Law Journal* 287.

Frederic Jameson (1991) *Postmodernism or the Cultural Logic of Late Capitalism*, Verso.

Isabel Karpin (2000) 'The Genetic Connection: Owning Our "Genetic Heritage"' 7 *Journal of Law and Medicine* 376.

Celia Lury (1993) *Cultural Rights: Technology, Legality and Personality*, Routledge.

Roger Magnusson (2000) 'The Use of Human Tissue Samples in Medical Research: Legal Issues for Human Research Ethics Committees' 7 *Journal of Law and Medicine* 390.

John Makdisi (1989) 'How Much of You Do You Really Own? A Property Right in Identity' 37 *Cleveland State Law Review* 499.

David Moen (1995) 'Lifestyles of the Rich and Famous: Personality Rights — A Canadian–American Perspective' 6 *Australian Intellectual Property Journal* 30.

Lee Randall (1992) *The Madonna Scrapbook*, Citadel Press.

Pamela Samuelson (2000) 'Privacy as Intellectual Property' 52 *Stanford Law Review* 1125.

Greg Seigworth (1993) 'The Distance Between Me and You: Madonna and Celestial Navigation' in Cathy Schwichtenberg (ed), *The Madonna Connection: Representational Politics, Subcultural Identities and Cultural Theory*, Allen & Unwin.

Mark St Michael (1990) *Madonna: in Her Own Words*, Omnibus Press.

David Tetzlaff (1993) 'Metatextual Girl: ->patriarchy->postmodernism->power->money->Madonna' in Cathy Schwichtenberg (ed), *The Madonna Connection: Representational Politics, Subcultural Identities and Cultural Theory*, Allen & Unwin.

Mark Tratos (1997) 'Recognition of Publicity/Privacy Right of Appropriation of Likeness: A Summary by State' electronic version: www.quirkandtratos.com/Newsletters/newsletters.htm#Articles

Kay Turner (ed) (1993) *I Dream of Madonna: Women's Dreams of the Goddess of Pop*, Thames and Hudson.

Samuel D Warren and Louis D Brandeis (1890) "The Right to Privacy" 4 *Harvard Law Review* 193.

## Cases

*British Northrop Ltd v Texteam Blackburn Ltd* (1973), [1974] RATC 57
*Celebrities Image Protection Act 1985* (California, USA)
*Cepeda v Swift Co* 415 F 2d 1205 (1969, CA 8)
*Gary Honey v Australian Airlines & House of Tabor Inc* (1990) 18 IPR 185
*Haelan Laboratories v Topps Chewing Gum* 202 F 2d 866 (2d Cir 1953)
*Henderson v Radio Corp Pty Ltd* (1960) SR (NSW) 57
*Hogan v Koala Dundee* (1988) 83 ALR 187
*Hogan v Pacific Dunlop Ltd* (1988) ATPR 40
*Re Holly Hobby Trade Mark* (1994) IPR 486
*Lugosi v Universal Pictures* 25 Cal 3d. 813 (1979)
*Midler v Ford Motor Co* 849 F 2d 460 (9th Cir 1988)
*Moore v Regents of the University of California*, 793 AT2d 479 (Cal 1990)
*Newton-John v Scholl-Plough (Australia) Ltd* [1986] ATPR 40
*Pacific Dunlop Ltd v Hogan* (1989) 87 ALR 14
*Robertson v Rochester Folding Box Co* 171 N.Y. 538 (1902)
*10th Cantanae Pty Ltd v Shoshona Pty Ltd* (1988) 79 ALR 299
*Waites v Tracey Locke & Frito Lay Inc* (1992) 14 (No 6) Entertainment Law Reporter 3
*Zacchini v Scripps-Hoard Broadcasting* 351 NE 2d 454 (1976)

## Legislation

*Alabama Code* (Alabama, USA)
*California Civil Code* (California, USA)
*New York Legislative Code* (New York, USA)
*Trade Practices Act* 1974 (Cth)
*Trade Marks Act* 1955 (Cth)