

THE SCOPE OF INTELLECTUAL PROPERTY'S PROTECTION OF STYLISTIC RIGHTS

INTRODUCTION

The doctrines of the right of publicity, copyright, unfair competition, and trademark all protect an individual's distinctive style as intellectual property.¹ These distinct areas of law frequently overlap.² In recent years, courts have extended protection for style by blurring the distinctions between these different legal theories and merging the tests for determining infringement under each theory.³ This extended protection creates new, hybrid causes of action and expands the protection given to stylistic rights beyond intellectual property law's traditional limitations.⁴

Ironically, the expanded protection given to stylistic rights threatens to destroy the traditional balance between an individual's interest in controlling commercial use of his or her distinctive style and the interest of the public in continued access to style that is not intimately associated with a particular indi-

1. This Note does not cover the general scope of the right of publicity, unfair competition, trademark, or copyright. The Note relies on these theories to show that stylistic rights are protected and that the uncertain scope of these rights is problematic. For further discussion of these theories see J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (1992); MELVILLE B. NIMMER & D. NIMMER, *NIMMER ON COPYRIGHT* (1989) (explaining the law of copyright); PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES* (2d ed. 1981) (emphasizing the relationship between trademark, unfair competition, and related theories).

2. A person's style may be distinctive enough to invoke his or her identity, receive copyright protection, and operate as a trademark. These are not always discrete theories. See Christopher Pesce, Note, *The Likeness Monster: Should the Right of Publicity Protect Against Imitation?*, 65 N.Y.U. L. REV. 782, 783 (1990) (describing this protection as a "collision of legal doctrines").

3. See Michael T. Helfand, Note, *When Mickey Mouse is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 STAN. L. REV. 623 (1992) (explaining how the convergence of intellectual property laws has expanded protection for fictional characters).

4. See *infra* part I.A (discussing how early courts limited application of these overlapping doctrines to protect individual style).

vidual.⁵ The current expansion of stylistic rights generates confusion as to what constitutes protected style and how rights to style can be transferred.⁶ Recent rulings on these issues have caused apprehension in the art, advertising, and entertainment markets. People with their own distinctive style now fear losing the right to create in that style if they sell the exclusive rights to any of their work.⁷ Similarly, potential buyers of works with stylistic components fear that buying the rights to a work may not give them the right to use the work as they please.⁸

This Note addresses the problems created by the recent expansion of stylistic rights. Part I discusses the origins of stylistic rights and traces the evolution of these rights to their present

5. See *White v. Samsung Elecs. America, Inc.*, 971 F.2d 1395, 1408 (9th Cir. 1992), (Alarcon, J., concurring in part, dissenting in part), *cert. denied*, 113 S. Ct. 2443 (1993).

The protection of intellectual property presents the courts with the necessity of balancing competing interests. On the one hand, we wish to protect and reward the work and investment of those who create intellectual property. In so doing, however, we must prevent the creation of a monopoly that would inhibit the creative expressions of others.

971 F.2d at 1408.

Although the balancing of public interest against individual interests was traditionally reserved for copyright and trademark cases, at least one commentator suggests that similar balancing is appropriate under the right of publicity. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993). Madow argues that complete protection of a person's identity is undesirable from a "cultural studies" perspective. *Id.* at 135-47. Madow contends that extensive protection for style locks popular images in place by preventing the public from building upon these images. *Id.* at 145-46. He feels the prevention of unjust enrichment is unnecessary in these circumstances because celebrities are generally enriched beyond what they deserve anyway. *Id.* at 196-205. Madow also argues that people would not be deterred from seeking celebrity status because other rewards are incentive enough. *Id.* at 205-25.

6. See *infra* part II (discussing the current expansion of stylistic rights).

7. See, e.g., *Fantasy, Inc. v. Fogerty*, 654 F. Supp. 1129, 1132 (N.D. Cal. 1987) (recognizing a viable copyright action against an artist accused of copying the style of material he previously sold), *rev'd on other grounds*, 114 S.Ct. 1023 (1994). See also Harvey W. Geller & Thomas M. Hines, *Copyright Used to Challenge Self-Plagiarism*, NAT'L. L.J., Nov. 1, 1993, at S9 (discussing the *Fogerty* case's implications for stylistic rights).

8. See Susan Bibisi, *Vocal Theft Leaves Ad World Speechless*, SAN DIEGO UNION TRIB., Jan. 27, 1993, at E8 (interviewing talent buyers afraid of purchasing stylistic rights because they are uncertain of how the rights can be legally used); Joanne Lipman, *Sound-alike Ads Should Sound Alarm in Wake of Court Ruling*, WALL ST. J., Mar. 26, 1992, at B8 (expecting recent successful suits to encourage more litigation); *Bi-Rite Enters., Inc. v. Bruce Miner Poster Co., Inc.*, 616 F. Supp. 71, 76 (D. Mass. 1984) (noting that the ephemeral nature of stardom may make a person's right of publicity commercially valuable for only a short period of time).

state. Part II explains that the value of stylistic rights has been undermined by expanding the scope of these rights so broadly that it is difficult to determine the ownership of these rights. Part III recommends that courts place limits on the scope of protection of stylistic rights and that buyers and sellers rely instead on contract warranties to protect their rights. Specifically, this Note favors maintaining the distinctions between the various theories protecting stylistic rights and limiting the right of publicity to cover only the identifying characteristics a person actually possesses. This proposal would force stylistic rights to depend on self-limiting theories, making protected aspects of style easier to identify and transfer.

I. THE PROTECTION OF AN INDIVIDUAL'S RIGHT TO THE COMMERCIAL USE OF IDENTITY

A. *Early Protection for Stylistic Rights*

Historically, courts protected an individual's identifying style under the doctrines of copyright, trademark, unfair competition, and the right of publicity.⁹ Each doctrine shares the common goal of preventing unjust enrichment of one who appropriates the distinctive style or identity of another.¹⁰ Recognizing, however, that the purpose served by each doctrine is separate and distinct, early courts hesitated to assume that all of the doctrines applied simultaneously.¹¹

The right of publicity, for example, developed as an extension of an individual's right to privacy.¹² As such, the right of

9. See Helfand, *supra* note 3, at 632-41 (discussing traditional application of the doctrines).

10. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977) (noting that the right of publicity and copyright have a common goal of preventing unjust enrichment); Helfand, *supra* note 3, at 638 (observing that § 43(a) of the Lanham Act essentially codified unfair competition laws in an effort to prevent the unjust enrichment of people who would profit from consumer confusion).

11. See, e.g., Helfand, *supra* note 3, at 639 (describing the elements a plaintiff claiming copyright infringement had to prove).

12. Samuel Warren and Louis Brandeis laid the foundation for the protection of an individual's identity in their famous article, *The Right to Privacy*. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For a thorough discussion of the evolution of the right of publicity and the impact of the Warren and Brandeis article on its development, see, e.g., William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

Prosser argues that the right of privacy included: (1) intrusion upon one's seclusion or solitude; (2) public disclosure of embarrassing private facts; (3) publicity which places one in a false light; and (4) appropriation of one's name or likeness for the defendant's advantage. This fourth aspect of the

publicity allows individuals to control the commercial use of their identities.¹³ In applying this right, early courts typically limited protection to a person's "name, portrait or picture."¹⁴

right to privacy is known as the right of publicity because it is less concerned with keeping private facts private as it is with making sure that individuals control the commercial use of their identities. *Id.* at 389. *See also* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 838 (6th Cir. 1983) (Kennedy, J., dissenting) (explaining that there are three policy rationales behind the right of publicity: (1) vindicating celebrities' economic interests, (2) providing a financial incentive for others to produce intellectual and creative works, and (3) preventing unjust enrichment and deceptive trade practices).

13. *See Zacchini*, 433 U.S. at 573 (noting that the difference between the right of privacy and the right of publicity is that the right of privacy seeks to "minimize publication of . . . damaging matter, while in 'right of publicity' cases the only question is who gets to do the publishing"). The right of publicity has been characterized in a variety of ways. *See, e.g.,* Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1138 (7th Cir. 1985) ("The right [of publicity] . . . prevent[s] others from using one's name or picture for commercial's purpose without consent."), *cert. denied*, 475 U.S. 1094 (1986); RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (Preliminary Draft No. 6, 1992) (explaining that liability should be established for "[o]ne who misappropriates the commercial value of another's identity by using without consent and for purposes of trade the other's name, likeness, or other indicia of identity"); McCarthy, *supra* note 1, at vii (defining the right of publicity as "the inherent right of every human being to control the commercial use of his or her identity"); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) ("[T]he right of publicity [is] the right of each person to control and profit from the publicity values which he has created or purchased.").

14. *See* Leonard A. Wohl, Note, *The Right of Publicity and Vocal Larceny: Sounding Off on Sound-Alikes*, 57 FORDHAM L. REV. 445, 448-50 (1988) (differentiating between the traditional view of the right of publicity being limited to name or likeness, and the more recent view which protects "the persona in toto").

One of the first cases dealing with this issue was *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902). In 1902, Roberson sued the defendant for placing her picture on a box of flour without her consent. *Id.* at 442. The New York Court of Appeals ruled against her, finding no precedent to support her claim. *Id.* at 447-48. In response to public protest, the New York legislature passed a statute preventing the use of a person's "name, portrait or picture" for commercial purposes without the person's consent. *See Lahiri v. Daily Mirror, Inc.*, 295 N.Y.S. 382, 384-85 (N.Y. Sup. Ct. 1937) (explaining that New York's privacy statute was passed after public outcry over the *Roberson* decision).

The New York privacy statute is still in force. *See* N.Y. Civ. Rights Law §§ 50-51 (McKinney 1976 & Supp. 1989) ("Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained . . . may . . . restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use."). Although other courts found a common law right to protect plaintiffs in similar cases, they construed the right narrowly. *See, e.g., Lahiri*, 295 N.Y.S. at 389 (recognizing a limited common law right of publicity). As a result of these decisions, a person's identity was protected

The reasoning behind the rule was that appropriation of a person's name, portrait, or picture for commercial use violated the individual's privacy "right to be let alone".¹⁵ Thus, traditional intellectual property law principles would prohibit an advertiser from using person A's picture without her consent, but would not prohibit the advertiser from using a picture of person B, who resembled person A.

Unfair competition laws also traditionally protected an individual's identifying style.¹⁶ The traditional test for infringement under the doctrine of unfair competition was whether the "look and feel" of the defendant's work caused the public to confuse his work with that of the plaintiff.¹⁷ Early courts extended the doctrine of unfair competition to protect against appropriation of a celebrity's identifying style.¹⁸ One reason for applying unfair competition to protect a celebrity's unique style was to avoid confusing the public.¹⁹ Traditionally, therefore, a plaintiff who did not have a right of publicity action against a defendant for using the picture of a look-alike in a commercial could have a viable claim under the doctrine of unfair competition.²⁰

against appropriation through the use of a person's name or face. See Wohl, *supra* note 14, at 450 (explaining the limited nature of the early protection for the right of publicity). Other attributes which could identify someone, such as voice or distinctive dress, remained unprotected.

15. See Warren and Brandeis, *supra* note 12, at 193 (describing an individual's "right to be let alone" as a component of the right of privacy).

16. The goals of unfair competition are to identify the source of goods, to distinguish these goods from others on the market, to identify that the goods are of equal value, and to assist in advertising. See 1 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 1:03 (3d ed. 1992 & Supp. 1994). A person's identity does not have to be invoked to receive protection from unfair competition laws. Similarities that cause confusion regarding the source of goods may violate unfair competition laws, even though the similarities are not specific enough to identify another person.

17. See, e.g., *Chaplin v. Amador*, 269 P. 544 (Cal. Ct. App. 1928). In *Chaplin*, the California Court of Appeals protected an actor's style and mannerisms with unfair competition law. Charles Amador appeared in movies under the name "Charles Aplin" and imitated Charlie Chaplin's famous character. *Id.* at 544-45. Chaplin sued and received an injunction preventing Amador from making films that imitated Chaplin's movies, style of dress, costume, or mannerisms. *Id.* at 545. The court explained that Chaplin's character enjoyed such immense fame that his identity was invoked by the character, even without reference to Chaplin by name. *Id.* at 546. The court reasoned that Amador would deceive the public into believing Chaplin was the actor in the movie. *Id.*

18. *Chaplin*, 269 P. at 546. The *Chaplin* court expanded the protection of style by prohibiting not only appropriation of another person's picture, but also imitation of a person's likeness.

19. *Id.*

20. Early efforts to protect style, such as the New York privacy statute,

Trademark law, codified by the Lanham Act, is the federal counterpart to state unfair competition laws.²¹ The same "look and feel" test used in unfair competition cases applies in trademark cases. The Lanham Act, however, provides uniform minimum protection for trademarks.²² To the extent they are not abandoned by their creators,²³ trademarks are protected under the "look and feel" test against dilution by other market participants.²⁴ Trademark and unfair competition laws, therefore, traditionally focused on protecting an individual's identifying style rather than protecting an individual's identity itself.²⁵

Copyright laws traditionally had an even narrower scope than the foregoing doctrines.²⁶ Copyright law gives the owner of

only prevented the use of a person's actual attributes. Chaplin won his suit, even though the impostor modified his own appearance and did not use Chaplin's actual appearance.

21. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (1988). *See also* Helfand, *supra* note 3, at 638 (noting that the Lanham Act codifies most of the unfair competition laws on the federal level); Goldstein, *supra* note 1, at 91 (explaining that the Lanham Act was initially interpreted narrowly, but it is now read broadly enough to be virtually coextensive with state unfair competition laws).

22. *See* Marcia B. Paul, *Section 43(a) of the Lanham Act*, in PRACTICING LAW INSTITUTE, LITIGATING COPYRIGHT, TRADEMARK, AND UNFAIR COMPETITION CASES 1989, at 131, 149 ("[W]hile § 43(a) claims are frequently conjoined with statutory patent, trademark, and copyright claims, it cannot be assumed that every act of trademark, copyright or patent infringement is, *ipso facto*, a violation of Section 43(a).").

23. *See* Helfand, *supra* note 3 at 637 (noting that trademark protection is potentially perpetual provided the mark is not abandoned by its creator).

24. *See, e.g.,* *Fischer v. Star Co.*, 132 N.E. 133 (N.Y. 1921) (relying on trademark dilution theory to support a holding of trademark infringement), *cert. denied*, 257 U.S. 654 (1921). In *Fischer*, the New York Court of Appeals recognized that trademark law could provide protection for stylistic rights which had acquired a secondary meaning. *Id.* at 138. Fischer was a cartoonist who had created and registered a trademark on his cartoon characters, "Mutt 'n' Jeff." *Id.* at 136. Fischer later developed the characters into a syndicated cartoon strip for the Star Company. *Id.* When Fischer changed syndicators, the Star Company hired artists to continue the strip with the same title, characters and names. *Id.* The court determined that the Star Company infringed Fischer's trademark because the public associated the characters with their original artist. The court relied on a trademark dilution theory to enjoin the Star Company from publishing the strip. The court believed the Star Company's continued use of the strip could result in the public tiring of "Mutt 'n' Jeff" cartoons and that this would be an unfair appropriation of the skill and celebrity Fischer had acquired. *Id.* at 138.

The purpose of state trademark dilution laws is to prevent the trademark from losing its unique status in the marketplace, regardless of whether the trademark is passed off as belonging to the imitator or not.

25. *Compare* *Fischer*, 132 N.E. 132 (relying on the impact on the public of two producers of indistinguishable work to find infringement of style) with RESTATEMENT (THIRD), *supra* note 13 (defining the purpose of a right of publicity as protection against appropriation of one's identity).

26. *See* Helfand, *supra* note 3, at 629 (explaining that copyright protection

original and expressive work a temporary monopoly on his or her novel ideas.²⁷ Traditionally, however, courts did not extend copyright protection to an individual's identifying style unless the copying was very precise.²⁸ Thus, in *Nichols v. Universal Pictures Corp.*,²⁹ Judge Learned Hand recognized that an artist's style, as embodied in characters in a story line, was protected by copyright.³⁰ Judge Hand suggested that if Shakespeare's *Twelfth Night* was copyrighted, the characters of Sir Toby Belch or Malvolio would be protected, but the portrayal of a "riotous knight" or a "foppish steward who becomes amorous of his mistress" would not.³¹

is more limited because it only protects aspects of a work that are unique and expressive). See also Copyright Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909) (repealed 1976).

27. The Copyright Act of 1909 gave copyright protection to works for 28 years after their creation and allowed the copyright to be renewed for another 28 years. See 17 U.S.C. § 24 (1976) (explaining this aspect of the previous copyright Act) (repealed by 17 U.S.C. § 302 (1988)). After that, the copyright would fall back into the public domain. See Goldstein, *supra* note 1, at 7-8.

The modern copyright Act extends copyright protection for the life of the creator plus 50 years. 17 U.S.C. § 302 (1988). This modification is much easier to apply because all of a creator's work enters the public domain at the same time, so difficult determinations of when a work was created can be avoided. See, e.g., Phillip E. Page, *The Works: Distinguishing Derivative Creations Under Copyright*, 5 CARDOZO ARTS & ENT. L.J. 415, 430 (1986) (explaining that all works enter the public domain simultaneously).

28. 17 U.S.C. § 102(b) (1988) (explaining what is known as the idea-expression dichotomy by declaring "[i]n no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work"). Basic plot premises, described as *scenes a faire*, are not protected because they lack the originality copyright law requires. See, e.g., *Anderson v. Stallone*, 1989 WL 206431, at *13 (C.D. Cal. April 25, 1989) (refusing to consider the similarity between movie ideas containing fight scenes because fight scenes are "scenes a faire" in all boxing movies). Essentially, copyright protects expression, but not ideas.

For further discussion of copyright law and the idea-expression dichotomy, see Amy B. Cohn, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 196-220 (1990) (explaining the origins of the idea/expression dichotomy); Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321 (1989) (explaining the idea/expression dichotomy thoroughly). See also Michelle Brownlee, Note, *Safeguarding Style: What Protection is Afforded to Visual Artists by the Copyright and Trademark Laws?*, 93 COLUM. L. REV. 1157 (1993) (arguing that in many areas, particularly the visual arts, it is difficult to separate "idea" from "expression" and noting that this confusion makes it difficult to know how much "style" can be appropriated before it becomes copyright infringement).

29. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

30. *Id.* at 121.

31. *Id.*

Early courts carefully distinguished the doctrines of the right of publicity, unfair competition, trademark, and copyright.³² Consequently, courts applied a particular doctrine only when its independent objective was furthered by protecting an individual's identifying style. In particular, the right of publicity was invoked only when an individual's identity itself was appropriated for commercial use.³³ Early courts' restrictive application of these intellectual property doctrines, however, left some areas of individual style unprotected.

B. *The Expansion of the Right of Distinctive Style*

Current intellectual property law has expanded the scope of protected style by further developing the right of publicity and by converging the doctrines of copyright, unfair competition, and trademark. This expansion began as an attempt to fill gaps in the protection of stylistic rights under traditional intellectual property law.³⁴ Consequently, courts expanded stylistic rights by broadening the scope of protected identifying characteristics to include other distinguishing attributes such as voice and appearance. Courts further expanded protected style by moving away from the traditional practice of applying a particular theory only if the objective of that theory could be furthered by protecting an individual's distinctive style. Now, however, this expansion threatens to protect elements of style that are neither distinctive nor identifying.

1. The Protection of Appearance

Courts have different theories for protecting an individual's right to the commercial use of his or her appearance. For example the Superior Court of New York, in *Onassis v. Christian Dior — N.Y., Inc.*,³⁵ broadly interpreted a New York privacy statute "to protect the essence of the person."³⁶ In *Onassis*,

32. See *supra* notes 9-11 and accompanying text.

33. See *supra* notes 12-15 and accompanying text.

34. There are many aspects of a person's identity which were not protected by the traditional doctrines protecting style. Recent cases recognize that people can be identified by other characteristics. See, e.g., *Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir. 1962) (protecting Lahr's distinctive voice); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) (protecting Ali's appearance from drawings of his likeness); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1279-83 (D. Minn. 1970) (protecting identification of baseball players by their names and playing statistics).

35. 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984).

36. *Onassis*, 472 N.Y.S.2d at 263. See also *Allen v. National Video*, 610 F. Supp. 612, 627-30 (protecting plaintiff's identity under the Lanham Act and rejecting protection under the right of publicity).

Jacqueline Kennedy-Onassis sued Christian Dior for using an Onassis look-alike in a commercial featuring other famous celebrities.³⁷ The court interpreted the word "portrait" in the New York privacy statute to include a picture of another person designed to "convey the idea that it was the plaintiff."³⁸ Despite the limited language of the statute, the court concluded that Onassis' "portrait" had been appropriated because the look-alike was a good impostor and the presence of other celebrities would foster a belief that Onassis actually appeared in the commercial.³⁹

The New York District Court in *Allen v. National Video, Inc.*,⁴⁰ on the other hand, relied on trademark law to protect Woody Allen's appearance.⁴¹ National Video hired a look-alike holding a V.I.P. card and renting Woody Allen videos to appear in a commercial.⁴² The defendants conceded that they intentionally sought a look-alike of Allen for the commercial, but they denied any intention to pass the look-alike off as Woody Allen.⁴³ The court concluded that even if the look-alike was not intended to look like Woody Allen, many people would believe that it was him.⁴⁴ This decision broadens protection for appearance beyond *Onassis* to include even poor impostors.⁴⁵ As long as the impostor causes confusion regarding another person's identity, there may be a violation of the Lanham Act,⁴⁶ whether or

37. *Onassis*, 472 N.Y.S.2d at 256.

38. *Id.* at 261.

39. *Id.* at 262.

40. 610 F. Supp. 612 (S.D.N.Y. 1985).

41. *Id.* at 628-31.

42. *Id.* at 617-18. National Video was marketing a V.I.P. card that "apparently entitled the bearer to favorable terms on movie rentals." *Id.* at 618. The caption to the advertisement read "Become a V.I.P. at National Video. We'll make you feel like a star." *Id.*

43. *Id.* The defendants claimed the commercial depicted a fan of Woody Allen who adopted Allen's appearance and went to National Video to receive star treatment. *Id.*

44. *Allen*, 610 F. Supp. at 628 ("[A]t a cursory glance, many consumers, even sophisticated ones, are likely to be confused."). Woody Allen's association with movies strengthened the court's impression that the public would construe the commercial as an endorsement by Allen. *Id.*

45. The court concluded that the impostor interfered with Allen's rights under the Lanham Act, even though the impostor did not look enough like Allen for the public to be certain that it was him. *Id.* at 624, 628. The Lanham Act provided more expansive protection for Allen than was available to Onassis under the New York privacy statute. The *Onassis* court required the imitation of a person's likeness to serve as a substitute for a photograph. *Onassis*, 472 N.Y.S.2d at 259.

46. *Allen*, 610 F. Supp. at 627 ("This inquiry requires the court to consider whether the look-alike employed is sufficiently *similar* to plaintiff to create such a likelihood — an inquiry much like that made in similar, but not identical, trademarks.").

not the look-alike's picture is good enough to constitute the celebrity's "portrait" under a privacy statute.⁴⁷

The protection given to a person's appearance has even been extended to inexact drawings of a person. In *Ali v. Playgirl, Inc.*,⁴⁸ the court issued a preliminary injunction under the New York privacy statute to prevent *Playgirl* from using an illustration of Muhammad Ali.⁴⁹ The illustration was done in a style described as "somewhere between representational art and cartoon."⁵⁰ The picture depicted a nude black man sitting on a stool in the corner of a boxing ring with his hands taped and outstretched on the ropes at his side.⁵¹ The man in the picture was not identified by name,⁵² but the caption described him as a "Mystery Man" and as "the Greatest."⁵³ The resemblance of the character's features to Ali, combined with his presence in a boxing ring and the reference to his nick-name, "the Greatest," convinced the court that the man in the picture invoked Ali's identity.⁵⁴

The courts in *Onassis*,⁵⁵ *Allen*,⁵⁶ and especially *Ali*⁵⁷ relied on only marginally identifying factors to find infringement. None

47. *Id.* at 625 (rejecting plaintiff's argument that his "privacy" rights were violated). See also *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110-11 (9th Cir. 1992) (as amended on denial of rehearing and rehearing en banc) (finding infringement of the right of publicity and the Lanham Act, but striking the damages under the Lanham Act because they are duplicative), *cert. denied*, 113 S. Ct. 1047 (1993). There is little practical difference from prevailing under either a trademark or invasion of privacy theory. There may be a difference between whether a violation is classified as dealing with the right of publicity or unfair competition. The right of publicity is alienable in some jurisdictions. See, e.g., *Haelan Lab. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 869 (2d Cir.) (designating the right as assignable), *cert. denied*, 346 U.S. 816 (1953); *Bi-Rite Enters., Inc. v. Bruce Miner Poster Co.*, 616 F. Supp. 71, 73 (D. Mass. 1984) (finding the right assignable). See also *Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Prods., Inc.*, 296 S.E.2d 697, 705 (1982) (holding the right descendible); CAL. CIV. CODE § 990 (West Supp. 1994) (creating an inheritable right of publicity); FLA. STAT. ANN. § 540.08(1)(c) (West 1988) (creating an inheritable right of publicity); NEB. REV. STAT. §§ 20-202, 207 to 208 (1987) (creating an inheritable right of "privacy"). Trademark and unfair competition laws may not extend this far. See *Pesce*, *supra* note 2, at 784.

48. 447 F. Supp. 623 (S.D.N.Y. 1978).

49. *Id.* at 730.

50. *Id.* at 727.

51. *Id.* at 726.

52. *Id.*

53. *Id.* at 727.

54. *Id.* at 726-27.

55. *Onassis*, 472 N.Y.S.2d. at 257 (considering the presence of the other celebrities in the commercial to reinforce the idea that Jacqueline Onassis was actually present).

56. *Allen*, 610 F. Supp. at 617-18 (S.D.N.Y. 1985) (concluding the movies

of the courts claimed that infringement was determined solely by comparing the plaintiff's physical characteristics to the impostor's. Instead, each court considered additional factors, like the presence of other celebrities,⁵⁸ the movies being rented,⁵⁹ and the presence of a boxing ring,⁶⁰ to support the plaintiffs' assertions that their images were invoked.

The weight these peripheral factors should be given is difficult to determine.⁶¹ Cases like *Ali* are difficult because the numerous similarities are only marginally identifying.⁶² After *Ali*, the test for determining whether a person's right of publicity has been violated appears to be whether through an accumulation of several factors that are only marginally identifying, little doubt is left as to who the picture represents.⁶³

being rented and the excited reaction of the woman behind the counter in the commercial implied that Allen was present).

57. *Ali*, 447 F. Supp. at 725-27 (relying solely on marginal characteristics to identify the man in the picture as Ali, such as his smile, the caption "the Greatest," the presence of the boxing ring, and that the figure was a black male).

58. See *supra* notes 37-39 and accompanying text (discussing the factors used by the *Onassis* court).

59. See *supra* notes 40-47 and accompanying text (describing how the *Allen* court relied on the circumstances in which the imitator appeared).

60. See *supra* notes 49-54 and accompanying text.

61. A person may be identified by marginal characteristics if enough of those characteristics are used to conjure up that person's image. See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (discussing copying for purpose of parody), *cert. denied, sub nom.*, *O'Neil v. Walt Disney Prods.*, 439 U.S. 1132 (1979). It is difficult to decide how much similarity is enough to identify a person. Courts should be careful to balance individual rights against the public interest in a broad public domain. See *supra* note 5 (discussing traditional balancing in intellectual property law under copyright and trademark). See also Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533 (1993) (arguing that copyright strikes a balance between the rights of the individual and the general public).

Courts will also have to consider what weight, if any, should be given to factors that do not conform to a person's image. For example, the *Ali* court considered factors present in the drawing that would strengthen the public's association between Ali and the man in the picture. *Ali*, 447 F. Supp. at 726-27. The court did not consider factors that were inconsistent with Ali's image. The public may associate Ali with a black man in a boxing ring, but they have no reason to associate a nude black man in a boxing ring with Ali. The court did not address this issue, so it is not clear if the court overlooked it or deemed it irrelevant. Had the man in the picture been white or had long blond hair, perhaps the result would have been different.

62. Compare *Ali*, 447 F. Supp. at 723 (finding infringement on Ali's right of publicity when none of the characteristics in the defendant's drawing were independently identifying) with *Chaplin v. Amador*, 269 P. 544 (Cal. Ct. App. 1928) (protecting Chaplin's right to use his character against an impostor who copied his routine verbatim).

63. See *Ali*, 447 F. Supp. at 729.

Trademark and unfair competition laws can provide even more protection than the right of publicity in cases where the imitation is not very accurate.⁶⁴ Trademark and unfair competition statutes do not require the image to be exact, only close enough to cause consumer confusion.⁶⁵ Satisfying the other prerequisites for a trademark or unfair competition claim is not usually very difficult.⁶⁶ However, trademark and unfair competition laws will not completely replace the need for the right of publicity.⁶⁷ Instances still occur when the right of publicity may be the only source of relief, for example, when a celebrity's image is misappropriated by a look-alike who can't possibly be the actual celebrity.⁶⁸ In such cases, the right of publicity remains a significant source of protection for celebrities.

2. The Protection of Voice

Voice is another identifying characteristic that intellectual property laws protect.⁶⁹ Some states protect this right through privacy statutes,⁷⁰ while other states rely on the common law.⁷¹

64. See *supra* notes 16-20 and accompanying text (discussing why unfair competition may provide more extensive protection than the right of publicity). *But cf.* *Nurmi v. Peterson*, 10 U.S.P.Q.2d (BNA) 1775 (C.D. Cal. 1989) (refusing to conclude that Elvira's character infringed on the right of publicity of her 1950's equivalent, Vampira, because unfair trade practices were not proven).

65. See *Nurmi*, 10 U.S.P.Q.2d at 1775.

66. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992) (as amended on denial of rehearing and rehearing en banc) (overcoming the requirement that the defendant's commercial competed with Waits' ability to market his identity, even though Waits refused to do commercials), *cert. denied*, 113 S. Ct. 1047 (1993); *Dallas Cowboy's Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366, 374 (S.D.N.Y. 1979) (holding that the defendant's use of plaintiff's uniforms in pornographic movies violated the plaintiff's trademark rights, even though plaintiff did not make pornographic movies). *But see* *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (rejecting Midler's claim that the defendant's use of Midler's voice violated California's unfair competition law because Midler refused to do commercials), *cert. denied*, 112 S. Ct. 1513 (1992).

67. Unfair competition law serves different purposes than the right of publicity. See *supra* note 16 (discussing the goals of unfair competition law).

68. See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (upholding the plaintiff's claim under the right of publicity, but rejecting her claim of unfair competition), *cert. denied*, 112 S. Ct. 1513 (1992).

69. See, e.g., *Lahr v. Adell Chemical Co.*, 300 F.2d 256 (1st Cir. 1962) (recognizing for the first time that distinctive voices were protected by the right of publicity).

70. See, e.g., CAL. CIV. CODE § 3344 (West Supp. 1995) (providing protection for the use of a person's actual voice).

71. See, e.g., *Midler*, 849 F.2d at 463 (recognizing a common law right of voice misappropriation when Midler's voice was copied by an impostor). See also Donna Larcen, *Going Commercial: Stars Lend Voice, but not Visage*,

The common law often provides more expansive protection than privacy statutes.⁷² Both the common law and statutes, however, recognize that the human voice is one of the most palpable ways that identity is manifested.

In *Midler v. Ford Motor Co.*,⁷³ the Ninth Circuit held that the California privacy statute prevented misappropriating but not imitating a person's voice.⁷⁴ The court concluded, however, that celebrity Bette Midler had a common law cause of action against the defendant for the tort of voice misappropriation. The elements of this tort are: (1) the intentional imitation of (2) a distinctive and (3) well known voice (4) for commercial purposes.⁷⁵ The *Midler* court justified protecting distinctive voices as a natural extension of the right of publicity.⁷⁶ The court noted, "A voice is as distinctive and personal as a face."⁷⁷ The court felt it was particularly important to protect the use of Midler's voice in this instance because the infringement involved singing.⁷⁸

The Ninth Circuit clarified the *Midler* requirement that the imitated voice be "distinctive" in *Waits v. Frito-Lay, Inc.*⁷⁹ In

to *T.V. Ads*, HOUSTON CHRON., Apr. 6, 1992, at 6 (explaining that the use of celebrity voices is on the rise because advertisers realize that a familiar voice captures the public's attention).

72. *Midler*, 849 F.2d at 463 (relying on the right of publicity to protect Midler's voice against impersonation when the California statute would not).

73. 849 F.2d 460 (9th Cir. 1988), cert. denied, 112 S. Ct. 1513 (1992).

74. *Id.* at 463 (recognizing that the defendant misappropriated Midler's voice). See also *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992) (as amended on denial of rehearing and rehearing en banc) (describing the tort of voice misappropriation described in *Midler* as a "species" of the "right of publicity"), cert. denied, 113 S. Ct. 1047 (1993). See also *Trust Co. Bank v. Putnam Publishing*, No. CV 87-07393 AHS (JRX), 1988 U.S. Dist. LEXIS 4963, at *3 (C.D. Cal. Jan. 4, 1988) (concluding that the defendant's book violated the copyright to *Gone with the Wind* because it was a read-alike).

75. *Midler*, 849 F.2d at 463 ("We hold only that when a . . . singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California."). See also Neil L. Shapiro and Karl Olson, *Encore Performances: "Do you Want to Sue?" Climbs the Charts*, LEGAL TIMES, Jan. 15, 1990, at 27 (noting that it is ironic that under First Amendment principles Young & Rubicam could have a singer perform an awful rendition of Midler's song as a parody, probably doing more harm to Midler's image). This view is buttressed by the recent Supreme Court holding that parody is a fair use under the Copyright Act. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994).

76. *Midler*, 849 F.2d at 463.

77. *Id.*

78. Judge Noonan explained, "The singer manifests herself in the song. To impersonate her voice is to pirate her identity." *Id.* at 463 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 852 (5th ed. 1984)).

79. 978 F.2d 1093 (9th Cir. 1992) (as amended on denial of rehearing and rehearing en banc), cert. denied, 113 S. Ct. 1047 (1993).

Waits, singer Tom Waits sued Frito-Lay for hiring a sound-alike to imitate his voice in a commercial.⁸⁰ The court explained that to be a distinctive imitation, an imitation must not merely remind the public of the plaintiff,⁸¹ must also imitate an artist's voice that is distinguishable from other singers.⁸²

It is important to maintain the distinction between identifying characteristics and nonprotectable characteristics that are merely associated with an individual.⁸³ The courts are justified in protecting the aspects of an individual's style which set him or her apart from all others, but they should be careful to leave enough room for other artists to develop their own styles.⁸⁴ Unfortunately, separating an individual's characteristics from a genre's characteristics often proves difficult. Artistic work inherently builds upon the work of others.⁸⁵ When a new art form begins, it is difficult to distinguish the style of a particular artist from the genre it could grow to become.⁸⁶ Most people, for example,

80. *Waits*, 978 F.2d at 1097.

81. *Id.* at 1101.

82. *Id.* at 1101-02.

83. Cf. Gordon, *supra* note 61, at 1582-83. The goal of the right of publicity to protect an individual's persona is furthered only by protecting attributes that invoke a particular person's identity. *Id.* Protecting traits that are merely associated with an individual may provide some additional protection for that person's identity. *Id.* This benefit is insignificant because a person's identity is not conclusively invoked by attributes that are merely associated with them. Expanding the right of publicity to include marginally identifying characteristics gives an individual the right to control the commercial use of attributes held in common by other people. *Id.* Restricting the scope of the public domain is unwarranted because the benefit to individual rights is insignificant. *See also* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1170 (1994) (explaining that courts should avoid a "rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster") (citing Stewart v. Abend, 495 U.S. 207, 236 (1990)); Gordon, *supra* note 61, at 1533 (arguing that copyright law is designed to balance the rights between individuals and the public).

84. *See* Madow, *supra* note 5, at 239 (arguing that the right of publicity should be restricted to preserve room for innovation in the public domain). The scope of the public domain becomes uncertain when the right of publicity is expanded to protect attributes that are merely associated with an individual. The public's incentive to create would diminish because works the public builds upon may be protected by someone else's right of publicity.

85. *See* Page, *supra* note 27, at 418. Page explains that, in a broad sense, all works are derivative because they rely on previously existing elements. Page notes that the distinction between works that share common elements and works that are based on an earlier work may be difficult to determine. *Id.* *See also* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1169 (1994) (noting that all works "must necessarily borrow" from works of the past) (quoting Emerson v. Davies, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845)).

86. Determining the scope of an innovative artist's style is difficult when

can distinguish between the music of Elvis Presley and Buddy Holly, but at one time all "rock 'n' roll" music probably sounded like Elvis'. When faced with these innovative artist cases, the courts should tailor the law to promote the individual's interests, as well as those of society as a whole.

3. The Protection of Style in a Person's Creations

Copyright law protects a person's right to his or her creative work for the life of the creator plus 50 years.⁸⁷ Literary works, dramatic works, pictorial and graphic works, motion pictures, and other audiovisual works fall within the scope of copyright protection.⁸⁸ A person's copyright is violated when the unique and expressive portions of his or her work are "substantially" copied.⁸⁹ This protection extends to original works, as well as works derived from the original.⁹⁰

a genre first emerges because the genre grows with the artist who discovered it. The protected aspects of the artist's style should be narrowly construed to encourage the public to explore the genre's outer limits. *See Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 947 (8th Cir. 1992) (Lay, J., concurring in part, dissenting in part) (explaining that jurors should determine whether musical compositions share a similarity of expression because judges have no expertise in the area). The Supreme Court recently reminded us of Justice Holmes' words that:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.

Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1173 (1994) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

87. 17 U.S.C. § 302 (1988). *See also supra* note 27 (describing the differences between the current copyright act and earlier copyright law).

88. 17 U.S.C. § 102 (1988). Section 102 states:

a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings.

17 U.S.C. § 102 (1988).

89. This is the traditional test for determining copyright infringement. *See*,

Copyright protects an individual's own unique style, it does not protect a general artistic style. The District Court for the Southern District of New York explained this distinction in *Jewelry 10, Inc. v. Elegance Trading Co.*⁹¹ Jewelry 10 designed porcelain jewelry using a style called pointillism⁹² and sued other jewelry designers for copying this technique without their consent.⁹³ The court noted that some of the defendant's designs "created a similar general effect or impression" as the plaintiff's designs because they both used the pointillism technique.⁹⁴ The designs that created this "similar general effect" did not, however, infringe on the plaintiff's copyright because the idea of applying pointillism to porcelain jewelry was too general to receive copyright protections.⁹⁵ The defendant violated the copyright to the plaintiff's "more distinctive designs" because these designs were part of the artist's distinctive style, rather than his or her genre.⁹⁶

The court that decided *Jewelry 10* provided more extensive protection to style in *Steinberg v. Columbia Pictures Industries, Inc.*,⁹⁷ and gave more explicit protection to an artist's style. The court explained that copyright law protects style only when the style is distinctive.⁹⁸ The plaintiff in *Steinberg* sued Columbia Pictures, the producers of "Moscow on the Hudson," for infringing on the style of his work.⁹⁹ The plaintiff had designed a print that is "widely known as a parochial New Yorker's view of the world."¹⁰⁰ The picture gave its viewers a unique, birds-eye view of the world. New York City was drawn in detail with the rest of the world receiving only minimal attention.¹⁰¹ The court recognized this "sketchy, whimsical style" as "one of Steinberg's hallmarks."¹⁰² The defendant's movie poster changed much of the design, but retained Steinberg's distinctive style.¹⁰³

e.g., *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 941-42 (8th Cir. 1992) (applying the "substantial similarity" test).

90. 17 U.S.C. § 103(b). See also 17 U.S.C. § 101 (1988) (defining a "derivative work" as one that is based on one or more preexisting works which has been modified in a manner that, as a whole, transforms the work into an original work of authorship).

91. No. 88 Civ. 1320 (PNL), 1991 WL 144151 (S.D.N.Y. July 20, 1991).

92. *Id.* at *1.

93. *Id.*

94. *Id.*

95. *Id.* at *4.

96. *Id.* at *5.

97. 663 F. Supp. 706, 712 (S.D.N.Y. 1987).

98. *Id.* at 711-12.

99. *Id.* at 708.

100. *Id.* at 709.

101. *Id.* at 710.

102. *Id.* at 712.

103. *Id.* at 713.

The stylistic similarities convinced the court that the defendant's poster infringed on Steinberg's copyright.¹⁰⁴

Jewelry 10 and *Steinberg* represent the outer limits of protection for stylistic rights.¹⁰⁵ The plaintiffs in those cases essentially argued that the defendants created a derivative of their work rather than an exact copy. Proving infringement is much harder when the defendant's work is derivative.¹⁰⁶ Plaintiffs alleging that a defendant created a derivative work cannot show a "substantial similarity" by pointing to direct copying.¹⁰⁷ Instead, plaintiff's must establish the scope of their style entitled to protection before they can prove infringement.¹⁰⁸ This additional hurdle could prevent many would-be plaintiffs from suing to protect their copyrights.

These obstacles cause plaintiffs to find trademark law an attractive alternative to copyright when another person's work is similar to their own, even though it is not a copy.¹⁰⁹ Specific forms of artistic expression frequently develop a secondary meaning, entitling them to trademark protection.¹¹⁰ Mickey

104. *Id.* at 713-14, 716.

105. In these cases, the "substantial similarity" between the works infringed the plaintiff's copyrights, even though the copying was not verbatim. *See supra* notes 96 and 104 and accompanying text. When the copying is not direct, however, a "substantial similarity" is more difficult to identify.

106. A substantial similarity between works is easier to identify when the copying is direct, like a lithograph, because the similarities are very apparent. When copying is done in a modified form, a substantial similarity is more difficult to prove because the similarities are less obvious.

107. Derivative works by their nature are modified forms of the original.

A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, . . . condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'

17 U.S.C. § 101 (1988).

108. The plaintiff must show that his copyright includes the distinctive aspects of the defendant's work. Before this can be proved, the plaintiff must establish that his overall style is distinctive enough to be subject to copyright protection.

109. Trademark protection may be more appealing to plaintiffs than copyright law because trademark only requires the similarities between works to be substantial enough to confuse consumers regarding the source of the goods. Trademark does not require the public to be misled into believing that the defendant's goods are the same as the plaintiff's, but only demands a strong enough similarity to mislead the public into believing the goods came from the same source. *See supra* notes 21-24 and accompanying text (discussing the goal of trademark law).

110. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 13 (Tentative Draft No. 2, 1990) (explaining that "secondary meaning" is acquired when

Mouse, for example, is not only an art form, but also a trademark for Disney.¹¹¹ Furthermore, it is even possible for an artist's style to be distinctive enough to operate as a trademark.¹¹² Keith Haring is an example of an artist with a style distinctive enough to act as a signature.¹¹³ Haring's work can be set apart from other artists through his unique use of bubble-shaped figures, bright colors, and a minimal amount of detail.¹¹⁴

C. *The Legal Theories Protecting Style Converge*

Protection is often available for a person's style under several different legal theories.¹¹⁵ Although each theory is distinct, courts recently have merged the tests for the theories, providing more extensive protection for stylistic rights.¹¹⁶ For example, the Ninth Circuit has used the "look and feel" test of trademark law to determine whether a "substantial similarity" exists under copyright law.¹¹⁷ This approach broadens copyright protection by allowing the trier of fact to consider more than the actual similarities between works.¹¹⁸ The "feel" element of the test

something, which is not inherently identifying, is used by a particular person so frequently that the public recognizes its use as "uniquely associated with [a particular] person's goods, services or business"; McCarthy, *supra* note 1, at § 15:2 ("The prime element of secondary meaning is a mental association in buyers' minds between the alleged mark and a single source of the product. It is the crucial word 'association' which appears most often in judicial observations on secondary meaning."). See also *Fuddrucker, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 843-44 (9th Cir. 1987) (explaining that secondary meaning is not required when a mark is inherently distinctive).

111. See *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 759 (9th Cir. 1978) (recognizing that the Disney characters operate as a trademark for Walt Disney Productions), *cert. denied, sub nom.*, *O'Neil v. Walt Disney Prods.*, 439 U.S. 1132 (1979).

112. See *Jewelry 10*, 1991 WL 14451 and *Steinberg*, 663 F. Supp. 706 (protecting individuals' distinctive artistic styles).

113. Keith Haring was a graffiti artist whose unique characters propelled him to fame in the pop art community. Haring died of AIDS in 1990. Paul Richard, *Keith Haring Amid the Pop Icons*, WASH. POST, June 6, 1992, at C1.

114. See *Brownlee*, *supra* note 28, at 1179 (arguing that Keith Haring's style may be distinctive enough to be entitled to copyright expression).

115. See *supra* note 2 and accompanying text (explaining that the various intellectual property doctrines protecting style frequently overlap).

116. See *infra* notes 120-42 (discussing cases combining the intellectual property law doctrines to provide more expansive protection for stylistic rights).

117. See *Sid & Marty Krofft Television Productions v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). See also *Helfand*, *supra* note 3, at 643-52 (detailing the convergence of copyright and trademark in the Ninth Circuit).

118. See *Helfand*, *supra* note 3, at 643-51 (observing that the convergence of these tests allows courts to find copyright infringement by considering subjective factors, in addition to the objective factors traditionally relied upon in copyright cases).

introduces subjective factors into determining whether a copyright has been infringed.¹¹⁹

1. Initial Blending of the Intellectual Property Doctrines

The Ninth Circuit first applied the "look and feel" test to a copyright action in *Sid & Marty Krofft Television Productions v. McDonald's Corp.*¹²⁰ The plaintiff in *McDonald's* argued that the defendant's McDonaldland characters infringed the characters of the H.R. Pufnstuf television program.¹²¹ The Ninth Circuit concluded that McDonald's infringed the plaintiff's copyright because the McDonaldland characters possessed the subjective qualities of the plaintiff's characters, even though the court did not find any objective similarities.¹²²

Trademark law has also been altered by copyright law. In *Edgar Rice Burroughs, Inc. v. Manns Theaters*,¹²³ the District Court for the Central District of California applied copyright standards to determine a trademark violation.¹²⁴ In that case, the plaintiff claimed the defendant infringed on their trademark in "Tarzan"¹²⁵ by producing an X-rated film called "Tarz & Jane & Boy & Cheeta."¹²⁶ The court concluded that the defendant violated the trademark even absent any proof of confusion regarding the source of the film.¹²⁷ The court based its decision that "Tarz" infringed on the trademark to "Tarzan" on the copyright standard of "substantial similarity," rather than the traditional trademark test of confusion regarding the source of goods.¹²⁸

The court in *Edgar Rice Burroughs, Inc.* blended copyright and trademark law even further by declaring that the names "Tarzan," "Jane," "Boy," and "Cheeta" were the exclusive property of the plaintiff for the life of its copyright.¹²⁹ This

119. *Id.* (noting that the "feel" aspect of the trademark test is a subjective inquiry because it seeks to determine whether the public is reminded of someone other than the work's creator).

120. 562 F.2d 1157 (9th Cir. 1977).

121. *Id.* at 1169.

122. *Id.* at 1162-63.

123. 195 U.S.P.Q. (BNA) 159 (C.D. Cal. 1976).

124. *Id.* at 162.

125. *Id.* See also *Edgar Rice Burroughs, Inc. v. High Society Magazine, Inc.*, 7 Media L. Rep. (BNA) 1862 (S.D.N.Y. 1981) (challenging a pornographic magazine for publishing a raunchy escapade by Tarzan).

126. *Edgar Rice Burroughs, Inc. v. Manns Theatres, Inc.*, 195 U.S.P.Q. at 162.

127. *Id.*

128. *Id.*

129. See Helfand, *supra* note 3, at 646 (arguing that the plaintiff was given trademark protection for the life of the copyright).

hybrid legal theory gave the plaintiff's trademark in these names absolute protection.¹³⁰ Extending the protection of the names for the life of the copyright prevents the plaintiff from losing the trademark on the names through abandonment, a traditional defense to trademark infringement.¹³¹ In other words, under the *Edgar Rice Burroughs* analysis, the plaintiff will not lose the right to the names until the copyright runs out, even if the public ceases to associate the names with the plaintiff.¹³² Additionally, the fair use exception to copyright does not apply because the names are still trademarks.¹³³

The U.S. District Court for the Northern District of Georgia created another hybrid, described as "copyright-dilution,"¹³⁴ in *DC Comics Inc. v. Unlimited Monkey Business*.¹³⁵ The court denied the defendant's copyright infringement defense of fair use because the defendant's use of the plaintiff's characters would harm the character's all-American images.¹³⁶ The court did not fear that the defendant's work would actually compete with the plaintiff's.¹³⁷ Instead, the court feared that the defendant's satirical use of "Superman" and "Wonder Woman" would damage the characters' positive public image.¹³⁸ However, protection of the *image of a trademark* is the goal of state anti-dilution statutes, not copyright.¹³⁹ The court in *DC Comics*

130. *Id.* (explaining that the protection given to these characters avoids the traditional defenses to copyright and trademark because of the way that the court combined the doctrines).

131. *Id.* at 647.

132. See Helfand, *supra* note 3, at 644-46 (stating that the trademark defense of abandonment would not give the public access to the characters because they are entitled to copyright protection).

133. *Id.* (noting that the fair use exception, traditionally available as a defense against a claim of copyright infringement, did not apply to the characters because they were entitled to trademark protection).

134. Traditionally, secondary dilution was a focus of state trademark law. See *supra* note 24 (discussing the role of state trademark dilution laws).

135. 598 F. Supp. 110 (N.D. Ga. 1984).

136. *Id.* at 118.

137. See Helfand, *supra* note 3, at 648 (noting that the court never questioned whether any harm would be inflicted upon the plaintiff from competition).

138. *D.C. Comics*, 598 F. Supp. at 118 (noting that the defendant tarnished the "all-American" image that the plaintiff labored to create).

139. See *Pillsbury Co. v. Milky Way Prods., Inc.*, 8 Media L. Rep. (BNA) 1016 (N.D. Ga. 1981) (using the plaintiff's character in an adult-oriented satire constituted a fair use under copyright law, but nevertheless violated the state anti-dilution statute); Jerome Gilson, *Highlights of the Trademark Law Revision Act of 1988*, in 3 TRADEMARK PROTECTION & PRACTICE at COMM-5 (1989) (noting that about twenty states have passed anti-dilution statutes); *Chemical Corp. of America v. Anheuser-Busch, Inc.*, 306 F.2d 433 (5th Cir. 1962), *cert. denied*, 372 U.S. 965 (1963) (concluding the insecticide maker's

divorced the goals of the theories protecting style from their applications by haphazardly combining the distinct elements of those theories.¹⁴⁰ The "copyright-dilution" theory was unnecessary because the case could have been decided using either copyright or trademark law.¹⁴¹ Although the scope of this new doctrine remains undefined, it is a source that allows future courts to further intrude into the public domain.

2. The Extreme Cases Protecting Style

Several recent cases have extended the right of publicity to aspects of style which are not unique to a particular individual. These cases protect style associated with a person even though it is not a strong enough indicator to identify the person. Earlier right of publicity cases sought to protect only a person's identity.¹⁴² These recent cases infuse trademark standards for determining infringement into the right of publicity.¹⁴³ This combination renders infringement an easier standard for plaintiffs to prove because the similarities do not have to relate to an identifying characteristic.¹⁴⁴ Further, trademark's requirement of consumer confusion does not apply.¹⁴⁵ Instead, infringement

slogan "Where there's life, there's bugs," harmed the defendants slogan "Where there's life, there's Bud"); Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031 (N.D. Ga. 1986) (merchandising Garbage Pail Kids injured the Cabbage Patch kids' mark); DC Comics, Inc. v. Unlimited Monkey Business, 598 F. Supp. 110 (N.D. Ga. 1984) (holding that the trademarks to Superman and Wonder Woman were damaged by a singing telegram business); General Elec. Co. v. Alumpa Coal Co., Inc., 205 U.S.P.Q. (BNA) 1036 (D. Mass. 1979) (deciding the "Genital Electric" logo damaged the plaintiff's trademark); Gucci Shops, Inc. v. R.H. Macy & Co., Inc., 446 F. Supp. 838 (S.D.N.Y. 1977) (labeling diaper bag "Gucchi Goo" injured the plaintiff's trademark); Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183 (E.D.N.Y. 1972) (enjoining posters bearing the "Enjoy Cocaine" logo because of its similarity to the Coca-Cola logo).

140. The trademark goal of preventing confusion is not furthered by preventing a trademark from being diluted.

141. *DC Comics*, 598 F. Supp. at 118 (noting that an antidilution statute was available in that jurisdiction). See also Helfand, *supra* note 3, at 649 (observing that the creation of "copyright-dilution" was not necessary because other remedies were available).

142. See *supra* note 13 (describing the traditional application of right of publicity to protect an individual's identity).

143. See *infra* notes 147-97 and accompanying text. The cases described *infra* recognize a right of publicity when the defendant's activities remind the public of the plaintiff. This confusion standard is traditionally associated with trademark law, rather than the right of publicity. See *supra* note 22 and accompanying text (explaining that the goal of trademark law is to prevent confusion regarding the source of goods) and *supra* note 12 and accompanying text (emphasizing that the goal of the right of publicity is to protect an individual's identity by preventing the misappropriation of identifying characteristics).

144. All identifying characteristics remind the public of the person who

is determined solely by whether the defendant's actions remind the public of the plaintiff.¹⁴⁶

Courts that expand the right of publicity to include marginally identifying characteristics often rely on *Motschenbacher v. R.J. Reynolds Tobacco Co.*¹⁴⁷ The Ninth Circuit in *Motschenbacher* held that the defendant's commercial featuring a race car resembling the plaintiff's violated the plaintiff's right of publicity.¹⁴⁸ The advertisement did not refer to Motschenbacher by name or use his photograph.¹⁴⁹ The *Motschenbacher* court nevertheless reasoned that the car in the commercial identified Motschenbacher. The car had distinctive markings that identified Motschenbacher even though the defendant had changed many of the marks on Motschenbacher's car.¹⁵⁰ The court's decision was premised on the unlikely assumption that Motschenbacher was identifiable in the commercial.¹⁵¹ Cases following *Motschen-*

possesses the characteristics, but not all characteristics that remind people of a particular person are strong enough indicators of a person's attributes to definitively say that they invoke a person's identity. For example, describing a man as "the actor who plays a private detective on t.v." may remind people of Tom Selleck's character on *Magnum P.I.*, but this description is not identifying because this description is true of many other actors who play private investigators, including Robert Blake (*Barretta*), David Soul (*Starsky and Hutch*), and Bruce Willis (*Moonlighting*).

145. The merger of trademark law into the right of publicity did not include trademark's requirement that actual confusion result to prove infringement. Under the hybrid, infringement can be determined by showing that the characteristic the defendant invokes is associated with the plaintiff.

146. See Scott M. Martin & Peter W. Smith, *The Unconstitutionality of State Motion Picture Film Lien Laws (or How Spike Lee Almost Lost It)*, 39 AM. U. L. REV. 59 (1989) (explaining and criticizing state laws that interfere with copyright laws); Karen M. Corr, Comment, *Protection of Art Work Through Artists' Rights: An Analysis of State Law and Proposal for Change*, 38 AM. U. L. REV. 855 (1989) (explaining that state laws which may interfere with federal copyright law may be preempted).

147. 498 F.2d 821 (9th Cir. 1974). See also Penelope McMillan, *The Scales of Justice Often Weigh Some Very Odd Things*, LOS ANGELES TIMES, Sept. 20, 1993, at B1 (providing the details of *Peyton v. Health Devices, Inc.*). *Peyton* was a very strange case involving the misappropriation of a person's likeness. *Id.* The case involved a porn star who claimed his identity was misappropriated by the defendant's use of a mold of his penis. *Id.* The plaintiff was paid \$200,000 to have a mold of his penis made for development of sexual devices. *Id.* The plaintiff sued when the mold was recast to make additional sexual devices. The Los Angeles Superior Court dismissed the case. *Id.*

148. *Motschenbacher*, 498 F.2d at 826-27.

149. *Id.* at 822.

150. *Id.* at 827. For example, the defendant added a spoiler with the "Shell" logo that Motschenbacher did not normally have on his car. *Id.*

151. It seems unlikely that Motschenbacher's race car was distinct enough from other race cars or sufficiently associated with him by the public for the car to be an identifying characteristic. The court, however, concluded that the

bacher have apparently viewed the tenuous connection between the car and its driver as giving the green light to expanding protection for aspects of a person's style to those aspects which are merely associated with the person.

As an example, the court in *Lombardo v. Doyle, Dane & Bernbach*¹⁵² relied on *Motschenbacher* to expand the right of publicity. In *Lombardo*, the defendant produced a commercial portraying a New Year's Eve party complete with balloons, party hats, and a band playing *Auld Lang Syne*.¹⁵³ Guy Lombardo sued claiming the commercial infringed on his identity. The defendant had not used Lombardo's name, nick-name, or even a person resembling him in the commercial.¹⁵⁴ In denying the defendant's motion for summary judgment, the court concluded that the similarity between the performances gave Lombardo a cause of action because people could be deceived into believing that he was in the commercial.¹⁵⁵

Lombardo is a gross extension of *Motschenbacher*.¹⁵⁶ There was no basis for the *Lombardo* court to deny the defendant's motion for summary judgment because the actor in the commercial did not physically resemble the plaintiff.¹⁵⁷ A right of publicity cause of action on these facts essentially gave Lombardo a monopoly on the commercial use of the traditional New Year's Eve party.¹⁵⁸ The court relied upon a New Year's Eve party with balloons, party hats, and a band playing *Auld Lang Syne* to determine that Lombardo could have an infringement claim against the defendant.¹⁵⁹ These aspects are common to

car was a distinctive attribute that invoked Motschenbacher's identity. *Id.* at 826-27.

152. 58 A.D.2d 620 (N.Y. App. Div. 1977).

153. Guy Lombardo had conducted a band at similar New Year's Eve parties for more than forty years and was known as "Mr. New Year's Eve." *Lombardo*, 58 A.D.2d at 622.

154. *Id.* at 623 (Titone and Suozzi, JJ., concurring and dissenting in part) (noting that "the plaintiff's name was never mentioned in the commercial" and that the man in the commercial "did not physically resemble [the] plaintiff").

155. *Id.* at 622.

156. See also *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 844 (6th Cir. 1983) (Kennedy, J., dissenting) (describing *Motschenbacher* as "an 'identifying characteristics' case").

157. See *supra* note 154 (noting that the commercial did not use the plaintiff's name, picture, or a look-alike).

158. The court's acknowledgement that Lombardo's image may have been misappropriated by the use of a band conductor at a New Year's Eve party prevents other people from acting in this capacity.

159. These were the only factors that could have identified Lombardo because neither his face, name nor physical likeness were used. See *supra* note 154 and accompanying text.

many New Year's Eve parties. Even if the public tends to associate New Year's Eve parties with "Mr. New Year's Eve," the plaintiff should not have a cause of action because the commercial invoked none of his unique attributes.¹⁶⁰

The Sixth Circuit extended the right of publicity to a phrase associated with a performer in *Carson v. Here's Johnny Portable Toilets, Inc.*¹⁶¹ In that case, Johnny Carson objected to the defendant's use of the phrase, "Here's Johnny."¹⁶² Carson used the phrase on every episode of the "Tonight Show" since 1962, and also as a label on his own line of clothing.¹⁶³ Although the court rejected Carson's claims for relief under trademark and invasion of privacy theories, the court allowed Carson's claim under the right of publicity theory.¹⁶⁴ By protecting the phrase under the right of publicity,¹⁶⁵ the *Carson* court may have gone too far.

Carson extended the right of publicity far beyond earlier precedents. The court compared the case to *Hirsch v. S.C. Johnson & Co.*,¹⁶⁶ in which "Crazy Legs" Hirsch was entitled to bring an action against a pantyhose maker who used his nickname.¹⁶⁷ The phrase "Here's Johnny," however, is not distinctive enough to qualify for protection under the *Hirsch* test.¹⁶⁸ The *Hirsch* court protected the phrase "Crazy Legs" because it served as a distinctive nickname for the plaintiff.¹⁶⁹ The phrase "Here's Johnny" is not distinctive.¹⁷⁰ It is used to

160. The right of publicity is designed to prevent a person's identity from being misappropriated, but a person's identity cannot be invoked by characteristics which are not identifying. See *supra* note 13 and accompanying text (emphasizing that the right of publicity is designed to protect a person's identity).

161. 698 F.2d 831 (6th Cir 1983).

162. *Id.* at 833.

163. *Id.*

164. *Id.* at 834.

165. *Id.* at 835-37 (explaining that defendant violated Carson's right of publicity by using the phrase "Here's Johnny").

166. 280 N.W.2d 129 (Wis. 1979).

167. *Id.* at 130. The *Hirsch* court noted that Elroy Hirsch was indisputably a nationally-known sports figure. *Id.* at 131. Hirsch acquired the nickname "crazy legs" during the fourth game of his first season at the University of Wisconsin. *Id.* The name followed Hirsch into a dazzling career as a professional athlete. *Id.* Moreover, Hirsch was identified as "crazy legs" when he subsequently did a number of advertisements. *Id.*

168. *Carson*, 698 F.2d at 842 (Kennedy, J., dissenting) ("*Hirsch* simply stands for the principle accepted by commentators, if not by courts, that the right of publicity extends not only to an individual's name but to a nickname or stage name as well."). *Hirsch* required that the characteristic used commercially "clearly identify the wronged person." *Hirsch*, 280 N.W.2d at 137. The phrase used in *Carson* was applicable to several other people, and even toilets, so the phrase did not identify Carson with the same specificity as *Hirsch's* nickname did.

169. *Hirsch*, 280 N.W.2d. at 129.

170. "The phrase 'Here's Johnny' is not distinctive."

introduce anyone named John, not just Johnny Carson. Furthermore, the term "John" is commonly used in reference to toilets.

The *Carson* court also relied on *Ali* for the proposition that phrases could be protected.¹⁷¹ *Ali*, however, is easily distinguishable. First, the phrase "the Greatest" was not protected outright in *Ali*.¹⁷² The *Ali* court relied on the phrase in connection with several other factors to prove that the defendant had used a drawing of Ali.¹⁷³ Carson's claim was based on the use of the phrase alone.¹⁷⁴ Second, Ali used the phrase "the Greatest" to describe himself, making the connection between the phrase and himself stronger.¹⁷⁵ By contrast, Ed McMahon introduced Carson by the phrase "Here's Johnny." The dissent in *Carson* noted that if the phrase should receive protection, McMahon might have had a stronger claim to it because the phrase was used by him.¹⁷⁶

Motschenbacher, *Lombardo*, and *Carson* raise the possibility that virtually anything can receive protection under some theory if it reminds the public of a particular person.¹⁷⁷ These cases

the name is not exclusively associated with his identity. *Carson*, 698 F.2d at 837. A term that is not inherently distinctive may still be entitled to trademark protection if it has acquired "secondary meaning." Lanham Act, 15 U.S.C. § 1052 (1988). Basically, if the term over time becomes distinctive, it may be protected under trademark law despite the fact that the term was merely descriptive. According to the *Carson* court, the term "Here's Johnny" is said to have acquired distinctiveness. Thus, Johnny Carson may be entitled to trademark protection for the phrase "Here's Johnny," because most of the public associates the saying with his television show.

171. *Carson*, 698 F.2d at 835.

172. The *Ali* court found Ali's identity invoked by the presence of several factors associated with Ali, including the phrase "the Greatest." See *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727 (S.D.N.Y. 1978). The court made no statement that Ali's identity would have been invoked by the use of this phrase alone.

173. *Id.*

174. Carson did not argue that the plaintiff used any characteristic associated with him other than the phrase "Here's Johnny." See *Carson*, 698 F.2d at 832.

175. *Id.* at 843 (Kennedy, J., dissenting) (explaining that the association between the phrase "the Greatest" and Ali was bolstered by Ali's use of the phrase to describe himself).

176. *Carson*, 698 F.2d at 839, n.5 (arguing that McMahon has a competing interest because he used the phrase in "a distinctive drawn out manner").

177. These cases protected the plaintiffs' right of publicity when the defendants used characteristics that were only marginally associated with the plaintiffs. The scope of protection an individual can receive is significantly broadened when characteristics that are invoked are not identifying, like a name or face. These cases only required the characteristic being protected to be associated with the plaintiff in some way.

use a hybrid of trademark and right of publicity law. Specifically, the courts in these cases determine whether a particular attribute is an identifying characteristic for the right of publicity by asking whether the defendant's conduct causes consumer confusion.¹⁷⁸ Under the current trend, once something becomes associated with a person, the right of publicity will protect it.¹⁷⁹ This protection will last the life of the individual and, in some jurisdictions, even longer.¹⁸⁰ This theory incorporates only the expansive aspects of trademark law, and neglects typical defenses, like abandonment.¹⁸¹ This hybrid theory threatens to engulf much of the public domain by removing any logical stopping point for the scope of stylistic rights.¹⁸²

178. *Motschenbacher, Lombardo, and Carson* were decided under the right of publicity, but the characteristics protected in those cases did not invoke the exclusive identity of the plaintiffs. See, e.g., *Carson*, 698 F.2d at 837. The test for determining infringement in these cases resembles the requirement of consumer confusion in trademark cases. Even though the courts did not seek a finding that actual confusion had resulted, they tried to determine if the public associated the characteristics with the plaintiffs. See *id.* The courts determined that the defendants invoked the plaintiffs' identities because the public would be reminded of the plaintiffs. See *id.*

179. Rather than requiring an identifying characteristic to be protected by the right of publicity, recent cases only require the characteristic to be associated with a person. See *supra* notes 137 and 138 (explaining that in some jurisdictions the right of publicity has incorporated a trademark like test for determining copyright infringement, which only requires a characteristic to be associated with a person, rather than identifying).

180. See *Martin Luther King, Jr., Ctr. for Social Change, Inc. v. American Heritage Products, Inc.*, 296 S.E.2d 697, 704-05 (Ga. 1982) (holding that the right of publicity is descendible). *But cf.* *Lugosi v. Universal Pictures*, 603 P.2d 425, 430-31 (Cal. 1979) (declaring that the right of publicity is not descendible). See also Andrew B. Sims, *Right of Publicity: Survivability Reconsidered*, 49 *FORDHAM L. REV.* 453 (1981) (favoring descendibility for the right of publicity).

181. See Helfand, *supra* note 3, at 643-48 (discussing the convergence of trademark and copyright laws to protect comic strip characters). The characteristics protected by the right of publicity are a part of a person's identity and cannot be abandoned like a trademark. A trademark can fall into disuse causing the public's connection between a person and the mark to fade. See *supra* notes 122-24 and accompanying text. However, these considerations are not relevant to the right of publicity. The right of publicity is solely concerned with whether a person's identity is invoked.

182. The balance between the rights of society and the rights of individuals is destroyed when individuals are free to intrude upon the public domain. See Madow, *supra* note 5, at 239. Requiring characteristics to be identifying, or requiring similarities between goods to cause actual confusion, limits the extent to which individuals in the public domain may develop their own unique style by building on others'. See *supra* notes 85-87 and accompanying text. The decisions that weaken these requirements expand individual rights with the price of taking expression out of the public domain. See generally Madow, *supra* note 5 (explaining that when the right of publicity is construed broadly,

The Ninth Circuit, however, recently expanded the scope of stylistic rights without relying on the hybrid analysis. In *White v. Samsung Electronics America, Inc.*,¹⁸³ the court protected Vanna White's identity under the right of publicity by ignoring the theory's limitations.¹⁸⁴ Vanna White sued Samsung for making a commercial that invoked her letter-turning style.¹⁸⁵ The commercial's setting resembled the set of *Wheel of Fortune*, and the robot hostess in the commercial shared Vanna White's look and style.¹⁸⁶ The court concluded that White had a viable cause of action, even though the commercial appropriated none of her personal attributes.¹⁸⁷ The court decided that the combination of similar characteristics invoked White's identity.¹⁸⁸ It did not matter to the *White* court that no one would believe the robot was Vanna White; all that mattered was that the public would be reminded of her.¹⁸⁹

White simultaneously removed a crucial limitation on the right of publicity and undercut the objectives of copyright law.¹⁹⁰ None of the factors that identified White were unique attributes she possessed.¹⁹¹ The dissent correctly noted that the only reason the public would associate the commercial with Vanna White

the public domain is diminished). See also Gordon, *supra* note 61, at 1538 (arguing that intellectual property law attempts to balance the rights of society against the rights of individuals).

183. 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 113 S. Ct. (1993).

184. The Ninth Circuit reversed the district court's grant of summary judgment and required the district court to evaluate White's claims on remand. Their decision to do so suggests that the right of publicity should be construed broadly. *Id.* at 1401.

185. *Id.* at 1396.

186. The commercial's robot wore a long evening gown, a blond wig, and jewelry, while turning letters on a game board. *Id.*

187. *Id.* at 1402. See also Madow, *supra* note 5, at 127 (arguing that the protection the right of publicity gives celebrities is unwarranted because it unnecessarily depletes the public domain); Dan Hurley, *The End of Celebrity*, in *PSYCHOL. TODAY*, Dec. 1988, at 50, 55 (quoting Vanna White, "I don't know why this happened to me. I work hard and I'm dedicated, but overall I'm totally surprised. What did I do to deserve this?").

188. *White*, 971 F.2d at 1399.

189. *Id.*

190. The *White* court disregarded the right of publicity's traditional requirement that the characteristic being invoked identify the plaintiff. See *supra* note 12 and accompanying text. The image in the commercial was clearly not that of Vanna White. See *White*, 989 F.2d at 1513 (rejecting a motion for a rehearing and a rehearing en banc) (Kozinsky, J., dissenting) (noting that White's identity was not invoked because none of her attributes were invoked), *cert. denied*, 113 S. Ct. 2443 (1993).

191. In rejecting a motion for rehearing, the Ninth Circuit noted that Ms. White is not the only woman who owns "nice dresses and jewelry." *White*, 989 F.2d at 1515.

was because the robot played the role of a hostess on *Wheel of Fortune*.¹⁹² Judge Kozinsky, who dissented to the Ninth Circuit's denial of a rehearing *en banc*, observed in his dissent that "once you include the game board, anybody standing beside it — a brunette woman, a man wearing women's clothes, a monkey in a wig and gown — would evoke White's image, precisely the way the robot did."¹⁹³ Furthermore, the copyright holder of the game show owns the right to the game board and the role of hostess, not Vanna White. Granting White the ability to control the use of this image undercuts the value of the copyright.¹⁹⁴ This case may replace the need for hybrid analysis under the right of publicity because confusion is no longer an element of the tort at all.¹⁹⁵ Moreover, the expanded right of publicity threatens to destroy the value of copyright protection¹⁹⁶ and bankrupt the public domain by allowing individuals to usurp the rights of copyright holders and the public.¹⁹⁷

The *White* court's expansion of the right of publicity leaves many questions unanswered. Does a person develop a property right in a style by creating it or by becoming associated with it?¹⁹⁸ Beyond that, who, if anyone, should own a style that is

192. *Id.* at 1515.

193. *Id.*

194. *Id.* at 1516.

195. The *White* court found an infringement of the right of publicity with a characteristic that is neither identifying nor capable of causing confusion between the plaintiff and the robot in the commercial. The court disregarded both the traditional requirements of the right of publicity and the hybrid version of this doctrine. White's identity was not invoked by the commercial because none of the robot's attributes held an exclusive association with White. The hybrid analysis does not seem applicable either because it is not possible for confusion to have resulted from the commercial, since the robot was clearly not White.

196. If courts allowed people to assert their right of publicity over the use of characteristics owned by others, copyright holders will lose the ability to control the use of their property. It is conceivable that after *White*, a court might require the copyright holder of *Wheel of Fortune* to get White's permission before they replace her, because a replacement would remind the public of White.

197. If the right of publicity can be extended to include anything that reminds the public of someone, virtually all characteristics are protectable. Extending the right of publicity this far will disturb settled expectations of copyright holders and the public. Copyright holders expect the right to control the use of their property and the public expects the right to create without fear of reprisals if their creations remind some members of the public of another's work or image.

198. The *White* court protected White's right of publicity for the role she plays on *Wheel of Fortune*, even though the role was probably created by the show's producers. Protecting the right of publicity on the basis of association, rather than origination, is misguided because no goal of intellectual property

routinely copied?¹⁹⁹ One example is Marky Mark, the Calvin Klein underwear model, who has been credited with initiating a fashion trend by wearing his pants low and his shirt rolled up, revealing his underwear label.²⁰⁰ Would a future court recognize an exclusive right in Marky Mark for the commercial use of this clothing style? If Marky Mark's manager created the idea, would his manager own it? And would it matter that the Calvin Klein underwear was someone else's trademark or copyright?²⁰¹

One academic study has found that "Marky Mark's body" has become "the locus/vehicle by which Calvin Klein underwear is sold."²⁰² Is the public's connection between the underwear and Marky Mark's body enough to give him an exclusive right to be the only male model for Calvin Klein?²⁰³ If Marky Mark receives this right, his ownership of the right may survive his death, leaving Calvin Klein without any model.²⁰⁴ This theory

law is furthered. Creativity is not promoted and accomplishment is not rewarded because the creator does not receive the right of publicity. In addition, the people who receive protection from the right of publicity in these circumstances are unjustly enriched because their profits come from the work of others.

199. A style that is widely copied becomes a common element of our culture. Allowing someone to control the commercial use of style in this circumstance would allow him or her to censure people who try to portray our culture truthfully. In addition, the First Amendment principle of promoting social commentary is undermined by this restriction on expression. See Gordon, *supra* note 61 at 1535 (arguing that the First Amendment's goals are undermined by expansive intellectual property laws). The justification for this protection is weakened because the more extensively a style is copied, the less the public associates the style with its creator.

200. See Phong Luu, *Underwear Everywhere*, ST. PETERSBURG TIMES, Sept. 22, 1993, at 1D (explaining that kids are copying Marky Mark's style of wearing their pants and shirts to reveal their underwear labels).

201. These issues remain open questions after *White*. Courts should be careful to balance the rights of individuals who become associated with a characteristic, those who created the characteristic, the rights of trademark or copyright holders that may be effected, and the needs of the public. See also *supra* note 5 (emphasizing the need for intellectual property law to balance the rights of individuals and the public).

202. See Laurence Goldstein, *Perspective on the Body: It's Not Just an Underwear Ad; Images of Physical Perfection and the Brute Male Glamour Spread a Societal Anxiety Worthy of Academic Study*, L.A. TIMES, July 4, 1993, at M5.

203. Marky Mark's association with Calvin Klein underwear may be close enough to entitle him the same protection *White* was afforded because of her association with *Wheel of Fortune*. Although *White* was not a challenge against the show's owners, the court recognized *White*'s right of publicity irrespective of any ownership of the show's owners. *White v. Samsung Elec. America, Inc.*, 971 F.2d 1395, 1397-99 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 2443 (1993). Recognizing that *White* had a personal right in the role suggests that the right is enforceable against everyone, including the show's owners.

204. In some jurisdictions the right of publicity is descendible. See *supra*

could conceivably be extended to allow Marky Mark to prevent any commercial use of a man wearing only underwear.²⁰⁵ It is hard to believe that a court would allow any of these results, but these outcomes are viable unless some limitations are imposed on the scope of stylistic rights.²⁰⁶

II. PROBLEMS ASSOCIATED WITH THE IDENTIFICATION OF STYLISTIC RIGHTS

Intellectual property law usually attempts to balance the rights of the individual against the rights of the public. The expanded scope of stylistic rights destroys this balance²⁰⁷ and replaces it with a dysfunctional set of rules governing ownership.²⁰⁸ The new intellectual property regime leaves the public unable to create anything without violating someone's rights²⁰⁹ and prevents anyone from knowing whose rights are violated.²¹⁰ Even those who are fortunate enough to own an aspect of style under trademark or copyright law may not have the exclusive right to

note 47 (listing jurisdictions that have adopted this rule by case law and statutes).

205. The public's association between Marky Mark and Calvin Klein may include an association with underwear in general. If a mere association with a characteristic is enough to establish protection under the right of publicity, Marky Mark's association with underwear may entitle him broad protection under the right of publicity.

206. The Marky Mark hypotheticals are designed to show the dangers of removing the limitations on the scope of traditional intellectual property doctrines. Limits must be placed on these doctrines if the original balance between the rights of individuals and society is to be restored.

207. The potentially unlimited expansion of stylistic rights gives individuals the power to absorb much of the public domain and to intrude on the rights others hold under trademark and copyright law. *See supra* notes 5 and 181 and accompanying text (describing the traditional balance of rights established by intellectual property law and how the current expansion of stylistic rights threatens to destroy it).

208. *See Madow supra* note 5 (explaining the benefits of maintaining a balance between individual and societal rights under intellectual property law). Destroying this balance through the expansion of stylistic rights threatens to undermine creative forces because people will be afraid that their creation will violate someone else's rights.

209. An unlimited scope for stylistic rights allows individuals to extend their rights at the expense of the public domain. When the public domain is diminished, the public has fewer resources to freely build upon. *See supra* note 85-86 and accompanying text (explaining that the ability to build upon other peoples work to some extent is an essential part of the creative process).

210. Stylistic rights would be difficult to identify if they were construed to protect aspects of individual's personas that are merely associated with them. The same trait may remind different members of the public of different people. This may make it difficult for those who would like to purchase rights to identify the owner of such rights.

that style because someone else may possess an overlapping right under the right of publicity.²¹¹

Courts' reliance on a variety of legal theories to protect style makes it difficult to determine the source of protection.²¹² Some of the legal theories protecting style do so because the style belongs to its creator.²¹³ Other branches of intellectual property law, such as copyright, protect style because it is embodied in a work.²¹⁴ When courts blend these distinct theories together, ownership of stylistic rights becomes difficult to determine.²¹⁵ This problem generally arises when the creator no longer owns the work that embodies the style he created.²¹⁶ The need for a more rational approach becomes apparent in cases where copyright owners and copyright creators sue each other.²¹⁷

One of the earliest cases of this kind was the famous "Sam Spade" case²¹⁸ in which the parties disputed the ownership of

211. An owner of a right to an aspect of style under copyright or trademark may not be able to use this right if doing so would interfere with someone else's right of publicity. Copyright holders, for example, would also have a hard time selling their rights if buyers were uncertain of what the rights entitled them to do.

212. Courts frequently combine the doctrines protecting style or conclude that a violation of one doctrine is the equivalent to a violation of all. See Helfand, *supra* note 3, at 623 ("In the 1970s, however, a transition began that resulted in convergence — the phenomenon where courts view copyright, trademark, and unfair competition claims as though they are coequal and necessarily interrelated.").

213. The right of publicity is a personal right, designed to protect an individual's persona. Trademark and copyright law protect the thing subject to protection. See *supra* notes 12-31 and accompanying text (discussing the right of publicity, copyright, and trademark).

214. See *supra* notes 26-31 and accompanying text (discussing copyright law and its objective as a doctrine under intellectual property).

215. The *White* case is an example of this because under *White*, the *Wheel of Fortune* hostess is subject to copyright protection by the show's owner and *White's* own right of publicity. If someone wished to create a *Wheel of Fortune II*, based on the original program, it is unclear whether the rights to do so would have to be purchased from *White* and the shows owners. See also *Goodis v. United Artists Television, Inc.*, 425 F.2d 397, 405-06 (2d Cir. 1970) (considering the implications that recognizing a right in style may have on other potentially interested parties).

216. It makes little difference which legal theory protects a person's right to style when the creator owns his own work, because no one else will have a claim to the work. When the rights to the work are sold, however, the original classification of the rights may become problematic. For example, a creator who owns the copyright to a work in which an aspect of the style is protected by the right of publicity may sell the copyright and retain his right of publicity. When more than one party possesses overlapping rights to the same work, it may be difficult to determine the extent to which one party can exercise his rights without the other's consent.

217. See, e.g., *Goodis*, 425 F.2d at 405-06.

218. *Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc.*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955).

the character Sam Spade. The plaintiff had purchased the copyright to the book *The Maltese Falcon* and made it into a very successful movie.²¹⁹ The book's author, Dashiell Hammett, later wrote stories for C.B.S. radio broadcasts using the book's Sam Spade character.²²⁰ The plaintiff claimed that the defendant's use of Sam Spade in its radio broadcasts infringed their copyright to *The Maltese Falcon*.²²¹

The court concluded that Hammett had not transferred his rights to the character when he sold the book.²²² The court held that Hammett did not sell the character with the copyright because Sam Spade is merely the vehicle for telling the story and not the story itself.²²³ The court refused to believe that Hammett intended to convey all rights to the character because writers often use the same character from one book in later works.²²⁴

This case raises several questions about the value of the copyright the plaintiff purchased. Copyright protects the original work and its derivatives,²²⁵ so the book and the movie are both protected. The copyrighted material also contains the characters, so it would seem that the plaintiff could use them in derivative works.²²⁶ They could even write stories in the same style as

219. *Id.* at 949-50.

220. *Id.*

221. *Id.* at 948-49.

222. *Id.* at 948-50.

223. *Id.* at 950. The court noted: "It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright." *Id.* See also Helfand, *supra* note 3, at 633 (noting that the application of this test affords limited protection because if Sam Spade is not the "story being told" it is difficult to imagine any character who would be). *But see* *Walt Disney Prods. v. Air Pirates*, 345 F. Supp. 108, 113 (N.D. Cal. 1972), *aff'd in part and rev'd in part*, 581 F.2d 751 (9th Cir. 1978), *cert. denied sub nom.*, *O'Neil v. Walt Disney Prods.*, 439 U.S. 1132 (1979), (weakening the "story being told" test by concluding that Mickey Mouse was the story being told).

224. *Warner Bros. Pictures, Inc.*, 216 F.2d at 949 (noting that the practice of an author using the same character in different books is well documented, a practice used by Edgar Allen Poe, Sir Arthur Conan Doyle, S.S. Van Dine, Earle Stanley Gardner, and others).

225. See *supra* notes 88 and 90 (defining the terms "original" and "derivative works" in the modern Copyright Act).

226. This is an issue the courts have not addressed. It is clear from the court's holding that Hammett could continue to use the character, but it seems that Warner Brothers would also be able to use the character in derivative works. See *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331 (S.D.N.Y. 1968) (allowing the copyright owner of pictures that contain "Dr. Seuss" characters to create dolls based on the pictures, even though the creator retained the ownership of the characters). If Warner Brothers and Hammett both produced "Sam Spade" stories, it might have been very difficult for the public to tell

Hammett because the court held that his style was not unique to the mystery genre.²²⁷ The value of the plaintiff's right to the character is undermined, however, because the ownership is not exclusive.²²⁸

The court in *Geisel v. Poynter Products, Inc.*²²⁹ reached a different conclusion on similar issues. *Geisel* involved the ownership of characters created by "Dr. Seuss" and the right of the defendants to use the creator's pen-name.²³⁰ The plaintiff sold the defendant the copyright to cartoons containing his famous characters.²³¹ The defendant later created dolls based on the drawings in the cartoons.²³² The early dolls bore labels indicating that the dolls were designed by Dr. Seuss.²³³ Later dolls had labels which explained that the dolls were derived from illustrations by Dr. Seuss.²³⁴

Unlike the court in the Sam Spade case, the *Geisel* court concluded that the characters were subject to copyright protection.²³⁵ The copyright gave the defendant the right to transform the two-dimensional figures into a three-dimensional doll.²³⁶ The court emphasized that the defendant could make the doll because it was derived solely from the cartoon they owned, and none of Dr. Seuss' other works.²³⁷

The court even recognized the defendant's right to use the name Dr. Seuss in association with the dolls.²³⁸ It was not unfair

the products apart. This raises the problems of consumer confusion and trademark dilution, which trademark and unfair competition laws are designed to prevent. For a discussion of these theories see *supra* notes 16-25 and accompanying text.

227. *Warner Bros. Pictures, Inc.*, 216 F.2d at 951 (explaining that the similarities between the stories, such as a long complicated search for an extremely valuable object, complications along the way, and fatalities, are not unique to Hammett, but are used by many mystery writers). See also *supra* notes 86-87 (explaining that a commonly used plot sequence often lacks the originality necessary to be afforded copyright protection).

228. The potential for competition between Warner Brothers and Hammett reduced the value of "Sam Spade" stories because the competition might have reduce prices and lead to the public tiring of "Sam Spade."

229. 295 F. Supp. 331 (S.D.N.Y. 1968).

230. *Id.* at 333.

231. *Id.* at 342.

232. *Id.* at 347 (noting that the defendant's counsel insisted that the defendant should not consult any source outside the copyrighted material they owned in designing the doll).

233. *Id.* at 348-49.

234. *Id.* at 349-50.

235. The court in the "Sam Spade" case determined that the character was not subject to copyright protection. *Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys.*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955).

236. *Geisel*, 295 F. Supp. at 353-54.

237. *Id.* at 354.

238. *Id.* ("That ownership must include some right to use the name 'Dr.

competition for the defendant to show that the dolls were derived from Dr. Seuss' drawings because the dolls *were* derived from Dr. Seuss' drawings.²³⁹ The defendant's use of the early labels implying that Dr. Seuss had designed the dolls was improper, however, because this was not true.²⁴⁰ This did not violate Geisel's right of publicity because he had sold the right to use his name in this context because his name was on the copyrighted material.²⁴¹

These two cases illustrate the confusion buyers and sellers confront regarding the rights exchanged in a transaction. The purchasers of the copyright in Sam Spade felt they had been deprived of a right they purchased. Geisel, in contrast, discovered that he had inadvertently transferred more rights than he intended.

Determining infringement of protected style is more difficult when the subject matter involves more subjective components.²⁴² The subjects of the controversies in *Warner* and *Geisel* were easy to spot because they were characters easily identifiable by name or appearance.²⁴³ Some aspects of style are more difficult to identify and, consequently, harder to protect.²⁴⁴

The court in *Franklin Mint Corporation v. National Wildlife Art Exchange, Inc.*²⁴⁵ had to determine whether an artist plagiarized himself by copying a work he had previously sold.²⁴⁶ The

Seuss' because that name appeared on each of the pages of cartoons [the defendant purchased].").

239. *Id.* at 351 (citing *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924) (noting that when a mark "is used in a way that does not deceive the public" and the mark is used to "tell the truth," the mark is not used improperly).

240. *Geisel*, 295 F. Supp. at 352-53. The *Geisel* court explained that the early labels violated Geisel's trademark because the label falsely implied that Dr. Seuss created the dolls. The later labels, which explained that the doll was based on Dr. Seuss' designs, were acceptable. *Id.*

241. *Id.* at 355-56.

242. Objective similarities, like the same names or faces, can be identified with little confusion. Determining infringement of more subjective elements of style is more difficult because people may view a person's style differently. This danger is reduced by requiring the style to be distinctive, but it may not make infringement as easy to determine as objective factors.

243. The infringing marks in those cases could be determined objectively because they involved a name and a cartoon character.

244. See *supra* notes 105-14 (highlighting the difficulty of determining infringement on the basis of subjective factors).

245. 575 F.2d 62 (3d Cir. 1978), *cert. denied*, 439 U.S. 880 (1978).

246. *Id.* at 63. See also *Esquire, Inc. v. Varga Enters., Inc.*, 81 F. Supp. 306 (N.D. Ill. 1948), *aff'd in part and rev'd in part*, 185 F.2d 14 (7th Cir. 1950). In *Varga*, an artist painted semi-nude women in a style that exaggerated their torsos and elongated their legs. 81 F. Supp. at 307. These popular pictures were published in *Esquire* and the women in the drawings were known as "Varga girls." *Id.* The artist ceased providing *Esquire* with his paintings,

artist specialized in painting wildlife and had sold the copyright to a painting of a cardinal to the National Wildlife Art Exchange.²⁴⁷ The artist later painted a series of four pictures of birds, including one of a cardinal, and sold the copyright to the Franklin Mint.²⁴⁸ The artist relied on the same source materials for painting both cardinals, including photographs of the birds and preliminary sketches.²⁴⁹ The National Wildlife Art Exchange sued the Franklin Mint for copyright infringement.²⁵⁰

The court's first major hurdle was deciding which aspects of the paintings were protected by the copyright. Wildlife pictures have to be very precise. This limits the amount of unique expression an artist can create and copyright.²⁵¹ The court de-

but he continued to paint his "Varga girls." *Id.* Esquire sued to prevent him from using the title "Varga girls" and to keep him from painting in his traditional style. *Id.* The court reasoned that the phrase "Varga girl" belonged to Esquire because it was a benefit they received from the contract. *Id.* at 309. The court, however, concluded that Esquire had not purchased the artist's style, even though it owned all previous commercial productions of the "Varga girls." *Id.* The court concluded that this distinctive style was all the artist painted, so all of his paintings should be expected to share the stylistic similarities. The court determined that there was no infringement because none of the new paintings were direct copies. *Id.* at 306-09.

The *Varga* court evidently chose to protect the interest of the artist over the property interest of the copyright holder. Varga's artistic style became better defined as his works evolved, but each stage of his artistic style was owned by the plaintiff. After painting more than 100 of his first paintings for the plaintiff, the court could have concluded that Varga's distinctive style was owned by Esquire.

247. *Franklin Mint*, 575 F.2d at 63-64.

248. *Id.*

249. *Id.* See also *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1532 (9th Cir. 1993) (explaining that even subconscious copying violates copyright) *rev'd*, 114 S. Ct. 1023 (1993); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971) (concluding that copying an "expression" is not prohibited when the expression is inseparable from the idea); *Winthol v. Wells*, 231 F.2d 550, 552-53 (7th Cir. 1956) (copying done from memory is as objectionable as making copies from more direct sources).

250. *Franklin Mint*, 575 F.2d at 63.

251. Judge Weis explained that the genre the artist creates within may determine the ease with which infringement can be determined:

[I]n the world of fine art, the ease with which a copyright may be delineated may depend on the artist's style. A painter like Monet when dwelling upon impressions created by light on the facade of the Rouen Cathedral is apt to create a work which can make infringement attempts difficult. On the other hand, an artist who produces a rendition with photograph-like clarity and accuracy may be hard pressed to prove unlawful copying by another who uses the same subject matter and the same technique.

Franklin Mint, 575 F.2d at 65. See Brownlee, *supra* note 28, at 1176 (explaining that artists who design in a realistic style have a more difficult time proving infringement).

terminated that no infringement had occurred because the paintings were not copies.²⁵² There were differences in the birds' positioning on the branches and their behavior in the paintings.²⁵³ The court felt that artists should be allowed to return to the same theme time after time, so long as they do not copy their earlier works.²⁵⁴

The current system for establishing a copyright makes it difficult to determine who owns the style embodied in a work.²⁵⁵ Copyright law protects unique forms of expression from the moment of creation.²⁵⁶ This means that a copyright is established on the preliminary work that goes into creating the final product.²⁵⁷ For example, if an artist designed a sculpture and relied on preliminary sketches, the sketches would be the original and the sculpture the derivative. Style that may appear unique to the sculpture may actually be protected by the copyright for the preliminary sketches. If the style is present in the preliminary work, the right to the style is retained by the owner of the preliminary work.²⁵⁸ If the "unique" style exists only in the final product, the right to the style is contained in the copyright to that work alone.²⁵⁹ People looking to buy "original" works need to be aware of the preliminary material the work is based upon to determine which rights they would be purchasing.²⁶⁰

252. *Franklin Mint*, 575 F.2d at 65-66.

253. *Id.* at 66.

254. The court noted the tendency of many painters to return to the same themes. Painting variations of a theme is appropriate, so long as they are not direct copies of copyrighted works that belong to someone else. *Id.*

255. See generally Page, *supra* note 27 (describing the protection derivative works receive under copyright). Artists would be reluctant to sell their works immediately after they are painted if the right to paint variations of the scene in the same style was sold with the work.

256. 17 U.S.C. § 101 provides:

A work is 'created' when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

17 U.S.C. § 101 (1988).

257. See Page, *supra* note 27, at 429-32 (explaining that all preliminary works are works in and of themselves, and are entitled to copyright protection).

258. This is because copyright protects the unique elements of a work as they appear in the original. Preliminary work is created before the final product is made, so the copyright to the unique stylistic elements lies in the original. See *supra* notes 27 and 28 (describing copyright requirements of original expression). See also Page, *supra* note 27 at 425-30 (explaining the problem of determining which work holds the copyright to the unique aspects of an artists style).

259. *Id.*

260. There is a danger that people may purchase a final product, believing

Markets that are style-oriented suffer from the inability to distinguish between protected style and unprotected style. Some art critics, for example, fear that this confusion has destroyed an entire genre, known as haute kitsch.²⁶¹ This genre portrays images from advertisements and the popular culture in a "sly, poke-in-the-ribs subtext."²⁶² *Rogers v. Koons*²⁶³ may have destroyed this field of art.²⁶⁴ Jeff Koons created a series of statues based on the plaintiff's popular picture of a couple holding a litter of puppies.²⁶⁵ Koons' style is described by some critics as an "ironic critique of consumerism,"²⁶⁶ and by others as "plagiarism."²⁶⁷ The court concluded that Koons violated the plaintiff's copyright because his subtle changes did not produce a creation, only a copy.²⁶⁸

Advertising has also suffered from the inability to determine whether style is protected. Cases like *Midler* and *Waits* "sent a chill through the advertising world."²⁶⁹ Advertisers fear that courts may find infringement when similarities are not as blatant as they were in *Midler* and *Waits*.²⁷⁰ If this occurs, advertisers may be hesitant to create at all for fear of being sued.²⁷¹

that this work is an original. If the purchaser buys the work expecting to sell derivatives, the purchaser may be disappointed to learn that another holds the copyright to the unique aspects of the work. For this reason, buyers should persuade the seller to warrant that the work sold is not based on any previous material. See Page, *supra* note 27, at 339-42 (encouraging the use of warranties to protect the expectations of contracting parties).

261. See, e.g., Charlotte Low Allen, *Lawsuit Asks if Art is More than Tales of Puppies*, WASH. TIMES, Aug. 3, 1990, at E1 (arguing that the genre was destroyed because courts view it as copying, rather than a unique form of expression).

262. *Id.*

263. *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 365 (1992).

264. See Allen, *supra* note 261, at E1 (explaining that some art critics feel that a genre was destroyed by this decision).

265. Koons modified the faces of the people in the picture. See *Rogers*, 960 F.2d at 303-05.

266. See Allen, *supra* note 261, at E1.

267. *Id.* (suggesting that the work had been so substantially copied that it was essentially plagiarized); *Rogers*, 960 F.2d at 311.

268. *Rogers*, 960 F.2d at 311.

269. Bibisi, *supra* note 8, at E8.

270. Peter Stranger, president of a major Los Angeles advertising Agency, explained, "I'm not afraid of these clear-cut cases . . . I'm afraid of getting sued out of the blue by using someone's voice unknowingly. That does scare me." Bibisi, *supra* note 8, at E1.

271. *Id.* (explaining that the *Midler* and *Waits* rulings should put an end to the commercial use of sound-alikes and warning that more expansive declarations of rights may chill other aspects of the advertising market as well).

Even when rights are recognized, a problem still exists regarding how the rights may be purchased.²⁷² Young & Rubicam, the agency that made the Midler sound-alike commercial, thought they would be protected by purchasing the rights to use Midler's song.²⁷³ After their loss, representatives of the firm noted that the decision may come back to haunt performers because agencies will be hesitant to use their work, reducing the value of their royalties.²⁷⁴

The Ninth Circuit, in *Fantasy, Inc. v. Fogerty*,²⁷⁵ indicated that it is possible for an artist to sell the exclusive rights to his or her musical style.²⁷⁶ The suit involved a claim against John Fogerty for the infringement of a copyright that he had previously sold.²⁷⁷ John Fogerty recorded "Run Through the Jungle" ("Jungle") in 1970 and sold the exclusive rights to the song.²⁷⁸ Fantasy later purchased these rights.²⁷⁹ In 1985, Fogerty recorded "The Old Man Down the Road" ("Old Man").²⁸⁰ Fantasy thought "Old Man" was so similar to "Jungle" that it violated their right to create derivative works.²⁸¹ Although the jury re-

272. The expanded scope of stylistic rights makes it more difficult for people to know what rights they must purchase to be able to use material, such as songs. In *Midler*, for example, the defendant had purchased the right to use the song, but nevertheless violated Midler's right of publicity for having the song sung the way Midler would have sung it. *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988), *cert. denied*, 112 S. Ct. 1513 (1992).

If the rights to style are construed broadly, it becomes more difficult for copyright holders to exercise their rights without interfering with the conflicting rights of the original artist. Copyright holders can purchase these additional rights from the artist, but this is an additional and potentially unwarranted burden placed on the copyright holder. Performers may be hurt in the process because the value of their royalties may decrease as the potential litigation costs for using their material increases.

273. *Midler*, 849 F.2d at 462.

274. Robert Callagy, attorney for Ford and Young & Rubicam, explained that the *Midler* ruling will hurt songwriter's music royalties because advertisers will be less inclined to use widely known songs. Richard B. Schmitt, *Imitation: Flattery or theft?*, ST. PETERSBURG TIMES, Sept. 3, 1988, at 1D. He explained that to the extent courts "preclude a use such as this, you as a copyright holder are going to lose a market for licensing rights." *Id.*

275. 984 F.2d 1524, *cert. denied*, 113 S. Ct. 1047 (1993).

276. *Fantasy, Inc.*, 984 F.2d at 1532 (concluding that the defendant's suit was not frivolous because Fogerty would have violated the copyright he sold if he had subconsciously copied that work). See also Geller and Hines, *supra* note 7, at S9 (suggesting that the *Fogerty* holding could potentially restrict the rights of artists to create within their style after they have sold the copyright to some of their work).

277. *Fantasy, Inc.*, 984 F.2d at 1526-27.

278. *Id.* at 1526.

279. *Id.*

280. *Id.*

281. *Fantasy, Inc.*, 984 F.2d at 1526-28 (arguing that Fogerty had not sung

jected the claim, the court recognized the possibility of a cause of action.²⁸² The district court stated that "if Fogerty's Old Man is a derivative work of Jungle, then Fogerty has exercised one of the exclusive rights that he had previously granted to plaintiff."²⁸³ Under these facts, the district court held that the plaintiff could sue Fogerty for copyright infringement.²⁸⁴

Mr. Fogerty correctly observed that "the larger issue [was] whether composers, writers, and artists could be barred from creating new works that bear the stamp of their own distinctive style."²⁸⁵ If Fogerty's "swamp rock"²⁸⁶ sound is distinctive enough to be copyrighted, it can be sold with the copyright.²⁸⁷ Many artists will find this possibility troubling. On the one hand, copyright protection for stylistic rights is a great way to intimidate potential impostors.²⁸⁸ On the other hand, most of the artists who have sold the copyrights to their works probably never considered the possibility that they could be selling the backbone of their careers.²⁸⁹

The value of works with distinctive stylistic components is threatened by an inability to predict the protected status of the work's style.²⁹⁰ Additionally, the inability to distinguish between

the same exact song, but a variation that was so similar that it infringed on their right to create a derivative work).

282. *Id.* at 1532. See also Katherine Bishop, *A Victory for the Creative Process*, N.Y. TIMES, Nov. 11, 1988, at B5 (explaining that the jury reached its decision after just two hours, with one member of the jury explaining, "Creative people have got to have rights to create without being harassed by too many business types").

283. *Fantasy Inc. v. Fogerty*, 654 F. Supp. 1129, 1132 (N.D. Cal. 1987).

284. *Id.*

285. Bishop, *supra* note 282, at B5.

286. See *id.* (stating that Fogerty describes his unique sound as "swamp rock").

287. If style is distinctive enough to be copyrightable it becomes a part of the copyrighted material, along with the lyrics. Once the style is embodied in the copyright, the artist can sell the copyright and all that the copyright protects, including the style.

288. Artists gain more power to protect their style from copying when their rights are construed broadly.

289. This right may operate as a double-edged sword when the artist sells copyright rights because the right can then be used against the original copyright holder. The original artist may be hurt the most in these circumstances because he or she may only be commercially successful within a narrow stylistic range.

290. The problem of selling the rights to an artist's style is only present when the artist's style is distinctive enough to be protected. If an artist sells the rights to his work he, as well as others, can continue to use the style if it is not distinctive enough to be protected. The value of an artist's work may depend heavily on whether the artist's style is entitled to protection. The problem is that there is no way to predict whether a person's style is distinctive enough to receive protection from intellectual property laws.

the public domain and protected style may reduce the incentive for the public to create. Work that has already been created may lose its value because people cannot determine what rights will be conveyed with the work. Purchasers are as worried about buying works they do not need as buyers may be about inadvertently selling all rights to their style.²⁹¹ A reliable method for determining whether style is protected and how it can be transferred must be developed for market forces to function properly.

III. PROPOSAL: PLACING LIMITS ON STYLISTIC RIGHTS AND UTILIZING WARRANTIES TO NEGOTIATE THEIR TRANSFER

A. *Maintain the Distinctions Between Legal Theories*

The legal theories protecting style operate effectively when the standards for infringement are tied to their respective goals.²⁹² Merging the different theories that protect style has led to results that do not further the goals of any distinct theory.²⁹³ The goals of protecting a person's identity or preventing consumer confusion, for example, place logical limits on the scope of stylistic rights.²⁹⁴ Without these limitations, the decision to protect a person's style becomes arbitrary and unpredictable.

Untangling these legal theories will narrow the scope of stylistic rights.²⁹⁵ The right of publicity should not protect a per-

291. Young & Rubicam, for example, probably regret buying the rights to Bette Midler's song *Do You Want to Dance?* for their commercial because it did not give them the rights to make their commercial. *Midler*, 849 F.2d at 460. Artists may fear that selling their work may result in inadvertently selling their style.

292. The balance between the rights of individuals and society is maintained when intellectual property doctrines are applied only as far as necessary to protect the goals of intellectual property. *See supra* notes 5 and 181 (explaining that intellectual property law tries to maintain a balance between protecting the rights of individuals to their creations and the rights of the public to an expansive public domain). *See also* Madow, *supra* note 5 (urging that this balancing particularly be applied to curtail the expanding right of publicity).

293. *See supra* note 182 (explaining that merging the tests of distinct intellectual property doctrines frequently leads to results which undermine the public domain without furthering the goals of the doctrines used to protect individuals' creations).

294. The goal of the right of publicity, for example, is to protect a person's ability to control the commercial use of his or her identity. Requiring that a person's identity is *actually* invoked to constitute a violation of the right of publicity assures that this goal is protected without unnecessarily reducing the public domain. *See supra* note 182 (explaining how the merger of tests for distinct intellectual property doctrines undermines the goals of intellectual property).

295. The convergence of the doctrines protecting style has broadened the protection the doctrines provide without furthering their goals. Restoring traditional limits of these doctrines will help to preserve the public domain.

son's commercial use of things associated with him unless the connection between them is strong enough to invoke his identity alone. Likewise, trademark and unfair competition law should not protect the commercial use of something unless protection is necessary to prevent consumer confusion regarding the source of the goods or services. Copyright law would require a "substantial similarity" to exist in order to prove infringement,²⁹⁶ rather than simply enough of a similarity to cause confusion.

B. *Limit the Scope of the Right of Publicity*

The right of publicity is designed to prevent others from becoming unjustly enriched by appropriating another person's identity. This protection should only extend to characteristics which are truly identifying, not just associated with someone.²⁹⁷ Protected characteristics should also be ones that the person whose identity is invoked would have a right to use freely.²⁹⁸

A person should not be able to invoke the right of publicity to protect a characteristic he or she does not have a right to use freely. People who can be identified by characteristics someone else owns are unjustly enriched when they can prevent the copyright holder from using his or her rights. Vanna White has a right to associate herself with *Wheel of Fortune* and no one has the right to separate Marky Mark from his Calvins.²⁹⁹ These rights do not give Vanna or Marky the exclusive right to control the copyrighted material, and the right of publicity should not be construed to achieve this result. If individuals want the exclusive rights, they should purchase them from the copyright holder.³⁰⁰

296. This is the traditional requirement of copyright law. *See supra* notes 26-31 for a discussion of traditional application of the test for copyright infringement.

297. *See supra* notes 176-82 and accompanying text (describing the problems with extending the right of publicity to protect characteristics that are not identifying).

298. *See supra* notes 183-97 and accompanying text (describing the problems with the *White* decision, in which the court protected White's association with a game show she did not own).

299. *See* Ann Cooper, *Gathering Moss; Neil Kraft Updates Calvin Klein with a '90s-Style Controversy*, *Kate Moss*, *ADWEEK*, Nov. 29, 1993, at 33 (observing the phrase "Nothing comes between me and my Calvins" was previously used by actress Brooke Shields).

300. *See, e.g.,* *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970) (holding that Goodyear's use of "These Boots Were Made for Walkin'" did not violate Nancy Sinatra's right of publicity because she lacked a distinctive style). Judge Trask explained, "Had she desired to exclude all others from the use of the song so that her 'secondary meaning' with the song could not be imitated she could have purchased those rights from the copyright proprietor." *Id.* at 716. This rule would protect the value of the copyright by preserving the copyright holders right to exclusive ownership.

C. *Rely on Warranties to Negotiate Transactions*

People should protect their interests by stating specifically which interests they are transferring and which they wish to retain.³⁰¹ When a purchaser intends to use the material for a particular purpose, he or she should require the seller to include a warranty. This would foster efficient transactions because both parties would know exactly which elements of style the contract transferred.

Warranties may be particularly important when the transfer involves copyrighted material.³⁰² Potential buyers cannot determine the scope of a work's derivative rights unless they are aware of the material relied upon by the work's creator.³⁰³ Copyright protects preliminary works, like rough drafts and preliminary sketches.³⁰⁴ Protection for this preliminary work reduces the protection otherwise afforded the final product.³⁰⁵ Copyright purchasers interested in the value of derivative works should learn about the artist's earlier work. Purchasers may want to purchase the earlier work or ask the creator to warrant that the work they do purchase was not based on any preexisting, copyrighted material. Conversely, an artist may want to create and retain the preliminary work to preserve the ownership of his or her distinctive style.

CONCLUSION

A person's distinctive style may receive protection from privacy law, trademark, unfair competition, and copyright, or a combination of these theories. The recent expansion and merger of these doctrines has removed the limits constraining the scope of these rights. This expansion threatens to bankrupt the public domain and to leave a dysfunctional set of rules governing intellectual property in its place.

301. Contract warranties allow contracting parties to protect their interests by explicitly providing for what is exchanged. *See Page, supra* note 27. Page advocates using contract warranties to protect the interests of people who purchase works with the intent of creating derivatives. *Id.* at 437-38. The warranties need only provide that the work being transferred is not based on any other protected work. *Id.*

302. *See generally Page, supra* note 27 (explaining that warranties are the best way for contracting parties to protect their interests).

303. *Id.* *See also supra* notes 90 and 107 (defining derivative works under the Copyright Act).

304. *See supra* note 107 (explaining that even preliminary work is protected by copyright).

305. *See supra* notes 255-60 and accompanying text (explaining that preliminary work can possess the copyright that purchasers of a final product may believe they own).

Courts should restrict the scope of stylistic rights by carefully tailoring the scope of the rights to the goals of the laws that protect them. A return to the traditional application of these doctrines would require courts to maintain the distinctions between the various theories protecting style and to limit application of the right of publicity. Accordingly, courts can restore the balance between private and public ownership by delimiting the bounds of protected style. Restoring the public-private balance traditionally respected by intellectual property law properly benefits society by protecting unique styles that deserve protection and by opening new avenues for innovation.

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COMMENTS

