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**ARTISTIC EXPRESSION TODAY:
CAN ARTISTS USE THE LANGUAGE OF OUR CULTURE?**

MARK SABLEMAN*

INTRODUCTION

To many of us who came of age in the era of the Vietnam War and the Nixon administration, Senator Thomas F. Eagleton epitomized the model democratic legislator—a smart and eloquent champion for what is right, even when it is not popular. Those who knew him primarily in the last decade of his life (at least those few persons with whom he did not share his views on another mistaken war and arrogant president), may have seen a different person. Particularly as his hearing loss progressed, Senator Eagleton readjusted his sensory focus and became an enthusiastic connoisseur of visual art. He visited museums and galleries, and filled his home and office (and, to the delight of his colleagues, the corridors and rooms surrounding his office) with a hand-picked collection of paintings, photographs, and posters.

Eagleton the passionate policymaker, and Eagleton the art collector, may seem like two different persons, or at least two quite different personas of a multi-faceted man. But there are many connections between art and politics—and in particular between art and political persuasion—at least one of which was a lifelong passion of Senator Eagleton.

Political cartoons are born at the confluence of art and politics. Senator Eagleton loved crafty and effective editorial cartoons. He collected cartoons,

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and took special pride in the outstanding work of the *St. Louis Post-Dispatch's* cartoonists, including Daniel R. Fitzpatrick, Tom Engelhardt, and John Sherffius. He corresponded with cartoonists, congratulated them on their pointed artistic jabs, and encouraged them as they brought policy points home to readers in pictures truly worth many thousands of editorial column words. He delighted in the drawings of the pioneers of the genre, like Honoré Daumier, whose print *Le Ventre Législatif* (*the Legislative Belly*, or, very loosely, *the Vile Body of the Legislature*) unforgettably portrays corpulent self-satisfied lawmakers arranged around the legislative chamber awaiting their bounty.¹

Art is expression. It moves us, it motivates us, and it captures ideas and emotions. There is no oddity in a man of politics being a man of art, too. Perhaps we should consider it odd when our political leaders do not display, or acknowledge, the inherent sensitivity of human beings to artistic expression.

Whether the artist is Daumier in the France of Louis Phillippe, or Fitzpatrick of the *Post-Dispatch* in the 1950s, art is often closely tied to political thought.² Political passion and persuasion aren't solely a matter of logic; they arise just as much from the emotions and hopes and dreams that reside deep inside each and every one of us—aspects of our personality that respond to art. The principles and programs described in formal speeches by two opposing candidates often aren't all that different. But the images and hopes and aspirations of the two candidates, and the visions that they inspire—matters, like art, of emotion, feelings, and outlook on life—are often what really distinguish them from one another and what really motivate their followers.

I. ART AND LAW

When something is as central to life as art, it is necessarily affected by the law. Some laws protect art and artists, like copyright and moral rights laws, and basic commercial doctrines like contract law. Some laws regulate art, as,

1. The picture of overstuffed legislators shirking their public responsibility has outlasted Daumier. A few years ago, I came across some prints of old *Post-Dispatch* editorial cartoons, and showed my finds to Senator Eagleton. One of his favorites, a Fitzpatrick cartoon from May 1957, captioned, "We have it under consideration," portrayed two well-rounded senators (labeled "Senator Sidestep" and "Senator Stall") studiously looking away from the Civil Rights Bill on the conference table before them.

2. The caricatures of Daumier and other French artists were viewed as such potent tools of political persuasion that they were subject to on-again, off-again spurts of official censorship in France by three different royal regimes between 1820 and 1881. Robert Justin Foldstein, *The Debate Over Censorship of Caricature in Nineteenth-Century France*, 48 ART J. 9, 9 (1989). The government viewed caricatures as more dangerous than the written word "because they were perceived as communicating more directly to people's senses and emotions and hence more likely to incite immediate action." *Id.* More than a score of artists were imprisoned at times for their roles in publishing drawings, including Daumier. *Id.* at 10.

for example, the law of obscenity seeks to do. And some laws stifle or control art, particularly where art touches public areas like government funding, public art, and publicly regulated forums like broadcasting.

Art and law often mix like oil and water. When James Joyce wrote a revolutionary version of an old story in a startling format peppered with raw human insights, the law fought hard against the artist and his work, closing off our country for years to that fresh look at life, and perhaps even fatally weakening the artist and his vision.³ When one artist criticized another in a classic clash of styles, the ensuing litigation took both artists from Olympus to the law courts, and solved nothing.⁴ When a sacrosanct pastor sued a rebel pornographer over a cartoon that nobody believed and everyone disdained, it took a climb up the ladder of justice to the Supreme Court before the fight ended with the simple rule: It's okay to use art to make a point.⁵

Art is an easy target for sophists, and our system, unfortunately, makes attack on art easy, and often even politically profitable. One of the leading presidential candidates of the current day made his stand for demagoguery not long ago by attacking *avante garde* artists for committing the sin of challenging religious and social orthodoxy.⁶ In the name of family friendliness, a local dedicated art gallery was told not too long ago that it must not display too prominently art that features the naked figure.⁷ A local religious leader has asserted that an artist who lacks his imprimatur of approved beliefs is unworthy to support a worthy cause.⁸ No simple principle of artistic freedom controls these cases. Particularly when government is not

3. See *United States v. One Book Called ULYSSES*, 5 F. Supp. 182 (S.D.N.Y. 1933); MORRIS L. ERNST & ALAN U. SCHWARTZ, *CENSORSHIP: THE SEARCH FOR THE OBSCENE* 93–107 (1964).

4. In a classic nineteenth century British libel case, James McNeill Whistler sued John Ruskin, another artist, over Ruskin's critical review of Whistler's painting *Nocturne in Black and Gold: The Falling Rocket*. Whistler eventually won the case, but received only one farthing damages and had to pay a share of the court costs. Whistler had to file for bankruptcy shortly thereafter. The verdict of history accords with Henry James's assessment of the trial: "It would very possibly, therefore, have been much wiser on Mr. Whistler's part to feign indifference." HENRY JAMES, *THE PAINTER'S EYE: NOTES AND ESSAYS ON THE PICTORAL ARTS 172–74* (John L. Sweeny ed., 1956).

5. *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988).

6. *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 191 (E.D.N.Y. 1999) (describing actions initiated by New York City's mayor at the time, Rudolph Giuliani, against Brooklyn Museum based on controversial art exhibit).

7. See John Sonderegger, *Angry Artist Withdraws Nude Sculpture of Adam*, ST. LOUIS POST-DISPATCH, Apr. 20, 2006, at A1 (describing incident in which a sculpture known as *The Creation of Adam* was pulled out of the Foundry Art Centre in St. Charles by St. Louis artist Philip Hitchcock because of what he calls "vigilante censorship" and the "systematic defacement" of his work).

8. Tim Townsend, *Burke Quits Board in Protest of Crow*, ST. LOUIS POST-DISPATCH, Apr. 26, 2007, at A1.

the censor, such sophistic censorship can be fought, if at all, only on collateral grounds.

Our system has grappled for years with artistic expression legal issues, in many different ways. It has solved some classic censorship problems, swept a few others under the cultural rug, and left a few others in a continuing seesaw of unclear rules and applications.

At the outset, art is quintessential expression protected by the First Amendment. This is so whether or not it carries an obvious political message, as the U.S. Court of Appeals for the Ninth Circuit recently held:

[I]t is clear that White's self-expression through painting constitutes expression protected by the First Amendment. In painting, an artist conveys his sense of form, topic, and perspective. A painting may express a clear social position, as with Picasso's condemnation of the horrors of war in *Guernica*, or may express the artist's vision of movement and color, as with "the unquestionably shielded painting of Jackson Pollock." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Any artist's original painting holds potential to "affect public attitudes," *Joseph Burstyn, Inc.*, 343 U.S. at 501, by spurring thoughtful reflection in and discussion among its viewers. So long as it is an artist's self-expression, a painting will be protected under the First Amendment, because it expresses the artist's perspective.⁹

Thus, the First Amendment protection for free expression presumptively applies to all art, whether it consists of words or images, whether it is

9. *White v. City of Sparks*, No. 05-15582, 2007 WL 2429380, at *2 (9th Cir. Aug. 29, 2007) (parallel citations omitted). The court found support for this position in both Supreme Court precedents and decisions of other circuits:

While not having spoken directly on the protections afforded visual art, the Supreme Court has been clear that the arts and entertainment constitute protected forms of expression under the First Amendment. See *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (dance); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (theatre); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-34 (1975) (topless dancing); *Miller v. California*, 413 U.S. 15, 34-35 (1973) (serious artistic work, unless obscene in the legal sense); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (movies).

....

In holding that the First Amendment protects an artist's original paintings, we join two of our sister circuits. See *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (holding that "[t]he protection of the First Amendment . . . includes . . . music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures"); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) ("[P]aintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection."); see also *Piarowski v. Ill. Cmty Coll. Dist.* 515, 759 F.2d 625, 628-32 (7th Cir. 1985) (holding that stained glass windows, as "art for art's sake," were protected under the First Amendment).

Id. (parallel citations omitted).

embodied in paper or on canvas or in stone or on a digital medium, and even whether or not it conveys a recognizable message.

The wave of vigorous and broad-sweeping obscenity prosecutions that opened with the Comstockian book bannings of a century ago¹⁰ practically disappeared in the video revolution of the 1990s, as prosecutors learned that the rules of *Miller v. California*¹¹ meant very little to middle-class juries whose members, friends, and/or neighbors watched X-rated videos behind the curtains of their suburban homes. Book bannings are generally classified today like the witch hunts of the past. Indeed a recent “civic reading” project in St. Louis promoted community-wide reading of Ray Bradbury’s *Fahrenheit 451*, a classic screed against book censorship.¹² Today’s orthodoxy is so tilted against book bannings of any kind that citizens are encouraged to consume the targeted works (“Read Banned Books!”), even though First Amendment purists may wonder if their defense of extremists’ right to publish really should be equated with embrace of their content.

Sideways attacks on allegedly scandalous art, such as the late Reverend Jerry Falwell’s attack on a parody cartoon as “outrage,” have failed. Falwell sued *Hustler* magazine over a tasteless parody advertisement, which mimicked the then-current Campari liquor double entendre “My First Time” ads with a drawing that purported to show Falwell bragging of having had sex with his mother in an outhouse.¹³ After initial rulings that rejected Falwell’s libel and invasion of privacy theories based on such an obviously incredible cartoon, Falwell took his final theory—the tort of intentional infliction of emotional distress, sometimes known by the shorthand term “outrage”—to the United States Supreme Court.¹⁴ That staid court, dominated by Republican appointees, ruled unanimously against Falwell and in favor of *Hustler*.¹⁵ Or perhaps it is more accurate to say that the Court ruled in favor of the ability of all persons to participate in the long tradition (traced by Chief Justice Rehnquist back to the early days of the Republic, which featured brutal depictions of Washington and other revered Founders)¹⁶ of the “art of the cartoonist” which “is often not reasoned or evenhanded, but slashing and one-sided.”¹⁷ The ruling in this bizarre case saved an art form: Eagleton’s beloved editorial cartoons.

10. See ROBERT W. HANEY, *COMSTOCKERY IN AMERICA: PATTERNS OF CENSORSHIP AND CONTROL* 20 (Da Capo Press 1974) (1960).

11. 413 U.S. 15 (1973).

12. FAHRENHEIT 451: The Big Read @ Washington University in St. Louis, <http://bigread.wustl.edu/events4.php> (last visited Oct. 9, 2007).

13. *Hustler Magazine v. Falwell*, 485 U.S. 46, 47–48 (1988).

14. *Id.* at 49–50.

15. *Id.* at 47, 57.

16. *Id.* at 54–55.

17. *Id.* at 54.

In other areas the law has been less hospitable to art. Government can regulate some non-obscene artistic expression such as nude dancing for non-content purposes such as protection of health and safety (pasties and G-strings being high-court-approved health and safety devices).¹⁸ In the broadcasting field, courts and the Federal Communications Commission struggle to apply the broadcast “indecent” rules of *FCC v. Pacifica Foundation* (a case arising from a ban on seven “dirty” words)¹⁹ to a media world full of indecent words and pictures, most of which enter homes through means other than broadcast waves. While the FCC has found a fuzzy bump-and-grind scene involving fully dressed teens indecent,²⁰ an appeals court has told the agency that the F-word can be just dandy for broadcast discourse.²¹

Government sponsored or subsidized art work similarly falls in a murky area. The federal government is permitted to impose quality artistic standards on the art it funds through the National Endowment for the Arts, according to the Supreme Court—though the Court’s ruling based on deliberately ambiguous congressional compromise language doesn’t confront true content-based censorship.²² But government can’t wield its funding power to retaliate against art works that it doesn’t like.²³

So while art censorship is not fully settled, the overall results of these classic arts controversies seem sensible, and safe for art. We aren’t censoring for obscenity or orthodoxy, and we’re not banning books. We have protected the editorial cartoonists whose works represent the crown jewels of political expression. And while we clumsily grapple and swing back and forth with broadcast indecency, we do so in the name of protecting children, not in the name of stifling speech. One might readily conclude that artistic expression is relatively safe in modern America.

But as our legal system has resolved or set aside many classic artistic censorship problems, it has made hardly a dent in an issue of equal seriousness. Specifically, how may artists *use* the commercial images of our culture in ordinary discourse?

As the law stands now, and particularly as it continues in the direction of ever greater property-type protections for expression and content of all kinds, we face an emerging artistic expression problem of great significance. It is the danger that overprotection of commercial interests will stifle and limit artistic

18. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991).

19. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

20. *In re Complaints Against Various Television Licensees*, 21 F.C.C.R. 2732, 2735 (Mar. 15, 2006) (notice of apparent liability for forfeiture).

21. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007).

22. *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998).

23. *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 198 (E.D.N.Y. 1999).

expression that employs the language and symbols of our popular culture. Government can interfere with artistic expression in ways other than by banning or sanctioning expression. Government action can also severely interfere with expression when it deprives artists of the words, symbols, and other expressive tools that will resonate with their audiences. This government action may take the form of *protection* for content—i.e., protection for copyrighted materials, trademarks, and personal attributes—but its real effect may be to stifle communications. Such interference is becoming a greater and greater threat in today's imbalanced commercial world, where many of the tools and symbols of expression have effectively become privately owned.

Artists create their works within the milieu of their own culture, and often portray, describe, or critique their culture. Culture consists of the shared symbols, beliefs, values, customs, behaviors, artifacts, and modes of living of a place or period. The constituent parts of culture, including its symbols and shrines, its values and manners, its leaders and idols, are basic and expected grist for art.

In the past, it seems, the constituents of culture were freely available for artists to use. The natural and man-made landscapes of agrarian times, the religious images dominant in devout times and places, the figures and faces of people in public—we see all of them in museum art, and know that these subjects carried no price tags and required no permission forms. The images of today's culture are different. Put simply, the culture of the United States today includes Disney characters, Marilyn Monroe, Happy Meals at McDonald's, Homer and Bart Simpson, James Gandolfini as Tony Soprano, popular movies, TV shows, and commercials, and the ubiquitous Starbucks.

II. ARTISTIC USE OF COPYRIGHTED MATERIAL

It is an accepted truism that art builds on previous works.²⁴ Many of Shakespeare's stories were taken from Plutarch's *Lives*. The folk singing

24. See Richard A. Posner, *On Plagiarism*, ATLANTIC MONTHLY, Apr. 2002, at 23:

Mention of Shakespeare brings to mind that *West Side Story* is just one of the links in a chain of plagiarisms that began with Ovid's *Pyramus and Thisbe* and continued with the forgotten Arthur Brooke's *The Tragical History of Romeus and Juliet*, which was plundered heavily by Shakespeare. Milton in *Paradise Lost* plagiarized Genesis, as did Thomas Mann in *Joseph and His Brothers*. Examples are not limited to writing. One from painting is Edouard Manet, whose works from the 1860s "quote" extensively from Raphael, Titian, Velásquez, Rembrandt, and others, of course without express acknowledgment.

If these are examples of plagiarism, then we want more plagiarism. They show that not all unacknowledged copying is "plagiarism" in the pejorative sense. Although there is no formal acknowledgment of copying in my examples, neither is there any likelihood of deception. And the copier has added value to the original—this is not slavish copying.

Id.

tradition involves generations and generations of building upon earlier works. Many of the popular Disney movies are derived from pre-existing tales and works—including the first Mickey Mouse movie, *Steamboat Willie*, which was based on a silent film called *Steamboat Bill, Jr.*, both of which were based on a previous song.²⁵ Iconic works like the *Mona Lisa* and Grant Wood's *American Gothic* are often imitated or reworked by artists pouring new content or meaning into well recognized images.

Shakespeare had it easy, as a borrower of previous works, because he borrowed works from long ago and in any event he wrote before any copyright act. Artists today face the situation where most works of the previous century are under copyright. Can they then use and build on these works without offending copyright? While our copyright law has long recognized some “fair use” rights, the extent and application of fair use has always been difficult. The United States Supreme Court took a major step in clarifying these rights for artists who parody previous works in *Campbell v. Acuff-Rose Music, Inc.*²⁶ In *Campbell*, the rap music group 2 Live Crew wrote and performed a rap version of Roy Orbison's song *Oh, Pretty Woman*.²⁷ The rap 2 Live Crew version used music and introductory lyrics from the Orbison original, but in place of the original's romantic references to “pretty woman,” it substituted references such as “big hairy woman,” “bald headed woman,” and “two timin' woman,” and its lyrics in their entirety depicted the ugliness of street life.²⁸

Despite the clear copying, the Supreme Court concluded that 2 Live Crew's version could be perceived as commenting on or criticizing the naiveté of the original work, and thus could be reasonably perceived as a parody.²⁹ The Court introduced into fair use analysis the issue of whether the new work was “transformative”—i.e., whether it added something new to the original work, thereby altering the expression, meaning, or message.³⁰

The *Campbell* decision also recognized that parody inherently involves copying, and even sometimes substantial copying.³¹ One cannot parody an original without copying enough of the original to bring it to mind.³² In another copyright parody case, involving parody photographs of a copyrighted doll, the Ninth Circuit refuted the copyright claimant's assertion that the artist could have expressed his message some other way, or did not need to

25. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 22–23 (Penguin Press 2004).

26. 510 U.S. 569 (1994).

27. *Id.* at 572.

28. *Id.* at 582, 594–96.

29. *Id.* at 583.

30. *Id.* at 579.

31. *Campbell*, 510 U.S. at 588.

32. *Id.*

photograph the complete copyrighted product.³³ The court concluded that the photographer had the fair use right to use a copyrighted powerful popular symbol (the Barbie doll) in his parodic works, and that the parody wouldn't work if only parts of the copyrighted work in question were used.³⁴ Thus, while it is common in copyright fair use cases to view the use of the entirety of the copyrighted work as a factor weighing against the user, parody situations demand a different analysis, recognizing the parodist's inherent need to use substantial portions of the copyrighted original.

Though *Campbell* gave artistic parody a crucial fair use vote of approval, the issue of whether a subsequent work qualifies as a parody for fair use protection continues to bedevil many courts. For example, in a case involving a parody of the famous novel *Gone With the Wind* (*GWTW*), a district court initially ruled that Alice Randall's novel *The Wind Done Gone* (*TWDG*), telling the story of Tara from a plantation slave's perspective, did not constitute fair use because it essentially constituted "a sequel" to *GWTW*, using only a different writing style than the original.³⁵ The Eleventh Circuit reversed, accepting the author's argument that her novel was a "critique of *GWTW*'s depiction of slavery and the Civil-War era American South," despite borrowing a substantial amount of the original work.³⁶ *TWDG* used numerous characters and settings from *GWTW*, and even copied the description and history of the characters, and their relationships with one another.³⁷ Particularly for the first half of the book, *TWDG* also copied *GWTW*'s story line and settings.³⁸ Nonetheless, in view of the obvious criticism of *GWTW*, the court found that that *TWDG* was a parody entitled to the "fair use" defense.³⁹

Even if a derivative work contains some elements of parody, these elements may be insufficient to qualify as "fair use" parody. In *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*,⁴⁰ the defendants produced a musical production entitled *Scarlett Fever*, based on the novel and movie *Gone With the Wind*.⁴¹ The play was a comical and condensed version of the original works, but used many of their major scenes, in sequence.⁴² Although the musical did contain some elements of parody, the work as a whole was not a critical commentary of the original book or movie,

33. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 804 (9th Cir. 2003).

34. *Id.*

35. *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1375 (N.D. Ga. 2001).

36. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001).

37. *Id.* at 1267.

38. *Id.*

39. *Id.* at 1277.

40. 479 F. Supp. 351 (N.D. Ga. 1979).

41. *Id.* at 354.

42. *Id.*

and therefore was not a parody.⁴³ For example, whereas some characters were used to “critically comment” on the characters in the original works, others were “treated strictly comically.”⁴⁴ An example of a character treated “strictly comically” was Aunt Kitty Kat (based on Aunt Pitty Pat), who was played by a male actor.⁴⁵ The court stated that her “purposely ill-concealed male identity is not parody or satire but rather pure comedy.”⁴⁶ Based on limited use of the original works for parodic purposes, and substantial use of the works for other purposes, such as comedy, the Court determined that the play *Scarlett Fever* was not a parody when construed as a whole and thus did not qualify as fair use.⁴⁷

The *Campbell*, *Suntrust*, and *Metro-Goldwyn-Mayer* cases, stripped to their essence, hold that parody of a previous work is protected as fair use, so long as the parody purpose—the author’s intent to use an original copyrighted work to create a new work that “at least in part, comments on that author’s works”⁴⁸—is apparent and even pronounced. The black-letter rule: Pronounced parody is protected.

But what about use of prior works to comment on social and cultural issues, but not to comment particularly on the work that was used? This technique, generally speaking, constitutes satire, not parody, and most courts have found such satiric use of portions of prior copyrighted works to be infringement, not fair use.

A classic example of a satire was the book *The Cat NOT In the Hat!: a parody by Dr. Juice*.⁴⁹ The book borrowed the style and characters of Dr. Seuss, the writer of distinctive rhythmical children’s stories, but the book did not comment on or criticize either Dr. Seuss’s style or his stories.⁵⁰ It was, rather, a jaundiced and humorous adult look at the O.J. Simpson murder case and trial.⁵¹ In *One fish, two fish, red fish, blue fish*, Dr. Seuss wrote the stanza: “One fish / two fish / red fish / blue fish.”⁵² The alleged infringing book, *The Cat NOT In The Hat!*, included the equally memorable sequence: “One Knife?

43. *Id.* at 357.

44. *Id.* at 358.

45. *Metro-Goldwyn-Mayer, Inc.*, 479 F. Supp. at 358.

46. *Id.*

47. *Id.* at 355, 357.

48. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

49. ALAN KATZ, *THE CAT NOT IN THE HAT: A PARODY BY DR. JUICE* (1996) (out of print), quoted extensively in *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F. 3d 1394 (9th Cir. 1997).

50. *Dr. Seuss Enters., L.P.*, 109 F.3d at 1401.

51. *Id.* at 1396.

52. *Id.* at 1401 (quoting DR. SEUSS, *ONE FISH, TWO FISH, RED FISH, BLUE FISH 3* (Random House, Inc. 1988) (1960)).

/ Two Knife? / Red Knife / Dead Wife.”⁵³ Similarly, a narrative passage about the O.J. Simpson trial in *The Cat NOT In The Hat!* followed the stylistic cadences of the Dr. Seuss books:

A plea went out to Rob Shapiro
Can you save the fallen hero?
And Marcia Clark, hooray, hooray
Was called in with a justice play.
A man this famous
Never hires
Lawyers like
Jacoby-Meyers.⁵⁴

In the ensuing copyright litigation, the court rejected the authors’ argument that *The Cat NOT in the Hat!* parodied *The Cat in the Hat*.⁵⁵ The authors argued that both stories involved immoral conduct, and ended with a moral dilemma.⁵⁶ However, the court rejected these arguments as a “post-hoc characterization of the work [that] is ‘completely unconvincing.’”⁵⁷ The court clearly viewed the authors as having used Dr. Seuss-like stylistic elements simply as a means for distinctively telling and commenting upon the Simpson trial story.⁵⁸ Thus, the court upheld the district court’s finding that Dr. Seuss Enterprises showed a likelihood of success on the merits, and affirmed the copyright preliminary injunction against the publisher.⁵⁹

Similarly, in *Rogers v. Koons*,⁶⁰ the Second Circuit found no fair use when the artist Jeff Koons directed the creation of a three-dimensional sculpture which closely replicated the design of a copyrighted photograph, showing a string of eight puppies on the laps of two individuals seated on a bench.⁶¹ While Koons argued that his sculpture sought to satirize American society, the court found this defense insufficient.⁶² The Second Circuit held that an artist who simply wants to “make a statement on some aspect of society at large” cannot do so using a previously copyrighted work unless he makes the previous work at least in part an object of his parody: “Koons’ claim that his

53. *Id.* (quoting KATZ, *supra* note 49).

54. *Id.* (quoting KATZ, *supra* note 49).

55. *Dr. Seuss Enters., L.P.*, 109 F.3d at 1402–03.

56. *Id.* at 1402.

57. *Id.* at 1403.

58. *Id.*

59. *Id.*

60. *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

61. *Id.* at 304–05, 309.

62. *Id.* at 309–10.

infringement of Rogers' work is fair use solely because he is acting within an artistic tradition of commenting upon the commonplace thus cannot be accepted."⁶³ If Koons wished to use the *String of Puppies* photograph as the basis for "a satirical critique of our materialistic society," the court held that he would have to pay the customary price for copyright permission.⁶⁴ (Of course, the court did not note that in this case, and many similar cases, the owner of the original copyright will not give permission, and thus, without fair use protection, such works are effectively unavailable for any artist's satiric purposes.)

For the most part, artistic copyright use cases follow the parody/satire distinction, despite the inherent difficulties in making the distinction and in having judges second-guess artists' motives and purposes.⁶⁵ Particularly after *Campbell*, pronounced parodies seem to be safe.⁶⁶ More subtle or borderline parodies are subject to the risky literary judgments of courts.⁶⁷ Satire, and parodies that are so sexually related that they may be viewed as tarnishing the original work, however are generally found to be infringing.⁶⁸

When an artist's work is classified as outside fair use, as with a subtle parody or a satire, the consequences for the artist can be harsh. The artistic work may be destroyed, and any future publication, distribution, or display of

63. *Id.* at 310.

64. *Id.*

65. One recent exception is *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962 (C.D. Cal. 2007), concerning *Family Guy*, an animated comedy television episode that "routinely puts cartoon versions of celebrities in awkward, ridiculous, and absurd situations in order to lampoon and parody those public figures and to poke fun at society's general fascination with celebrity and pop culture." *Id.* at 965-66. While the court found a parodic purpose in a *Family Guy* episode that ridiculed Carol Burnett, the court's fair use holding followed the traditional four factor test and did not require a finding of parody. *Id.* at 967-69.

66. *E.g.*, *Fisher v. Dees*, 794 F.2d 432, 440 (9th Cir. 1986) (holding song *When Sunny Sniffs Glue* a fair use parody of song *When Sunny Gets Blue*); *Elsmere Music, Inc., v. Nat'l Broad. Co., Inc.*, 482 F. Supp. 741, 746 (S.D.N.Y. 1980) (holding song *I Love Sodom* a permissible fair use parody of *I Love New York* tourism advertising jingle).

67. *E.g.*, *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp. 2d 84, 91-92 (S.D.N.Y. 2003) (The court found parodic purpose where alleged infringing song only used a portion of the original, using a defendant-friendly literary analysis: "*The Forest* sets up a contrast between the assertedly delusional innocence of mainstream culture and the purportedly more realistic viewpoint of the rapper, both by using cartoon characters as subjects and by quoting from and parodying *Wonderful World*").

68. *E.g.*, *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (finding *Cunnilingus Champion of Company C* was not fair use of the song *Boogie Woogie Bugle Boy of Company B* since the former "was neither a parody or burlesque" of the latter); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (holding copyright fair use defense not available for parody cartoon where the copying had been more exact than was necessary for the parodists' purposes).

it banned.⁶⁹ Damages may be imposed, including statutory damages of up to \$150,000 per infringed work, even in the absence of actual market damage to the copyright owner.⁷⁰ And even before the artist gets his or her day in court, he or she may find the copyright owner utilizing its powers under the Digital Millennium Copyright Act (DMCA) to have the work summarily removed from the Internet.⁷¹ Criminal penalties are also available for copyright infringement, although they are rarely used outside of deliberate counterfeiting situations.⁷² Artists who seek to create parodies or satires using copyrighted works must also be concerned about their potential legal costs, even if they ultimately prevail. There is significant evidence that many artists give in to copyright threats, even when they believe they have acted within their fair use rights, because of these costs.⁷³

The split in copyright law between parody and satire thus limits options for artists who wish to utilize others' copyrighted material in their own works. Only pronounced parody is relatively safe. More subtle parody (such as that argued by the defendants in *The Cat NOT In The Hat!* case),⁷⁴ or satire of any kind, is too risky and likely will not be viewed by courts as fair use. In effect, the law is telling artists who wish to build upon existing copyrighted work—even works like the Dr. Seuss books that have iconic and symbolic status in society—that they may create only in certain judicially approved ways (pronounced parody) and not in other ways (satire or subtle parody).

Courts follow the parody/satire distinction because of concern that allowing satire is equivalent to allowing commercial infringement. However, there are big differences between artistic satire and commercial misappropriation. It is one thing to appropriate Dr. Seuss's words and style in a competing children's book, or to sell *String of Puppies* art in competition with the original photographer, and yet another to create a work satirizing some aspect of American culture. Satiric works generally do not compete with

69. 17 U.S.C. §§ 502(a), 503(b) (2000).

70. *Id.* § 504(a), (c)(2).

71. *See id.* § 512(c)(3)(A), (g)(2)(C). Under the Online Copyright Infringement Liability Limitations section of the DMCA, a copyright owner may demand that internet service providers remove the internet works that the copyright owner reasonably believes to be infringing. *Id.* § 512(c)(3)(A). The original poster is given an opportunity to have the work re-posted if he or she believes it is not infringing. *Id.* § 512(g). In practice, copyright owners are most knowledgeable and aggressive concerning the DMCA notice-and-takedown provisions, and posters whose postings make fair use of copyrighted material may not understand their fair use or re-posting rights. *See, e.g.*, Complaint, *Lenz v. Universal Music Publ., Inc.*, No. 3:2007-CV3783-MEJ (N.D. Cal. filed July 24, 2007) (alleging improper takedown of home video based on overbroad copyright owner claims).

72. 17 U.S.C. § 506.

73. MARJORIE HEINS & TRICIA BECKLES, *WILL FAIR USE SURVIVE?: FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL* 37–45 (2005).

74. *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402–03 (1997).

the works that are used in the satire. *The Cat NOT in the Hat*, for example, as a satiric adult book about a current-events trial, competes not at all with Dr. Seuss's children's books.⁷⁵ It should be possible to both uphold the freedom of artists to make satiric use of copyrighted cultural content, and protect the legitimate commercial interests of copyright owners.

III. ARTISTIC USE OF TRADEMARKS

Consider next the prized icons of our commercial culture—trademarks. From McDonald's golden arches, to the Windows start-up sound, to mere dabs of design (the Nike "swoosh"; the Apple Computer apple-missing-a-bite logo) or silly words (PEPSI; STARBUCKS; iPod) that nonetheless evoke Pavlovian consumer responses, brand names and logos dominate and in some ways even define our commercial culture.⁷⁶ Artists who wish to portray or describe or critique that commercial culture will, in many cases, want or need to use those symbols.

Trademark owners and courts are rarely understanding or hospitable when it comes to artistic use of trademarks. After all, humor is not taught in law school intellectual property classes, and judges don't get elected, nominated or confirmed by poking fun at revered institutions. And apart from these practical issues, humor, *avant garde* art, and parody are legal outliers that don't fit in any convenient legal pigeonholes. Consequently, artistic parody using trademarks has had a rough ride in our legal system.

The U.S. Court of Appeals for the Eighth Circuit in past years found trademark law violations in a "Mutant of Omaha" parody about the threat of nuclear holocaust⁷⁷ and in a "Michelob Oily" parody in a humor publication.⁷⁸ It seems hard to believe that anyone would take either of the parodies seriously. The theory of the "Mutant of Omaha" decision was that the parodist's T-shirts and coffee mugs, which mimicked the Mutual of Omaha

75. *Id.* at 1396.

76. See DANIEL J. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 147 (1973) (Brand names "drew together in novel ways people who might not otherwise have been drawn together at all—people who did not share a religious or political ideology, who were not voyaging together on the prairie nor building new towns. The peculiar importance of American consumption communities made it easier to assimilate, to 'Americanize,' the many millions who arrived here in the century after the Civil War."); HANNAH CAMPBELL, *WHY DID THEY NAME IT. . . ?* (1964) ("*Coca-Cola* is as American as apple pie and the hot dog. It has woven itself to a remarkable degree into the fabric of the lives of the people of America, and rivals the flag itself in symbolizing the U.S.A. to millions of people all over the world." *Id.* at 65. "Over a period of [seventy-five] years, *Aunt Jemima* has become a national institution." *Id.* at 42. "*Betty Crocker* is known to almost every woman in the United States—and is truly America's First Lady of Food." *Id.* at 20).

77. *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 403 (8th Cir. 1987).

78. *Anheuser-Busch, Inc. v. Balducci Publ'ns*, 28 F.3d 769, 777 (8th Cir. 1994).

Indian head logo and added the words “NUCLEAR HOLOCAUST INSURANCE,” were likely to confuse customers shopping for Mutual of Omaha accident insurance.⁷⁹ In the “Michelob Oily” case, a similar theory was asserted against a parody that was published in a tiny-circulation humor newspaper (titled *Snicker*), portraying black oil pouring onto the Anheuser-Busch eagle.⁸⁰ (The eagle responded with the word “Yuck!” in a cartoon speech balloon.)⁸¹ In a city of serious beer consumers, the lack of official connection with the well-known brewer, and the attempted humor of the parody, was lost only in the courtroom.

Not every trademark parody case is seen through such humorless eyes. There are, indeed, nearly indistinguishable cases in which opposite results were reached. If anything, for example, the parody of the outdoors outfitter L.L. Bean that occurred in a sex magazine (portraying an “L.L. Bean [sic] Sex Catalog” in the same distinctive style as the well-known legitimate L.L. Bean catalog) carried more serious potential harm to the trademark owner, because of the tarnishment inherent in sexual associations.⁸² The First Circuit, however, recognized First Amendment concerns whenever a trademark owner claimed “the unfettered right to suppress the use of its name in any context, commercial or noncommercial, found to be offensive, negative or unwholesome.”⁸³ Where a parody constitutes an editorial or artistic, rather than a commercial, use of plaintiff’s mark and particularly where the context negates commercial confusion such parodies should be permissible, according to the First Circuit.⁸⁴ While trademark rights may permit some incidental impact on expressive rights in the commercial context, the court held, “It offends the Constitution, however, to invoke the anti-dilution statute as a basis for enjoining the noncommercial use of a trademark by a defendant engaged in a protected form of expression.”⁸⁵

Infringement or free expression? (The artist might ask, “Humorless court, or one that gets it?”). Trademark parody decisions go both ways, and even skilled commentators and practitioners must admit that the genius of the common law system—the slow-but-sure building up of clear principled rules

79. *Mutual of Omaha Ins. Co.*, 836 F.2d at 398.

80. *Anheuser-Busch, Inc.*, 28 F.3d at 772, 775, 780.

81. *Id.* at 780 (appendices showing parody advertisement).

82. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 27 (1st Cir. 1987). Indeed, the appellate decision discussed L.L. Bean’s claim of trademark dilution, a doctrine that protects against indirect harm to trademark interests such as diminution of the distinctiveness of a trademark through blurring or tarnishment. *Id.* at 29–34. L.L. Bean also asserted, though the appellate court did not discuss, trademark infringement, which requires the more difficult proof of likelihood of confusion of consumers in the commercial marketplace. *Id.* at 27.

83. *Id.* at 30.

84. *Id.* at 32.

85. *Id.* at 32.

to ensure that like cases are decided in like manner—has yet fully to manifest itself in this field.⁸⁶ Part of the problem may be that courts often view these cases narrowly, whether they choose the prism of trademark law or that of the First Amendment. Trademark law protects trademarks, understandably and properly.⁸⁷ First Amendment law just as understandably and properly protects expression.⁸⁸ The interest one chooses to emphasize—trademarks or free expression—can readily determine the outcome of a case.

It may be more fitting to view neither trademark law nor the First Amendment in isolation. Trademarks are commercial symbols, but they are more than that in our commercial culture. Some trademarks can become elements of our thought and expression, parts of our commonplace vocabulary, means by which we think and communicate ideas. In the era of jewelers' marks or public house signs, it may have been possible to isolate trademarks from the expressive vocabulary of society. Today it is not.

"That's a Mickey Mouse idea"; "You're my Superman"; "It's finger-lickin' good!"; "E.T., phone home"; "You've got mail!"; "You've got spam!"; "Duh!"; "Yadda, yadda, yadda"; "The President sent his Star Wars plan to Congress"; "McMansion"; "This is a Kodak moment!"; "He's a few french fries short of a Happy Meal"; "That's all folks!"; "The Swiss Army Knife of catalogs"; "When it rains it pours"; "Mc-anything"; "Anything-busters."

We talk, and sometimes think, in trademarks. This is not surprising, in our commercial culture, because trademarks are part of the language scene around us, and part of the culture we live in. In the past people often quoted Scripture. In more literary times, places, and enclaves, they quoted Shakespeare. Is it surprising that people in today's culture use trademarks and trademark derivatives in their conversations? If we recognize trademarks as elements of language as well as commercial tools, we can avoid the artificial separation of trademark and free expression doctrines. Trademarks used as trademarks—commercial symbols—deserve strong protection. Trademarks that have significance beyond mere commercial symbols, and which have expressive or cultural meaning, ought to be available for expressive purposes as well as the traditional commercial identification purposes. Does this penalize the trademark owner whose efforts have catapulted its trademark into the realm of cultural symbol? Perhaps, but a trademark so strong that it is a cultural symbol

86. Many of the outlier cases involve sexual situations, perhaps because courts feel that the need to prevent such memorable but tarnishing associations outweighs the artist's right to use the symbols for parodic purposes. *E.g.*, Pillsbury Co. v. Milky Way Prods., 8 Media L. Rep. 1016, 1017 (N.D. Ga. 1981) (*Screw* magazine parody showing Pillsbury trade characters "Poppin' Fresh" and "Poppie Fresh" engaged in sexual acts); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200 (2d Cir. 1979) (use of uniforms similar to Dallas Cowboys Cheerleaders in pornographic film found to constitute trademark infringement).

87. See 15 U.S.C. § 1051 (2000 & Supp. III 2003).

88. U.S. CONST. amend. I.

will likely retain its strength even when it is allowed to be used expressively. In reality, moreover, many of the most effective trademarks obtained their significance and prominence in part from contributions of the public, so it is hardly unfair to permit the public some continued ability to use them.⁸⁹ Finally, the alternative position—removing strong trademarks and cultural symbols from our cultural vocabulary available to our artists and commentators—is untenable in a society that values free and effective expression.

We need, in short, a law of artistic and expressive use of trademarks that replaces the roulette spin between trademark black and First Amendment red with a realistic recognition of the cultural and expressive role that attaches to many trademark symbols. A strong first step toward such a recognition occurred in a case involving one of America's most recognizable trademark cultural symbols, the Barbie doll.

Tom Forsythe, a photographer, created a series of photographs, called *Food Chain Barbie*, which portrayed unclothed Barbie dolls in bizarre kitchen situations—on a vintage malt machine, inside a blender, in a working fondue pot, and rolled in tortillas and covered with salsa in a casserole dish in an oven.⁹⁰ As the court acknowledged, Forsythe's Barbie photographs involved "various absurd and often sexualized positions."⁹¹ Forsythe's photos may not be everyone's choice of art (in fact, they sold poorly) but they were a legitimate artistic creation, making a statement about an ever-smiling plastic culture of artificial and subservient beauty. In Forsythe's words:

We blend, mix and confuse the ideal fantasy with the essence of our existence. Barbie may be only one of a great number of products contributing to a false sense of inadequacy, but in many ways, this product is the most potent single representation of the ubiquitous beauty myth. As a part of our cultural identity since being introduced in 1958, Barbie reveals the continuity of the commodity machine. In the same way, the doll retains its glazed, blissful smile regardless of its impending fate. While most of us at least start to grimace when we smell the heating oil that signals our demise, Barbie keeps a happy face courtesy of the image-makers who hope beyond hope that those of us on the receiving end will continue to do the same.⁹²

89. Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1 (1999). Moreover, in many cases, trademarks, copyrighted images, and even public personas may derive from the public domain. The Aunt Jemima trademark ultimately derives from the female counterpart of Uncle Tom on Southern plantations. The Colonel Sanders image, both a brand and a personal attribute of Harlan D. Sanders, is clearly based on the many gentlemen "colonels" of Southern historical legend and life.

90. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 796 (9th Cir. 2003).

91. *Id.*

92. Tom Forsythe *Artsurdism*, http://creativecommons.org/bio_detailed.cfm (last visited Oct. 9, 2007).

Forsythe's photographs taking an obviously critical look at Barbie as a cultural symbol were fair game for art lovers and critics, professors and students, and buyers and browsers. But Mattel, Barbie's creator and trademark owner, sued Forsythe in a three-year-long, \$2 million legal marathon under several intellectual property theories, claiming that his use of its famous doll infringed its copyright and trademarks and diluted the value of its trademark.⁹³ Forsythe was able to afford the litigation only because of donated legal assistance.⁹⁴ Ultimately, Mattel lost in the U.S. Court of Appeals for the Ninth Circuit, which issued a decision upholding Forsythe's right to parody and criticize Mattel's creation.⁹⁵

In its decision, the appeals court both followed and extended the U.S. Supreme Court's decision in *Campbell v. Acuff-Rose, Inc.*⁹⁶ The Ninth Circuit elicited from *Campbell*, the "Pretty Woman" case, a series of principles favoring the right to parody in all artistic media.⁹⁷ The court first noted Forsythe's critical purpose.⁹⁸ While Mattel associated Barbie dolls with beauty, wealth, and glamour, Forsythe turned that image on its head, the court noted, "by displaying carefully positioned, nude, and sometimes frazzled looking Barbies in often ridiculous and apparently dangerous situations."⁹⁹ In some photographs, for example, "Barbie is about to be destroyed or harmed by domestic life in the form of kitchen appliances, yet continues displaying her well known smile, disturbingly oblivious to her predicament."¹⁰⁰ So understood, the photographs expressed social commentary, including observations on Barbie's influence on women's roles in society.¹⁰¹

As to Mattel's trademark claims, the court noted that symbols like Barbie have assumed "cultural significance" and hence artists have a right to use them, especially where the symbol is used for purposes of comparison, criticism, or point of reference.¹⁰² The court found a "great" public benefit "in allowing artistic creativity and social criticism to flourish," and held that "[i]t is not in the public's interest to allow Mattel complete control over the kinds of artistic works that use Barbie as a reference for criticism and comment."¹⁰³

93. *Id.*; *Mattel, Inc.*, 353 F.3d 792.

94. Tom Forsythe, *Food Chain Barbie & The Fight for Free Speech*, NATIONAL COALITION AGAINST CENSORSHIP, Aug. 10, 2004, http://www.ncac.org/art/20040810~USA~Tom_Forsythe_Food_Chain_Barbie.cfm (last visited Oct. 9, 2007).

95. *Mattel, Inc.*, 353 F.3d at 816.

96. *Id.* at 800-01.

97. *Id.* at 800.

98. *Id.* at 800-03.

99. *Id.* at 802.

100. *Mattel, Inc.*, 353 F.3d at 802.

101. *Id.* at 802.

102. *Id.* at 807.

103. *Id.* at 806.

The *Forsythe* case wasn't Barbie's first day in court, nor even her first loss. She and her Mattel lawyers lost in earlier suits against a parody website and a parody song.¹⁰⁴ One could perhaps brush aside the Barbie cases on the ground that she is a unique well-recognized icon of an idealized American woman, whose image almost begs for use in parodies and social commentaries. But the *Forsythe* decision directly confronted, and recognized, the artistic right to use cultural symbols.¹⁰⁵ It recognized social good in such parodies, tracing that recognition to the policy inherent in the Supreme Court's ruling in *Campbell*.¹⁰⁶ Such a recognition of trademark symbols as part of our cultural language can, if followed, permit artists, humorists, and commentators to use those symbols—and maybe even do so without the hit-and-miss predictability of prior law. Such a result won't destroy trademarks, or impede enforcement against true commercial infringement; it will simply place trademarks used expressively as cultural symbols within reach of artists. And such a distinction between commercial and non-commercial use of trademarks would be consistent with recent case law that has placed many non-commercial activities outside the intended scope of the Lanham Act.¹⁰⁷

IV. ARTISTIC USE OF NAMES, IMAGES, AND PERSONAL ATTRIBUTES

Artists face problems not only with copyright and trademark law but also the laws that protect commercial appropriation of personal attributes—the doctrine known as the right of publicity. On such grounds, celebrities have raised claims based on parody baseball cards (involving players like “Cal Ripkenwinkle” and “Ozzie Myth” of the “Credit Cards”),¹⁰⁸ a billboard advertising a radio talk show which displayed the photograph of an often-discussed celebrity,¹⁰⁹ and even a silly advertisement that showed a robot turning *Wheel of Fortune* letters.¹¹⁰ In this area as well, legal decisions have

104. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902, 907 (9th Cir. 2002) (use of Barbie in song held not to infringe Mattel trademark; use protected from dilution liability because use was non-commercial); *Mattel v. Pitt*, 229 F. Supp. 2d 315, 318, 324–25 (S.D.N.Y. 2002) (finding fact questions on fair use where defendant attempted to comment on what she perceived as the sexual nature of Barbie through her use of customized Barbie figurines in sadomasochistic costume and storylines).

105. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d at 806.

106. *Id.*

107. *E.g.*, *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672 (9th Cir. 2005).

108. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 838 F. Supp. 1501, 1512 n.17–19 (N.D. Okla. 1993), Report and Recommendation Rejected by *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 868 F. Supp. 1266, 1276 (N.D. Okla. 1994), *aff'd*, *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 963, 976 (10th Cir. 1996).

109. *Britney Demands Removal of Unflattering Billboards*, REUTERS, June 18, 2007, <http://www.reuters.com/article/idUSN1822181320070618> (last visited Oct. 9, 2007).

110. *White v. Samsung Elecs. America, Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992).

been inconsistent and have not squarely confronted the cultural and expressive significance of the personal attributes used in the artistic works. And as with copyright and trademark, several key rulings have placed legitimate artistic use of the content of today's culture at risk.

The right of publicity is an unusual and sometimes hard to understand aspect of American law. While sometimes classified even by eminent scholars as part of the "right of privacy," it actually relates to the ability of celebrities and others to profit from *publicity* given to their names, likenesses, and other personal attributes.¹¹¹ It is often now classified alongside patent, trademark, and copyright as "a form of intellectual property that society deems to have some social utility."¹¹² At heart, it protects an individual's right to benefit from commercial advertising use of his or her name, image, or other distinctive personal attributes.¹¹³

An early and classic right of publicity case, *Munden v. Harris*, illustrates the doctrine and its understandable origins and purposes.¹¹⁴ The case was brought on behalf of Onel Munden, a five-year-old boy about whom we know little, except that he must have been a cute kid.¹¹⁵ Somehow a Kansas City jeweler, the Harris-Goar Company, had obtained a picture of little Onel, and used it in an advertisement the following manner:

Papa is going to buy mamma an Elgin watch for a present, and some one (I mustn't tell who) is going to buy my big sister a diamond ring. So don't you think you ought to buy me something? The payments are so easy, you'll never miss the money if you get it of [Picture of Plaintiff.]

Harris-Goar Co., 1207 Grand Ave., Kansas City, Mo.

Gifts for Everybody, Everywhere in their Free Catalogue.¹¹⁶

The boy sued and Harris-Goar demurred to his petition, claiming that Munden had no recognizable right involving the advertising use of his likeness, and, citing a scattering of decisions, that had found no property interest in the use of a person's name or image.¹¹⁷ The Court of Appeals squarely confronted the question of whether such a property interest should be recognized and found such a property interest reasonable and consistent with other legal rights:

111. *Christoff v. Nestlé USA, Inc.*, 62 Cal. Rptr. 3d 122, 129–131 & n.6 (2007) (discussing Dean Prosser's characterization of the right of publicity as one arm of the right of privacy, and the more modern characterization of it as an intellectual property like-tort of appropriation).

112. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 804 (Cal. 2001).

113. *Id.* at 807.

114. 134 S.W. 1076 (Mo. App. 1911).

115. *Id.* at 1077.

116. *Id.*

117. *Id.*

The privilege and capacity to exercise a right, though unexercised, is a thing of value—is property—of which one cannot be despoiled. If a man has a right to his own image as made to appear by his picture, it cannot be appropriated by another against his consent. It must strike the most obtuse that a claim of exclusive right to one's picture is a just claim . . . One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his own profit, and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?¹¹⁸

The court accordingly recognized this “novel” right, essentially as a claim in tort and equity for unauthorized use of a plaintiff's likeness:

We therefore conclude that one has an exclusive right to his picture, on the score of its being a property right of material profit. We also consider it to be a property right of value, in that it is one of the modes of securing to a person the enjoyment of life and the exercise of liberty, and that novelty of the claim is no objection to relief. If this right is, in either respect, invaded, he may have his remedy, either by restraint in equity or damages in an action at law.¹¹⁹

Cute little Odel Munden had been awarded the exclusive right to commercially exploit his cuteness.¹²⁰

After *Munden v. Harris* and other pioneering cases, including *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, which placed the Second Circuit's inestimable imprimatur on the right of publicity,¹²¹ came the hard questions. What besides a person's likeness is covered by the right? In what situations does the right apply? And—what has proved to be the most vexing question—in which situations does the right *not* apply?

Personal likenesses were protected from the beginning, as in *Munden* and *Haelan*. Cases protecting personal names followed swiftly. For both of these attributes, the reasoning seemed clear, for unauthorized use of either a person's likeness or name in advertising would improperly exploit that person and mislead consumers about his or her authorization or endorsement for the advertisement.¹²² But coverage did not stop with names or likenesses. For some well-known celebrities, even a small portion of their likenesses would evoke them. As one court suggested, such publicly identifiable features as “Groucho Marx's moustache, Bob Hope's nose, Eddie Cantor's eyes[,] or

118. *Id.* at 1078.

119. *Munden*, 134 S.W. at 1079.

120. *Id.*

121. 202 F.2d 866, 868 (2d Cir. 1953) (recognizing a right of publicity in baseball players, giving them the right to authorize or prohibit the use of their likenesses on baseball cards given away as a bonus in chewing gum packages).

122. *See, e.g., Matthews v. Wozencraft*, 15 F.3d 432, 437–38 (5th Cir. 1994) (describing rationale for right of publicity protecting use of a person's name or likeness).

Dolly Parton's hairstyle" could bring those celebrities to mind.¹²³ Next came slogans, as a court found the phrase "Here's Johnny" to be so closely associated with NBC *Tonight Show* host Johnny Carson that it could not be used by a portable toilet company, especially one that promoted itself as "the World's Foremost Comedian."¹²⁴ Subsequently, use of look-alikes in photographs,¹²⁵ and sound-alikes in audio tracks,¹²⁶ and even role-alikes (persons or things filling a role most often associated with the plaintiff)¹²⁷ entered the realm of right of publicity protection.

Most right of publicity cases involved use of the personal names, images or attributes in advertising, and a body of case law developed recognizing that the right applied to *commercial use or appropriation*, usually meaning classic advertising.¹²⁸ As with *Munden* and *Haelan*, in most cases the plaintiff's name, likeness, or attribute was directly used to sell products.¹²⁹ Especially where the advertisement suggested endorsement or authorization by the persons whose image, name or attribute was involved, coverage by the tort was clear.¹³⁰

As to what kinds of uses *didn't* invoke the right of publicity, courts readily recognized exceptions for editorial, educational, and political activities. Publication of a celebrity's photograph on a magazine cover, though it would probably aid sales, was recognized as privileged editorial use outside the scope of the proprietary right; to hold otherwise would inhibit legitimate news and editorial reporting.¹³¹ Documentaries for similar reasons were held exempt.¹³² Political messages as well could not be deprived of the ability to use the

123. *Cohen v. Herbal Concepts, Inc.*, 473 N.Y.S.2d 426, 431 (N.Y. App. Div. 1984), *aff'd*, 472 N.E.2d 307 (N.Y. 1984).

124. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 833, 836 (6th Cir. 1983).

125. *Prudhomme v. Proctor & Gamble Co.*, 800 F. Supp. 390, 393, 396 (E.D. La. 1992); *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S.2d 661, 664-65 (N.Y. App. Div. 1977); *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254, 256, 263 (N.Y. Sup. Ct. 1984).

126. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098, 1112 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

127. *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 809, 814 (9th Cir. 1997); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396, 1408 (9th Cir. 1992).

128. *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982); *Nat'l Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 540 (W.D. Tex. 1980).

129. *Nat'l Bank of Commerce*, 503 F. Supp. at 542.

130. *Id.*; *Cher*, 692 F.2d at 639.

131. *Time Inc. v. Sand Creek Partners, L.P.*, 825 F. Supp. 210, 213 (S.D. Ind. 1993); *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10, 11-12 (N.Y. App. Div. 1975), *aff'd*, 352 N.E.2d 584 (N.Y. 1976).

132. *Matthews v. Wozencraft*, 15 F.3d 432, 439 (5th Cir. 1994); *Benavidez v. Anheuser-Busch, Inc.*, 873 F.2d 102, 104 (5th Cir. 1989); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 793 (Cal. Ct. App. 1993); *Creel v. Crown Publishers, Inc.*, 496 N.Y.S.2d 219, 220 (N.Y. App. Div. 1985).

names, images and attributes of public figures.¹³³ And various “incidental” uses—not real advertising, but often not fitting neatly in the editorial, educational or political categories, either—were also found outside the scope of protection.¹³⁴

The largely settled principles of the right of publicity, therefore, included a broad scope (not just name and likeness, but a broad array of personally-linked attributes), a “commercial use” element, and an editorial/educational/political exception.¹³⁵ Left in the unsettled area, however, was artistic use. To the question, “May an artist make use of a celebrity or another person’s name, image or personal attributes in a work of art?”, the only fair answer one may give today is, “I don’t know.”

Some decisions have suggested an artistic right to use another’s name, image, or likeness for artistic purposes that is akin in certainty and scope to the well-recognized editorial exception. For example, Janice Joplin’s estate was not permitted to enjoin a play in Seattle based on her life, the second act of which simulated an evening’s concert performed by Ms. Joplin.¹³⁶ The court concluded that the use of a celebrity’s name in a play is free speech.¹³⁷ Similarly, a sculptor was held entitled to make and sell limited-edition sculptures portraying model Cheryl Tiegs.¹³⁸ The court noted: “Works of art, including sculptures, convey ideas, just as do literature, movies or theater. . . . An artist may make a work of art that includes a recognizable likeness of a person without her or his written consent and sell at least a limited number of copies [without violating the right of publicity].”¹³⁹

In a major victory for artists, the Sixth Circuit rejected right of publicity and related claims asserted by Tiger Woods against an artist who sold limited edition art prints portraying Woods in connection with his victory in the 1997 Masters Tournament.¹⁴⁰ After rejecting trademark claims on descriptive use and other grounds (which included a finding that Woods’s claim to be “a walking, talking trademark” [the Court’s characterization, not Woods’s] was “untenable”),¹⁴¹ the court found First Amendment implications in Woods’s right of publicity claims. Because the artist’s work, though sold for profit, did

133. *O’Hair v. Skolrood*, 17 Media L. Rep. 1869, 1870, 1872 (W.D. Tex. 1990).

134. *Velez v. VV Publ’g Corp.*, 524 N.Y.S.2d 186, 189–90 (N.Y. App. Div. 1988) (advertisements relating to a magazine); *Booth v. Curtis Publ’g Co.*, 223 N.Y.S.2d 737, 744 (N.Y. App. Div. 1962).

135. *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580, 585 (N.Y. 1984).

136. *Joplin Enters. v. Allen*, 795 F. Supp. 349, 350–51 (W.D. Wash. 1992).

137. *Id.* However, the court also relied on a special California statutory exemption which specifically limits the right of publicity to only advertising and endorsements. *Id.*

138. *Simeonov v. Tiegs*, 602 N.Y.S.2d 1014, 1017–18 (N.Y. Civ. Ct. 1993).

139. *Id.* at 1018.

140. *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003).

141. *Id.* at 922.

not propose a commercial transaction, the court found it “entitled to the full protection of the First Amendment.”¹⁴² The court found that right of publicity and related Lanham Act false endorsement claims should be applied to artistic works “only where the public interest in avoiding confusion outweighs the public interest in free expression”—a situation unlikely to occur if the use of the celebrity’s image had “artistic relevance.”¹⁴³

But other important decisions have, ominously for artists, treated art as little different from a mere commercial product. The Missouri Supreme Court’s ruling in *Doe v. TCI Cablevision* takes the art-as-commerce position.¹⁴⁴ That case involved a work that, at least in most academic, literary, and artistic circles, would be considered a classic literary-artistic work: a series of comic books and videos.¹⁴⁵ Created by Todd McFarlane, the *Spawn* comic book series was nothing if not creative: it featured a lead character who had descended to Hell, made a deal with the Devil, and returned to Earth with certain unknown powers imbued in Hell.¹⁴⁶ This character has journeyed in more than 150 print editions (and one made-for-cable video) through classic physical situations, personal and romantic encounters, and business and political developments no less daunting (though certainly less uplifting) than those of more recognized literary journeymen like Odysseus and Dante.¹⁴⁷

Like Dante and perhaps like Homer—the ancient record being sparse as to the blind bard’s use of the names, likenesses, and personal attributes of his contemporaries—McFarlane did not create his characters from whole cloth.¹⁴⁸ In at least one notable case, McFarlane, a Canadian and a hockey fan, borrowed a character’s name from that of a St. Louis Blues hockey player.¹⁴⁹ The hockey player’s name was Tony Twist.¹⁵⁰ The *Spawn* character’s name was Antonio (Tony) Twistelli.¹⁵¹ The hockey player was husky but boyish in appearance, with a full head of hair and trademark goatee, and was usually seen in a hockey uniform or casual attire. The Twistelli character was a clean-shaven balding middle-aged Mafioso who filled out a plus-sized business suit,

142. *Id.* at 925.

143. *Id.* at 928.

144. 110 S.W.3d 363, 375 (Mo. 2003) (en banc). The author was counsel to one of the original defendants in the case. Those defendants were dismissed before trial, and the author did not participate in subsequent proceedings including the appeal commented upon here.

145. *Id.* at 366.

146. *Id.*

147. See Ariel Carmona, Jr., *Spawn #150*, Dec. 6, 2005, <http://silverbulletcomicbooks.com/reviews/113390334341490.html> (reviewing the 150th edition of the *Spawn* comic book series); Hilary Goldstein, *Spawn #150 Review: The Hellspawn Is Spun in a Whole New Direction, But Is That a Good Thing?*, Oct. 25, 2005, <http://comics.ign.com/articles/661/661426pl.html>.

148. *Doe v. TCI Cablevision*, 110 S.W.3d at 366.

149. *Id.* at 370.

150. *Id.* at 365.

151. *Id.* at 366.

wore sunglasses, and walked about in a Godfather-wannabe strut.¹⁵² Most everything, in short, was different between the comic book Twistelli and the real life Twist.¹⁵³ There were, however, two similarities: the names, and the fact that both were “enforcers” of sorts.¹⁵⁴ Twist was the fighter-“Enforcer” for the Blues, and Twistelli filled a similar role as the leading gangster in the *Spawn* series.¹⁵⁵

Twist won his right of publicity claims against McFarlane and the *Spawn* comic book publisher at trial, though the trial judge set aside the verdict as barred by the First Amendment.¹⁵⁶ On appeal, the case presented the issues of how the right of publicity would apply to an artistic work like the *Spawn* comics, and the extent of the author’s First Amendment rights to use names and characters from contemporary society in his works.¹⁵⁷

The Missouri Supreme Court, after finding a prima facie right of publicity claim, determined that the free speech issue involved a weighing process: “not all speech is protected under the First Amendment, and in cases like this, courts often will weigh the state’s interest in protecting a plaintiff’s property right to the commercial value of his or her name and identity against the defendants right to free speech.”¹⁵⁸ Quoting from *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁵⁹ a right of publicity case in which a television station broadcast the entirety of a human cannonball’s act, the Court noted, “[t]he rationale for protecting the right of publicity is the straightforward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.”¹⁶⁰

Moving from this focus on the right of publicity as a valuable commercial right owned by the plaintiff, the court next noted cases holding that that the traditional First Amendment constitutional malice test of *New York Times Co. v. Sullivan*,¹⁶¹ did not fit in the right of publicity context.¹⁶² The court concluded accordingly that it had to find another test “to distinguish between expressive speech and commercial speech.”¹⁶³ Commercial speech (using a

152. See Gina Holland, *Celebs Ask Supreme Court to Protect Comic Creations: Hockey Player Had Sued Artist, Claiming Character Defamation*, CHI. SUN-TIMES, Nov. 28, 2003, at 46.

153. *Doe v. TCI Cablevision*, 110 S.W.3d at 366.

154. *Id.*

155. *Id.* at 367.

156. *Id.* at 365, 374–75.

157. *Id.* at 367–68.

158. *Doe v. TCI Cablevision*, 110 S.W.3d at 372.

159. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

160. *Doe v. TCI Cablevision*, 110 S.W.3d at 372.

161. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

162. *Doe v. TCI Cablevision*, 110 S.W.3d at 372–73.

163. *Id.* at 373.

person's name or likeness in advertising or on a product package), it noted, constituted the core of the right of publicity.¹⁶⁴ Expressive speech (“[f]or instance, the use of a person's identity in news, entertainment, and creative works for the purpose of communicating information or expressive ideas about that person”) fell outside the scope of the right, as the editorial/educational/political exception precedents showed.¹⁶⁵

The court reviewed the “relatedness” test described in the Restatement (Third) of Unfair Competition, which essentially described the editorial exception—the right to use a person's name or likeness when it was related to a news or educational publication.¹⁶⁶ It next reviewed the “transformative test” used in the admittedly quite similar case of *Winter v. D.C. Comics*, where a comic book that contained significant expressive content other than plaintiffs' mere likenesses was held outside the scope of the right of publicity.¹⁶⁷ The court rejected both approaches, for the somewhat conclusory reason that these expressive-protective tests “preclude a cause of action whenever the use of the name and identity is in any way expressive, regardless of its commercial exploitation.”¹⁶⁸ The court then approvingly cited an article by an advocate for right of publicity plaintiffs, which argued, contrary to the expressive-protective relatedness and transformative tests, that free speech defenses should not work where commercial exploitation “predominates” over expressive purposes.¹⁶⁹ And finally, the court purported to apply that test, but did so with the twist that the determination of commercial predominance over expressive content rested on the court's own literary judgment about the “value” of the *Spawn* work:

As discussed, Twist made a submissible case that respondents' use of his name and identity was for a commercial advantage. Nonetheless, there is still an expressive component in the use of his name and identity as a metaphorical reference to tough-guy “enforcers.” And yet, respondents agree (perhaps to avoid a defamation claim) that the use was not a parody or other expressive comment or a fictionalized account of the real Twist. *As such, the metaphorical reference to Twist, though a literary device, has very little literary value compared to its commercial value.* On the record here, the use and identity of Twist's name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under these circumstances, free speech must give way to the right of publicity.¹⁷⁰

164. *Id.*

165. *Id.*

166. *Id.* (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995)).

167. *Doe v. TCI Cablevision*, 110 S.W.3d at 373–74 (citing *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003)).

168. *Id.* at 374.

169. *Id.*

170. *Id.* (emphasis added).

The *Doe* holding, though hardly crystal clear, appears to put artists in a near-impossible dilemma when they seek to use any cultural content that may implicate the right of publicity. It clearly rejects both established expressive-protective tests—the “relatedness” test (which underlies the editorial/educational/political exceptions to the right of publicity, recognized in many cases in other jurisdictions) and the “transformative” test (which derives from the *Winter* case involving a work of visual art, and ultimately from the *Campbell* case involving a musical art form).¹⁷¹ It substitutes, instead, a purported 50-50 test, in which no First Amendment preference is afforded for expressive elements, and it applies that 50-50 test in a manner that can only give chills to modern artists—by classifying use of merely a name and a vague persona (the “enforcer” image) in a non-mainstream non-parody work as having “little literary value” and being but a “ploy” of exploitation.¹⁷² Only Rembrandt and maybe Missouri’s favorite son artist Thomas Hart Benton appear safe under this test. Particularly given the few scattered references to Antonio Twistelli in the many *Spawn* issues, and the many other creative elements in the series and even in the Twistelli character, the court’s conclusion of commercial exploitation being predominant over expressive artistry will hardly be apparent to most artists. Any artist of the last fifty years, particularly one who uses alternative media, *avant garde* techniques, or popular culture content, must seriously worry that his or her reviews will not be favorable in the Missouri Supreme Court.

The *Doe* decision, though important for Missourians and because of its unique and extreme position giving little weight to the artist’s expressive content, is illustrative of decisions that elevate right of publicity commercial interests over artistic freedom. In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the California Supreme Court applied a test very similar to *Doe*, purporting to balance an artist’s creativity against the celebrity’s right of publicity.¹⁷³ There, an artist made a charcoal drawing of the Three Stooges, and sold his work in lithographs and T-shirts.¹⁷⁴ Initially, the court examined whether the defendant’s works fell within the California right of publicity statute, which required sale of a “product,” but it determined that even lithographic prints constituted covered “products.”¹⁷⁵ Moving to the content of the artist’s work, the court recognized that artwork portraying celebrities can have significant expressive value, like other First Amendment protected expression:

171. *Id.*

172. *Doe v. TCI Cablevision*, 110 S.W.3d at 374.

173. 21 P.3d 797, 799 (Cal. 2001).

174. *Id.* at 800–01.

175. *Id.* at 802.

Because celebrities take on public meaning, the appropriation of their likenesses may have important uses in uninhibited debate on public issues, particularly debates about culture and values. And because celebrities take on personal meanings to many individuals in the society, the creative appropriation of celebrity images can be an important avenue of individual expression. As one commentator has stated: “Entertainment and sports celebrities are the leading players in our Public Drama. We tell tales, both tall and cautionary, about them. We monitor their comings and goings, their missteps and heartbreaks. We copy their mannerisms, their styles, their modes of conversation and of consumption. Whether or not celebrities are ‘the chief agents of moral change in the United States,’ they certainly are widely used—far more than are institutionally anchored elites—to symbolize individual aspirations, group identities, and cultural values. Their images are thus important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation.”¹⁷⁶

The court recognized as well that art need not have an overt political message to deserve First Amendment protection:

[T]he United States Supreme Court has made it clear that a work of art is protected by the First Amendment even if it conveys no discernable message: “[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ [citation], would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.” (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) 515 U.S. 557, 569.)

Nor does the fact that Saderup’s art appears in large part on a less conventional avenue of communications, T-shirts, result in reduced First Amendment protection. As Judge Posner stated in the case of a defendant who sold T-shirts advocating the legalization of marijuana, “its T-shirts . . . are to [the seller] what the *New York Times* is to the Sulzbergers and the Ochs—the vehicle of her ideas and opinions.” (*Ayres v. City of Chicago* (7th Cir. 1997) 125 F.3d 1010, 1017; *Cohen v. California* (1971) 403 U.S. 15 [jacket with words “Fuck the Draft” on the back is protected speech].) First Amendment doctrine does not disfavor nontraditional media of expression.¹⁷⁷

Thus, the court recognized that the artist deserved First Amendment protection—but went on to require a balancing of that right with the Three Stooges’ right of publicity, which it portrayed as a product of “creative labor.”¹⁷⁸ The court admitted the difficulty in making the balance, and even

176. *Id.* at 803 (citing Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 128 (1993)).

177. *Id.* at 804.

178. *Comedy III Productions, Inc.*, 21 P.3d at 804–05.

appeared to suggest that the First Amendment requires significant deference to expressive rights in weighing the balance:

Once the celebrity thrusts himself or herself forward into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope. The necessary implication of this observation is that the right of publicity is essentially an economic right. What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through the merchandising of the "name, voice, signature, photograph or likeness" of the celebrity.¹⁷⁹

Borrowing from the "transformative" copyright fair use doctrine of *Campbell*, the court ultimately suggested a sufficient transformation test, which looks to "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized" (which would weigh in favor of free expression) or "whether the depiction or imitation of the celebrity is the very sum and substance of the work in question" (which would weigh in favor of the right of publicity).¹⁸⁰ In the case at hand, the court, as in *Doe*, assumed an art critic's role, and assessed the artistic content of the defendant's Three Stooges charcoal drawing.¹⁸¹ The assessment: "we can discern no significant transformative or creative contribution."¹⁸² Saderup's literal style was found undeserving of any artistic privilege from a right of publicity claim.

Some may defend the current law on the ground that artists can, indeed, use celebrity images, trademarks, and even copyrighted works if only they obtain and pay for permission. Indeed, this was the California Supreme Court's retort to Saderup's assertion that its decision singled out his literal artistic style, and hampered his ability to portray celebrities, while it permitted more abstract portrayals. You can do it, too, the court told Saderup—you just have to get permission.¹⁸³ Seeking and obtaining permission sometimes

179. *Id.* at 807.

180. *Id.* at 809.

181. *See id.* at 810–11.

182. *Id.* at 811.

183. As the court explained:

Saderup argues that it would be incongruous and unjust to protect parodies and other distortions of celebrity figures but not wholesome, reverential portraits of such celebrities. The test we articulate today, however, does not express a value judgment or preference for one type of depiction over another. Rather, it reflects a recognition that the Legislature has granted to the heirs and assigns of celebrities the property right to exploit the celebrities' images, and that certain forms of expressive activity protected by the First Amendment fall outside the boundaries of that right. Stated another way, we are concerned not with whether conventional celebrity images should be produced but with who produces them and, more pertinently, who appropriates the value from their production. Thus, under section 990, if Saderup wishes to continue to depict The Three

works. Andy Warhol, for example, after being surprised by some copyright claims for his clearly derivative works, made it his practice later in his career to obtain permissions when he used trademarks such as the Campbell's soup can and the Brillo soap pad package and when he used celebrity images like those of Marilyn Monroe.¹⁸⁴ It worked for Warhol because he was already famous, and because the trademark owners and celebrities involved knew that his works would be positive and even celebratory, not critical. Often they gave permission without charge, knowing that Warhol images would only enhance their trademarks or personal fame.¹⁸⁵ Indeed, several trademark owners later adapted their designs to the way Warhol drew them.¹⁸⁶ Getting permissions, however, can be a cumbersome, costly, and sometimes impossible for non-famous artists, particularly those whose works cast their subjects in a critical light.¹⁸⁷ It is obvious what answer an artist can expect to the request, "May I purchase the rights to use your image in a critical artwork?" A legal right of artistic use is the only realistic means for artists to have access to personal names and images.

Considered against the broad scope of the right of publicity—recall that use of just a distinctive moustache can invoke it, and that even robots can infringe if they happen to play a role that brings to mind a particular celebrity—the plaintiff-favorable *Doe* test and the similar *Comedy III Productions* test could significantly inhibit the creation of creative works that include portrayals of contemporary persons, celebrities, or even fictitious characters. In today's world, that means that a significant amount of the content and symbols of our culture is available to artists only with significant legal risk and uncertainty.

We are a celebrity-dominated culture; there can be no mistake about this. Celebrities are top-of-consciousness foci of our attention.¹⁸⁸ Top celebrity first

Stooges as he has done, he may do so only with the consent of the right-of-publicity holder.

Comedy III Productions, Inc., 21 P.3d at 811.

184. DAVID BOLLIER, BRAND NAME BULLIES: THE QUEST TO OWN AND CONTROL CULTURE 48–55 (2005).

185. *Id.* at 54.

186. *Id.*

187. See generally SUSAN M. BIELSTEIN, PERMISSIONS A SURVIVAL GUIDE: BLUNT TALK ABOUT ART AS INTELLECTUAL PROPERTY (2006).

188. See TYLER COWEN, WHAT PRICE FAME? 7 (2000):

In short, ours is a culture steeped in fame. Modern talk show hosts, such as Oprah Winfrey, have daily audiences ranging from 10 to 20 million people. The Barbara Walters interview with Monica Lewinsky was watched by over 70 million Americans, a record for a news program, if it may be called that. Graceland draws more visitors per year—750,000—than does the White House. Boris Yeltsin, when he visited America, asked as he stepped off the plane: "Do you think O.J. did it?" Michael Jordan, the subject of seventy books and one of the most widely recognized figures in the world, is an

names need no further elaboration: Oprah, Diana, Marilyn. Even the staid business world has its own celebrities, like Bill Gates, Warren Buffett, Donald Trump, and Jack Welch. A mass media culture probably inherently focuses on celebrities, and indeed conveys temporary celebrity status even on ordinary persons who for some reason or another achieve Andy Warhol's famous "fifteen minutes of fame." A century ago, when school children were surveyed about the persons they most admired, George Washington and Abraham Lincoln led the list, and other social and political leaders filled it out.¹⁸⁹ In 1948, Franklin D. Roosevelt and Clara Barton topped the list, which this time included entertainers like Gene Autrey and Betty Grable and sports figures like Ted Williams and Babe Ruth.¹⁹⁰ By 1986, a list of persons most admired by teenagers consisted almost entirely by entertainment celebrities, like Bill Cosby, Sylvester Stallone, and Eddie Murphy; the only political figure that appeared was Ronald Reagan, an actor turned politician.¹⁹¹ Many artists in this celebrity-focused culture will naturally wish to use the celebrity content of our culture as grist for their works. As the Sixth Circuit noted in *ETW*:

[T]hrough their pervasive presence in the media, sports and entertainment celebrities have come to symbolize certain ideas and values in our society and have become a valuable means of expression in our culture. As the Tenth Circuit observed "[c]elebrities . . . are an important element of the shared communicative resources of our cultural domain."¹⁹²

Decisions like *Doe*, however, are likely to inhibit artistic works making use of these cultural symbols.

As with copyright and trademark law, right of publicity law should evolve to accommodate legitimate artistic expressive interests, including the basic need of artists to be able to use the content of our celebrity culture in their works. Such an accommodation can be made without depriving future Odel Mundens of the value of their cuteness, or even the future Tony Twists of the opportunity to commercially exploit their personal fame. Such an accommodation will, most importantly, free the artists of our day to portray and comment upon our lives and society in the same way that Rembrandt portrayed Holland of his time and that Max Beckman portrayed early Twentieth Century Germany. The resulting art may well give us all, as art consumers, some of those wonderful pleasures, insights, and openings into new worlds that Tom Eagleton found in his journeys in the art world.

industry unto himself. In 1998 *Fortune* magazine estimated his career net economic impact at \$10 billion.

189. *Id.* at 47.

190. *Id.* at 47–48.

191. *Id.* at 48.

192. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 937–38 (6th Cir. 2003).

CONCLUSION

The law hasn't found it easy to deal with art. Perhaps this is because art isn't clear and literal, like a dollars-and-cents commercial transaction. Perhaps it is because art isn't predictable, like railroads, automobiles, and industrial equipment. Perhaps it derives from the fact that artistic frontiers change, unlike the known boundaries of our cities, counties, states, and nations. Perhaps, at root, it has something to do with the simple fact that art *affects* people, often deeply. We may perhaps even borrow from Justice William J. Brennan, Jr. (who Senator Eagleton admired and sometimes socialized with at his friend Joseph Rauh's Virginia parties) who defined sex as "a great and mysterious motive force in human life."¹⁹³

Art, too, can be great and mysterious in its effect on people, and the pursuit and receipt of artistic expression can be a "motive force" for many artists and art lovers. Legislators, courts, and business executives often seek control. Art can't be controlled. It breaks barriers, opens up new ways of thinking about the world, and moves people mysteriously, at an emotional and cultural level not open to objective scrutiny. And neither can or should the constituent elements of art be controlled, or removed from accessibility. Artists should be able to use the symbols and constituents of their culture in order to create their images and messages.

Lawyers, legislators, courts, and other policy makers should take care that the elements of culture are not legally barred from artistic and other critical expressive use. The law can adequately protect intellectual property rights if it confines their enforcement to the commercial arena. Blocking the elements of contemporary culture from artists, behind judicially enforced "no trespassing" signs, would be just as great a mistake today as Comstockian censorship schemes were a century ago. We will best honor artists, art lovers like Senator Eagleton, and First Amendment free expression rights, by allowing artists to use the language and symbols of our culture.

193. Roth v. U.S., 354 U.S. 476, 487 (1957).