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Teaching Intellectual Property Law

Article

*765 "THERE'S NO BUSINESS LIKE SHOW BUSINESS": USING MULTIMEDIA MATERIALS TO TEACH ENTERTAINMENT LAW

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Introduction

Many law students dream of working in the entertainment industry, both here in southern California, and around the country. [FN1] Perhaps that aspiration accounts for Entertainment Law's perennial status as one of the most popular electives in the law school curriculum. [FN2] Even students who do not seek careers in the entertainment field find the subject matter stimulating, with a syllabus that covers cases and controversies involving the likes of Bill Cosby, Pamela Anderson, Howard Stern, and Jay Z. I greatly enjoy teaching first year Contracts, and I also teach or have taught electives such as the basic Intellectual Property (IP) course, the Right of Publicity, and Music Law. However, Entertainment Law might be my favorite course to teach, as it contains elements of both Contracts and IP in a celebrity-studded arena that is evolving constantly.

At a pedagogical level, Entertainment Law, perhaps more than any single subject, lends itself well to use of multimedia material, including DVD clips, Court TV segments, audio music clips, and the Internet. Multimedia materials can help to vividly illustrate both how disputes arise and how to avoid them. Very often, multimedia materials themselves--a film clip, a digital sound sample, or a print or TV advertisement--are the dispositive evidence in a copyright, trademark, or right of publicity dispute involving a hit song, motion picture, or television program. As such, they can shed invaluable light on the legal doctrines that underlie Entertainment Law, as well as the real-world practical aspects of industry workings.

***766** This Essay will set forth my approach to teaching Entertainment Law by using multimedia materials to complement traditional case law approaches. Entertainment Law encompasses a wide array of subject areas, but I will concentrate this piece on the IP aspects of Entertainment Law. In Part I, I will describe my methodology for teaching the course, particularly the focus on examining Entertainment Law from the perspectives of clearance, litigation, and transactions. In Parts II, III, IV, and V, I will examine how multimedia materials can illuminate the law of ideas, copyright issues, right of publicity issues, and trademark issues, respectively, in the entertainment arena.

I. Methodology of Teaching Entertainment Law

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In earlier years of teaching Entertainment Law, I used a very fine casebook on the subject. [FN3] However, by year three of teaching, I was heavily supplementing the book with my own selected materials. By year four, I began exclusively using my own selected materials--including cases, short articles, and contracts--with no casebook. Having worked for a number of years in New York as an Entertainment and IP lawyer, I was familiar with many of the standard cases, but found that I liked picking my own cases, particularly when I could pair cases with multimedia materials. The entertainment industry is in constant flux, and new developments in Entertainment and IP move at warp speed. [FN4] Further, I typically do a limited amount of consulting work on IP projects that provides fresh material for the course. [FN5]

A. What is Entertainment Law?

The initial inquiry to start the course focuses on the question: What is entertainment law? Much like contract law, which has been described as a ***767** "residual" area of law, [FN6] there is really no such thing as "entertainment law." One could say that there are "entertainment tax" lawyers, who prepare taxes for film entities, entertainment trust and estate lawyers, "entertainment bankruptcy" lawyers who help music artists such as TLC and Toni Braxton (to name a few) escape onerous debt, and "entertainment labor" lawyers who represent talent and management in guilds such as the Screen Actors Guild (SAG), the American Federation of Television and Radio Artists (AFTRA), and the Directors Guild of America (DGA). However, the heart of what one would consider "entertainment law" consists of two areas--contract law and IP law--as they relate to the five traditional entertainment industries: motion pictures, television, music, publishing, and live theatre. [FN7]

My approach to teaching Entertainment Law accordingly focuses on IP and contract issues in the various entertainment industries. The goal is not merely to elucidate the legal doctrine, but to foster practical approaches to understanding the industry, which is subject to unique components of risk, concentration, and great expense of projects from films to sound recordings. [FN8] Accordingly, my approach also examines issues in the industry from three perspectives: a clearance perspective, which is pro-active in preventing litigation and liability; a litigation perspective, which is focused on finding causes of action and defenses based on doctrine and statutory provisions; and a transactional perspective, which focuses on deal-making and the interests of parties to contracts.

A litigation perspective examines elements of claims, such as whether a prima facie case of trademark or copyright infringement exists, and defenses, such as whether a contested use is permissible under the fair use doctrine of copyright. In contrast, a clearance perspective asks: What could the parties have done in advance of litigation to avoid this dispute? As I have written elsewhere, clearance efforts "will not deter all lawsuits [involving entertainment properties], but will reduce exposure to ultimate liability." [FN9] Both litigation and clearance perspectives can help to equip students to ***768** consider both preventing liability and pursuing or defending claims. In turn, litigation and clearance perspectives relate back to contract drafting and negotiation principles examined from a transactional perspective covered later in the course.

The litigation, clearance and transactional perspectives are examined in the class as a subtext within the larger context of IP disputes, beginning with the law of idea misappropriation, continuing to copyright law, and then trademark and the right of publicity. Once the students grapple with how disputes play out in the context of these IP areas in the motion picture, television, and music industries, they have a good sense of the main issues in the entertainment industries.

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II. Idea Misappropriation Disputes: The Player, The Cosby Show, and Howard Stern's The Evaluators

I begin the course with idea misappropriation issues because virtually all entertainment projects, such as television programs, movies, plays, books, and video games begin with an idea. The entertainment industry is concentrated in New York and California, and accordingly, most of the idea misappropriation cases we focus on arise in those jurisdictions. [FN10] The goals of this segment are to show first that there is no unified "law of ideas" but rather a potpourri of state law doctrines including contract, property, and unjust enrichment law. [FN11] Secondly, cases and disputes demonstrate that while relatively undeveloped ideas can be immensely valuable, "idea law" such as it is, provides the least firepower in the IP-related arsenal of claims, particularly in contrast to copyright law, where plaintiffs have wonderful rights to attorney's fees, statutory damages, and injunctive relief. [FN12] Thirdly, disputes over idea generation typically fail, underscoring the proposition that almost all idea misappropriation cases are failed copyright infringement cases. Said differently, screenwriters and other creators turn to idea law when they cannot deploy any other IP weapon.

Although copyright infringement is covered in great detail later in the course, the law of ideas segment introduces the notion that copyright does not protect raw ideas, but only their expression. [FN13] The Copyright Office, for ***769** example, has long taken the position that a mere "treatment" of a film concept does not qualify for copyright protection. [FN14] With that in mind, I play a clip from the film The Player, a fictional film about the film industry starring Tim Robbins and Whoopi Goldberg. [FN15] The Player contains a vivid scene in which a screenwriter and his agent give an impromptu "pitch" to a motion picture studio executive played by Robbins. [FN16] The concept of the "pitch" is central to filmmaking, and invites the students to think about what legal protection, if any, subsists in a "pitch" where valuable ideas are disclosed.

I use PowerPoint slides with visual images containing Star Trek, Art Buchwald and Coming to America, and the Taco Bell Chihuahua. To illustrate the value of even relatively simple ideas, I like to play a clip from the early Star Trek series, showing how the simple idea of a multi-ethnic crew exploring space --" the final frontier"--spawned a multi-billion dollar empire. Concurrently, I show a PowerPoint slide of Flash Gordon, to compare how ideas can be quite similar and yet non-infringing. The Star Trek franchise provides an opportunity to contrast the tremendous potential value of ideas with the legal foundation that ideas are generally as "free as air" and appropriable by anyone. The "idea" of Star Trek is not protectable unless the elements of idea misappropriation are present, which require an idea submitted under circumstances indicating payment is expected and which is appropriated. [FN17] This concept is illustrated by a clip from the film Coming to America, which was subject to a breach of contract suit when Paramount Pictures failed to compensate treatment writer Art Buchwald for his treatment upon which the film was based. [FN18]

The Taco Bell Chihuahua ("Yo Quiero Taco Bell") is presented as a visual image to discuss a multi-million dollar lawsuit brought by marketing professionals who "pitched" the idea of an ad campaign using their concept of a "Psycho Chihuahua." [FN19] The suit is notable because it is one of the few where an idea-submitter won a trial on misappropriation and was awarded a windfall in damages. [FN20]

The centerpiece of discussion is the case of Murray v. NBC, The Cosby Show case. [FN21] Murray is a great case to study because it shows how attenuated idea protection can be, particularly under the New York approach to idea ***770** protection, which requires some novelty as to the idea. [FN22] We can also contrast the Murray standard to that articulated under California law. I like to show a clip from The Cosby Show to begin the class, and then delve into the facts of Murray. We have the plaintiff, an employee of NBC, with a great idea for a TV show involving a first for TV at the time--the depiction of non-stereotypical African-American characters

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in a situational comedy. [FN23] Murray specified that Bill Cosby should play the lead in a show he called "Father's Day." [FN24] With the encouragement of his superiors, he submitted no fewer than five "treatments" to NBC executives, who ultimately "passed" on the project. [FN25] Four years later, The Cosby Show debuted, and went on to become the top-rated program of its time, generating millions for NBC. [FN26] Murray sued NBC under numerous theories, ranging from race discrimination and fraud to false designation of origin under section 43(a) of the Lanham Act, as well as idea misappropriation. [FN27]

New York law requires an idea to be novel to be protected as property. [FN28] The Second Circuit ultimately dismissed Murray's claims against NBC, holding that the idea of a non-stereotypical African-American family in a primetime sitcom was not sufficiently novel to warrant protection under idea misappropriation law. [FN29] To test the Murray court's hypothesis, which others have noted is clearly wrong, [FN30] I take the students through an audio journey of the television programs featuring African-Americans that preceded The Cosby Show. To demonstrate that virtually the only images of blacks in primetime prior to Cosby were stereotypical, I play audio clips from TV theme shows ranging from The Jeffersons (featuring the George Jefferson character as a classic black buffoon) to Sanford and Son (inner-city dysfunctional males living in a junkyard) to Good Times (black family on welfare in the inner-city projects) to That's My Mama (ghetto family run by mammy-type cast black matriarch). Given both the depictions of African-Americans that preceded it and its enormous success, The Cosby Show arguably was one of the most novel programs in television history, just not in the eyes of the Second Circuit.

***771** Idea misappropriation has been rampant in the context of reality television shows, and such shows provide a good opportunity to explore the contours of idea misappropriation doctrine. One of my favorite cases is one that ultimately settled, Stern v. Telepictures Productions Inc. [FN31] I use the complaint from the lawsuit in the materials, and play a video clip of Howard Stern from his show The Evaluators, which was at issue in the litigation. [FN32] Stern, the so-called "King of All Media" [FN33] sued the producers of ABC's reality television series Are You Hot? The Search for America's Sexiest People. [FN34] Stern (incredibly) claimed that ABC's show unlawfully appropriated ideas from his skit on his E-Channel TV show, The Evaluators. [FN35] In that segment, Stern and a panel of male "experts" do an on-camera evaluation of whether female applicants are "hot" enough to qualify for a photo-spread in Playboy or Penthouse magazines. [FN36]

Significantly, even though Stern's base of operation is Manhattan, his attorneys brought suit in Los Angeles, no doubt mindful of New York's more stringent idea misappropriation criteria. The "idea" of using a panel of men to "evaluate" women's bodies is hardly novel and probably dates back to the cave man. Indeed, the first cause of action in the Stern suit is not even misappropriation, but rather a claim for deceptive trade practices under the California code. [FN37] We also examine other reality TV show disputes, including Survivor versus Boot Camp. [FN38]

III. Copyright Law

A. Motion Picture Copyright Infringement: 12 Monkeys, Amistad, and The Devil's Advocate

Copyright law is at the heart of both entertainment transactions and disputes. For organizational purposes, I divide the copyright segment between motion picture copyright infringement and music copyright issues. Because of the great expense of filmmaking, there tend to be fewer reported cases on copyright infringe-

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ment of films than on copyright infringement of music, presumably because clearance reduces claims, and the "serious" cases where ***772** clearance has failed typically settle. Given how filmmaking costs "have skyrocketed in recent years," [FN39] a valid copyright claim is a veritable disaster for a film studio, which could see its massive investment evaporate with the stroke of a preliminary injunction.

On the motion picture side, I begin the segment at what copyright law protects, and who is an "author" of a motion picture. In this connection, I assign Aalmuhammed v. Lee. [FN40] In Aalmuhammed, the plaintiff was hired as a consultant to help Denzel Washington with scenes involving Malcolm X's conversion to Islam. [FN41] The plaintiff subsequently filed a copyright infringement claim against film director Spike Lee and Warner Brothers Studios, after the studio refused to give the plaintiff credit as co-writer of the film. [FN42] At issue in Aalmuhammed was whether the plaintiff's contributions to the script and screenplay of the film Malcolm X were so extensive as to make the plaintiff a joint author of the film. [FN43] I play a clip from the film Malcolm X with reference to claims of the plaintiff. This leads to a discussion of joint ownership and ownership generally in the copyright context, underscoring the point that the film studio, although not the creator, is always the owner of copyright in a motion picture.

Next we explore what constitutes copyright infringement in the motion picture context, with a clip from the film Driving Miss Daisy and a discussion of the case involving that film, Denker v. Uhry. [FN44] In Denker, the plaintiff playwright claimed that the film infringed on the copyright in his play, Horowitz and Mrs. Washington. [FN45] The Denker court provides an excellent analysis of how a film can infringe a literary or dramatic work and sets forth what elements of a literary work are protectable in a screen play and motion picture. [FN46]

After exploring the copyrightable elements of a film, we move to discussion of injunctive relief. This segment shows the students that the threat of injunctive relief drives dispute generation and resolution in the motion picture context. A preliminary injunction has the potential to derail the entire massive investment that goes into any feature Hollywood film today. Because ***773** an infringement suit can be so devastating to a big-budget motion picture, this segment also highlights the importance of stringent clearance in the film context. The centerpiece case in this segment is the 12 Monkeys case, Woods v. Universal City Studios, Inc. [FN47]

12 Monkeys was a big-budget feature film starring Bruce Willis and Brad Pitt. [FN48] The case arose when the film's director, Terry Gilliam, in connection with staff, decided to use a mechanical graphic drawing of a futuristic-looking chair authored by the plaintiff in the set of the film, drawn from a graphic arts book. [FN49] My materials contain a picture of the plaintiff's drawing of the chair, and I show a video clip of the scene in which the chair, which looks virtually exactly like the plaintiff's drawing, appears in 12 Monkeys for only a brief moment. Unfortunately, in a textbook case of clearance failure, Gilliam never bothered to "clear" the drawing, and its use in the film on its theatrical release was noted by friends of the plaintiff, Mr. Woods. [FN50] Woods hired an attorney and sought redress, but inexplicably, Universal brushed off the claims, and Woods sued for copyright infringement. [FN51]

The court in Woods, in a decision which shocked the entertainment film community, ruled that Universal did indeed infringe the copyright in the drawing, and awarded injunctive relief to Woods. [FN52] This would have required Universal to withdraw a film in active theatrical exhibition from theatres, essentially a death knell for any feature film given the "windows" a film passes through to generate revenue. The parties quickly settled. [FN53] The case lends itself to very interesting discussions of the doctrine of "striking similarity" in copyright law, as well as the law and economics approach to damages--the court's opinion ends with the stern admonition that copyright does not permit a policy of "infringe first, pay later." [FN54]

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We contrast Woods with the Amistad case, Chase-Riboud v. Dreamworks, Inc., [FN55] with use of a video clip from the film Amistad. There, a federal district court in Los Angeles found there was no likelihood of success on the merits of the plaintiff's copyright claims, despite extensive similarities between Spielberg's film and screenplay and the plaintiff's book, Echo of Lions, and clear access by the defendants to the work. [FN56] (The plaintiff's agent had ***774** "pitched" a concept for an "Amistad" film based on her book to a Spielberg production company prior to the suit. [FN57]) Most tellingly, in refusing to grant injunctive relief to the plaintiff, a black woman, the court references the balance of harms between an African-American woman's lost opportunity to present a pivotal moment in black history in her "own unique fashion" and DreamWorks's multimillion investment in Amistad. [FN58]

Film cases also present excellent opportunities to discuss moral rights, from colorization disputes in the 1980s, to digital manipulation of images and copyright infringement. Motion picture works are not protected under the Visual Artists Rights Act of 1990 (VARA) and "[t]he motion picture industry so far has fended off efforts . . . to gain statutory protection for moral rights . . . ." [FN59] Nevertheless, moral rights issues of integrity and attribution can be quite distinct in film cases. [FN60] A case I use in this connection is Hart v. Warner Bros., The Devil's Advocate case. [FN61] In Hart, the plaintiff, a noted visual artist, sued Warner Bros. for using a replica of his masterwork sculpture, Ex Nihilo, which sits at the National Cathedral in Washington, D.C., in its film The Devil's Advocate. [FN62] The scene is particularly graphic and profane, with the replica digitally manipulated to show the angelic characters in the sculpture come alive, while the protagonist, played by Keanu Reeves, engages in incestuous sex with his sister in the film. [FN63] Again, injunctive relief was granted, and a settlement was reached which required future reproductions of the film, scheduled to be released on video, to remove the scene. [FN64]

Film cases also provide fertile ground for discussions of fair use. In this connection, I use a clip from a film, whose creator I represented while practicing entertainment law in New York, entitled Cracking Up. The film ***775** was produced by a brilliant independent filmmaker, and financed independently, but like many independent films, it never garnered a theatrical release. Cracking Up is a dark satire/comedy about performance artists and drug addiction in the East Village of New York, and contains a scene with a hilarious parody of the classic Oscar-winning film starring Marlon Brando, On the Waterfront. [FN65]

The young producer of Cracking Up wished to do a parody called "Near the Waterfront," where the Brando character engages in the famous "I cudda been a contenda" scene in the taxi cab with the Brando character's brother, played by Rod Stieger ("You was my brother, Charley. You shoulda looked out for me a little bit. You shoulda taken care of me--just a little bit--so I wouldn't have to take them dives for the short-end money."). [FN66] I first play the famous Brando taxi scene from the original film, and then contrast it with the scene parodied by Cracking Up, which begins the same but ends with the tough Brando character morphing into Pee Wee Herman. We also discuss The Wind Done Gone case, a literary infringement case, [FN67] by showing a clip from Gone with the Wind and contrasting it with the dialog from The Wind Done Gone. [FN68]

B. Music Copyright Infringement: Love Is a Wonderful Thing, South Bronx, Ice, Ice, Baby, Pass the Mic, and 99 Problems

Music cases provide insight into copyright law on a variety of issues, from the standards of originality and fixation, to the statute of limitations. [FN69] We explore the defense of subconscious copying, comparing audio versions of the Chiffons' He's So Fine, with Harrison's My Sweet Lord. [FN70] We explore the crucial issue of

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access in two cases. The first involves an unknown songwriter's claim against Mariah Carey regarding the hit song Hero. [FN71] The other case involved a suit by the Isley Brothers against singer Michael Bolton and the song Love is a Wonderful Thing. [FN72] The Isley Brothers released their ***776** song with the same title as the Bolton tune in 1966, [FN73] and I play audio clips of both versions, which are remarkably similar. I also use a Court TV Trial Story video segment involving a copyright infringement claim by an obscure songwriter against mega-group New Kids on the Block. [FN74] The full Trial Story segment takes up about forty minutes of class time, but is worth it in my view, as students see expert witness testimony on the issue of substantial similarity.

However, the centerpiece of the music and copyright law segment focuses on digital sound sampling, where one can have a field day discussing copyright concepts. First, I play a video clip from a hilarious film that parodies the rap music industry, entitled Fear of a Black Hat. Then, I take the students on an audio pastiche of sound sampling cases, beginning with old school rapper KRS One's classic song outlining the origins of hip-hop, South Bronx. I also play a bit of James Brown, who is arguably the most sampled musician in the history of rap, [FN75] contrasting Brown's scream in his song I Feel Good, to the unifying sample used in the hit rap song It Takes Two by Rob Base. The James Brown scream, while only seconds long, is the core of the Rob Base song.

We also listen to clips of Vanilla Ice's Ice, Ice, Baby, with the query: What is original about Vanilla Ice? Answer: arguably nothing, since he did not write the music, which comes from Queen's Under Pressure, and reputedly did not write the lyrics either. The audio tour includes comparisons of Lou Reed's Walk on the Wild Side with A Tribe Called Quest's Can I Kick It?. We listen for the plaintiff's flute solo contained in the Beastie Boys rap song Pass the Mic, which is a seminal sampling case in the Ninth Circuit. [FN76] Other cases include Tag Team's Whoomp, There It Is and of course the Grey Album controversy, featuring the remix of Jay Z's hit 99 Problems with The Beatle's Helter Skelter. [FN77] We then discuss the seminal case of Grand Upright Music, the Biz Markie case, with its stark and substandard analysis that digital sound sampling equals theft and copyright infringement. [FN78]

***777** IV. Trademark Law Disputes in the Film Context: Muppet Treasure Island, Jerry McGuire, Lawnmower Man, and The Long Kiss Goodnight

Trademark law, no less than copyright, is critical to entertainment industry deals and disputes. [FN79] My approach to trademark issues is to track the Lanham Act, examining classic trademark infringement under section 32(1), [FN80] false designation of origin (and all that entails!) under section 43(a), [FN81] trademark dilution under section 43(c), [FN82] and trademark cybersquatting under section 43(d). [FN83] To explore the basic concepts of trademark infringement and dilution, we begin with Hormel Foods and a clip from Muppet Treasure Island featuring, of course Miss Piggy and the Henson “Spa'am” character that launched the whole ridiculous litigation. [FN84] The Hormel case is a great vehicle to explore the basics of trademark law, and the policy rationales for trademark infringement and dilution.

Credit issues were historically crucial to the entertainment industry; analysts have noted that “Hollywood . . . has a highly formal attribution system that is thoroughly infused with legally enforceable rules for granting screen credit.” [FN85] As a practicing lawyer representing film producers in New York, it is difficult to recall a single feature film my old firm represented that did not have a credit misattribution claim. From the 1980s through 2004, the basis of credit claims was the misattribution doctrine based on section 43(a) of the Lanham Act. [FN86] This all changed with the advent of the Dastar case. [FN87] As Tom Bell has noted, “Dastar now negates almost any complaint that a law of the United States limits the misattribution of intellectual property.”

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[FN88] To explore ***778** the issue of product placement in film, and how product displays could constitute trademark infringement under section 43(a), I show a clip from the film Jerry McGuire that resulted in litigation by Reebok sneakers against Tristar Films. [FN89] To explore the misattribution doctrine pre-Dastar, I show a clip from the film Lawnmower Man, which faced trademark litigation under the misattribution doctrine of section 43(a) of the Lanham Act. [FN90] Then we explore what, if any, of the misattribution doctrine is left post-Dastar.

Continuing on, I use a hilarious clip of the ad at issue in the Snuggles/Battle Tanks case. [FN91] To explore the connection between trademark and copyright, we show a clip from the film Long Kiss Goodnight. That film and New Line Cinema faced charges of trademark infringement arising from the brief (blink and you miss it) display within the film of a clip on a television of a Three Stooges film. [FN92]

Issues regarding titles are also salient in the entertainment context. [FN93] To explore the issue of trademark and titles in the film context, I show a clip from the film Drop Dead Gorgeous which ended up in litigation when American Dairy Queen Corporation sued New Line for trademark infringement and dilution arising from New Line's selection of the title "Dairy Queens" for the film. [FN94] The scene from the film I show is one of a hilarious "talent show" contest that includes a female contestant singing Can't Take My Eyes Off You to a life-sized doll of Jesus Christ.

V. Right of Publicity Issues: Like a Prayer, MC Hammer, Rosa Parks, The Sandlot

Right of publicity issues frequently arise in the entertainment context, and are often asserted in connection with trademark infringement claims. The right ***779** of publicity "gives individuals claims against unauthorized commercial use of their identity." [FN95] I use visual images in PowerPoint, including those of Pamela Anderson, Madonna, MC Hammer, the Spice Girls, and Amy Fisher, the "Long Island Lolita." Pam Anderson, of course, was involved in a notorious right of publicity suit arising out of unauthorized posting of a sex video of Anderson and her then-boyfriend, Bret Michaels, a case that brings to light the "privacy" aspects of publicity rights. [FN96]

The image I use of Madonna shows her surrounded by burning crosses in her Like a Prayer video. This is used to illustrate the point that celebrities like Madonna can "cash in" on their fame through lucrative endorsement deals. [FN97] Publicity rights need justification and often come under harsh attack. [FN98] I use the image of Amy Fisher, the notorious "Long Island Lolita," to demonstrate the potential "dark side" of fame, and to show that society does not have an interest in incentives for all forms of fame, undercutting purely economic arguments for the right of publicity.

MC Hammer and the Spice Girls demonstrate that "over-exposure" can cause real harm to a celebrity's marketability, suggesting that there should be some protection of image, and providing a good point to compare and contrast the problem of celebrity over-exposure with that of trademark dilution. The Rosa Parks case represents the personality theory of the right of publicity, in contrast to an economic rights theory. Under personality theory, a person's image is "an extension of human personality, and therefore . . . essential to human dignity." [FN99] We discuss publicity rights in the Rosa Parks case, where the rap group Outkast was sued by Rosa Parks for the use of the title Rosa Parks in a hit Outkast song. [FN100] In the film context, we explore right of publicity issues by use of a case involving former Black Panther Bobby Seale's suit against a production company for the film Panther. [FN101] Finally, we explore ***780** the right of non-celebrities to publicity rights in the film context with a case involving the film The Sandlot. [FN102]

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Conclusion

When I am teaching Entertainment Law I often can't believe I'm getting paid well to spin records and play DVD clips while leading discussions of issues from the cover of People or the headlines of Entertainment Tonight. The cases never get old, there is always something new popping up in the news, and the students never go to sleep, as they sometimes are wont to do during discussions of the parol evidence rule or U.C.C. § 2-207 in Contracts. Using a clearance, litigation, and transaction approach through the lens of the five traditional entertainment industries has proven an effective way to teach students the core IP concepts that underlie much of the Entertainment Law curriculum. The extensive use of multimedia materials, including DVD or film clips, audio clips, and PowerPoint slides not only keeps the students awake, it helps them understand conceptually "what is Entertainment Law," a field so unique that it has been famously said that "there's no business like show business."

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[FN1]. See Robert Jarvis et al., Theater Law: Cases and Materials, at xvii (2004) (noting that student demand has fueled an explosion of courses focusing on entertainment law in recent decades).

[FN2]. My (limited) experience shows that Entertainment Law classes are frequently over-subscribed, often with a long waiting list. This has held true both at our law school and in Entertainment Law and related courses I have taught as a visiting professor at both University of San Diego Law School and Hofstra University Law School in New York.

[FN3]. The casebook was Paul C. Weiler, Entertainment, Media, and the Law: Text, Cases, Problems (2d ed. 2002).

[FN4]. In contrast, in the first year Contracts course, the Hadley case is still the gold standard for exploring consequential damages. See Hadley v. Baxendale, (1854) 156 Eng. Rep. 145 (Ex.). Hadley is a classic common law nineteenth century case on consequential damages and is presumably taught by virtually every law professor in the country. Parenthetically, Hadley lends itself to multimedia treatment: my coverage of Hadley in Contracts begins with playing the theme song from the movie Shaft, sung by the great soul-singer Isaac Hayes. The Shaft song is germane both because a mill shaft is central to the case, and moreover, as any Contracts professors can attest, in the pantheon of contract doctrine, "that Shaft is one bad mother ...."

[FN5]. By way of example, I worked as a consultant in anticipation of being an expert witness in a case involving a right of publicity claim against a major motion picture studio. The analytical focus of the case turned on the application of a case covered in the course arising out of the motion picture The Sandlot. Polydoros v. Twentieth Century Fox Film Corp., 67 Cal. Rptr. 2d 305 (1997).

[FN6]. Lawrence M. Friedman, Contract Law in America: A Social and Economic Case Study 24 (1965).

[FN7]. The subject matter of the entertainment industries almost perfectly complements the subject matter of copyright set forth in the Copyright Act, which applies to literary, musical, sound recording, motion picture, audiovisual, and dramatic and choreographic works. See Copyright Act of 1976, 17 U.S.C. § 102(a) (2000).

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[FN8]. See K.J. Greene, Motion Picture Copyright Infringement and the Presumption of Irreparable Harm: Toward a Reevaluation of the Standard for Preliminary Injunctive Relief, 31 Rutgers L.J. 173, 179 (1999) ("Four structural features characterize the motion picture industry: concentration, expense, risk, and complexity.").

[FN9]. See K.J. Greene, Clearance Issues From a Litigation Perspective: Intellectual Property Infringement and Motion Picture Liability, in 2 Counseling Clients in the Entertainment Industry 255, 255 (2001).

[FN10]. See, e.g., Camilla M. Jackson, "I've Got This Great Idea for a Movie!": A Comparison of the Laws in California and New York That Protect Idea Submissions, 21 Colum.-VLA J.L. & Arts 47, 48 (1996).

[FN11]. For an excellent analysis of the challenges to protecting ideas cobbled together from the "ad hoc application of various common law doctrines," see Arthur R. Miller, Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come, 119 Harv. L. Rev. 703, 709 (2006).

[FN12]. See 17 U.S.C. §§ 502, 504, 505.

[FN13]. Jackson, supra note 10, at 49.

[FN14]. See Copyright: Dramatic Works: Scripts, Pantomimes, and Choreography, http://www.copyright.gov/fls/fl119.html (last visited Jan. 15, 2008).

[FN15]. The Player (Avenue Pictures Prods. 1992).

[FN16]. Id.

[FN17]. See Buchwald v. Paramount Pictures Corp., 13 U.S.P.Q.2d 1497, 1501-07 (Cal. Super. 1990).

[FN18]. Id.at 1497-1501.

[FN19]. See Wrench LLC v. Taco Bell Corp., 256 F.3d 446, 449-52 (6th Cir. 2001).

[FN20]. See Taco Bell Is Ordered to Pay Up in Dog Fight, L.A. Times, June 5, 2003, at C3.

[FN21]. Murray v. Nat'l Broad. Co., Inc., 844 F.2d 988 (2d Cir. 1988).

[FN22]. See id. at 994.

[FN23]. Id. at 989.

[FN24]. Id. at 989, 990.

[FN25]. Id. at 990.

[FN26]. Murray, 944 F.2d at 990.

[FN27]. Id. at 991.

[FN28]. Id. at 993-94. The New York Court of Appeals subsequently softened the novelty requirement. Nadel v. Play-By-Play Toys & Novelties, Inc., 208 F.3d 368, 376 (2d Cir. 2000) (holding that the idea did not have to be novel to the world but only to the entity receiving the submission). Arguably, Nadel would not have changed the

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result in Murray.

[FN29]. Murray, 844 F.2d at 992-93.

[FN30]. E.g., Deborah A. Levine, The Cosby Show: Just Another Sitcom?, 9 Loy. Ent. L.J. 137, 145-51 (1989).

[FN31]. See Complaint, Stern v. Telepictures Prods., Inc., No. BC292018 (Cal. Super. Ct. Mar. 13, 2003) [hereinafter Complaint].

[FN32]. See id. at 5.

[FN33]. See Paul D. Colford, Howard Stern: King of All Media: The Unauthorized Biography (1996).

[FN34]. Complaint, supra note 31, at 2.

[FN35]. Id.

[FN36]. Id. at 2, 5-6.

[FN37]. Id. at 8.

[FN38]. See Viacom Drops a Lawsuit Against Fox, N.Y. Times, Sept. 8, 2001, at C5.

[FN39]. See Jeffrey Brabec & Todd Brabec, Music, Money, and Success: the Insider's Guide to Making Money in the Music Industry 168 (4th ed. 2004) (noting that average cost of film production has increased from $16 million per film in 1980 to $90 million in 2002).

[FN40]. 202 F.3d 1227 (9th Cir. 2000).

[FN41]. Id. at 1229-30.

[FN42]. Id. at 1230. Aalmuhammed did receive credit in the film as “Islamic Technical Consultant,” which as anyone associated with the film industry can attest is a hardly a prestigious credit. Id.

[FN43]. Id.

[FN44]. 820 F. Supp. 722 (S.D.N.Y. 1992).

[FN45]. Id. at 723.

[FN46]. See id. at 728-36.

[FN47]. 920 F. Supp. 62 (S.D.N.Y. 1996).

[FN48]. 12 Monkeys (Universal Pictures 1995).

[FN49]. Woods, 920 F. Supp. at 63-64.

[FN50]. Id. at 64.

[FN51]. Id.

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[FN52]. Id. at 64-65.

[FN53]. See Claudia Eller, Novelist Urges Court to Block Spielberg Film, L.A. Times, Nov. 17, 1997, at D1.

[FN54]. Woods, 920 F. Supp. at 65.

[FN55]. 987 F. Supp. 1222 (C.D. Cal. 1997).

[FN56]. Id. at 1226-32.

[FN57]. Id. at 1224.

[FN58]. Id. at 1233.

[FN59]. See Pamela Samuelson, Copyright and Freedom of Expression in Historical Perspective, 10 J. Intell. Prop. L. 319, 331 (2003).

[FN60]. See 17 U.S.C. § 106A. It has been noted that one of the problems of VARA is that it applies "only to a very narrow category of visual art ...." Rochelle Cooper Dreyfus & Roberta Rosenthal Kwall, Intellectual Property: Cases and Materials on Trademark, Copyright and Patent Law 356 (2d ed. 2004); see also John T. Cross, Reconciling the "Moral Rights" of Authors with the First Amendment Right of Free Speech, 1 Akron Intell. Prop. J. 185, 199-200 (2007) ("[M]any of the most economically important copyright works--books, poetry, films, sound recordings, musical compositions, and architecture--fall completely [outside] VARA's ambit.").

[FN61]. See generally Matthew C. Lucas, The De Minimis Dilemma: A Bedeviling Problem of Definitions and a New Proposal for a Notice Rule, 4 J. Tech. L. & Pol'y 2 (1999), available at http://grove.ufl.edu/~ techlaw/vol4/issue3/lucas.html.

[FN62]. Id.

[FN63]. Id.

[FN64]. See Sylvia Moreno, Studio Settles Suit Brought by Sculptor; Video to Carry Disclaimer; Film to be Altered in Future Showings, Wash. Post., Feb. 14, 1998, at C03.

[FN65]. See Anita Gates, A Misunderstood Artist, Counting the Idiots, N.Y. Times, Nov. 24, 1998, at E5.

[FN66]. On the Waterfront (Columbia Pictures Corp. 1954).

[FN67]. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

[FN68]. See Alice Randall, The Wind Done Gone (2001).

[FN69]. E.g., Merchant v. Levy, 92 F.3d 51, 56 (2d Cir. 1996) (denying joint ownership copyright infringement claim by member of the Teenagers based on applicable three-year copyright statute of limitations).

[FN70]. I use the district court's opinion, Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976), in the materials, which provides more detail than the appellate version.

[FN71]. See Dimmie v. Carey, 88 F. Supp. 2d 142, 143, 148 (S.D.N.Y. 2000) (dismissing copyright infringe-

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ment claim because of lack of proof of access).

[FN72]. See Three Boys Music Corp. v. Bolton, 212 F.3d 477, 480 (9th Cir. 2000).

[FN73]. Id.

[FN74]. Trial Story: Northside Partners v. Page and New Kids on the Block: New Kids in Court: Is Their Hit Song a Copy? (CourtTV broadcast Jan. 1993). The Trial Story segment has video excerpts of an actual copyright infringement trial in 1992. The segment is enormously informative in showing how to prove access at trial, and is also hilarious, as it shows the testimony of the New Kids themselves, who prove to be, shall we say, less than compelling witnesses in their own defense.

[FN75]. See James Brown: Most Sampled Man in the Biz, Rolling Stone: Rock & Roll Daily, http://www.rollingstone.com/rockdaily/index.php/2006/12/26/james-brown-most-sampled-man-in-the-biz/ (last visited Jan. 15, 2008).

[FN76]. See Newton v. Diamond, 349 F.3d 591, 593 (9th Cir. 2003).

[FN77]. See Fredrich N. Lim, Grey Tuesday Leads to Blue Monday? Digital Sampling of Sound Recordings After The Grey Album, 2004 J.L. Tech. & Pol'y 369, 370-73 (2004).

[FN78]. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991).

[FN79]. For an exploration of trademark issues in the context of entertainment properties, see K.J. Greene, Abusive Trademark Litigation and the Incredible Shrinking Confusion Doctrine--Trademark Abuse in the Context of Entertainment Media and Cyberspace, 27 Harv. J.L. & Pub. Pol'y 609 (2004).

[FN80]. See 15 U.S.C. § 1114(1).

[FN81]. Id. § 1125(a).

[FN82]. Id. § 1125(c).

[FN83]. Id. § 1125(d).

[FN84]. Hormel Foods Corp. v. Jim Henson Prods., 73 F.3d 497, 500-01 (2d Cir. 1996).

[FN85]. See Catherine Fisk, Credit Where It's Due: The Law and Norms of Attribution, 95 Geo. L. J. 49, 77 (2006).

[FN86]. Smith v. Montoro, 648 F.2d 602, 605 (9th Cir. 1981).

[FN87]. See Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 38 (2003). Interestingly, Justice Scalia's opinion in Dastar makes no reference whatsoever to the twenty-plus years of precedent on credit misattribution under the Lanham-Act based Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981), and its progeny.

[FN88]. Tom W. Bell, Misunderestimating Dastar: How the Supreme Court Unwittingly Revolutionized Copyright Preemption, 65 Md. L. Rev. 206, 245 (2006). For a thoughtful critique of the Dastar decision, see Laura A. Heymann, Authorship and Trademark Law, in 3 Intellectual Property and Information Wealth: Issues and Prac-

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tices in the Digital Age 191, 205-07 (Peter K. Yu ed., 2007).

[FN89]. Stuart Elliott, Reebok's Suit over Jerry Maguire Shows Risks of Product Placement, N.Y. Times, February 7, 1997, at D1.

[FN90]. King v. Innovation Books, 976 F.2d 824, 826-28 (2d Cir. 1992).

[FN91]. See SNUGGLE Bear Bites Back; Crushes BattleTanx, http:// find-articles.com/p/articles/mi_m0EIN/is_1999_Nov_10/ai_57486584 (last visited Jan. 15, 2008). The ad shows an Army battle tank firing artillery at a Snuggles look-alike, which runs screaming with its arm on fire. In a second ad, the tank completely flattens the Snuggles figure.

[FN92]. Comedy III Prods., Inc. v. New Line Cinema, 200 F.3d 593, 595, 596 (9th Cir. 2000) (dismissing claim of trademark infringement against film studio because the Three Stooges' film clip displayed within New Line's film was not an enforceable trademark).

[FN93]. As a general rule, the Patent and Trademark Office will not register the title of a single expressive work. However, titles in a single work are protectable as a trademark if they have acquired secondary meaning, that is, an appreciable number of consumers would associate the mark with a particular source. See, e.g., Comment, Brooke J. Egan, Lanham Act Protection for Titles and the Pursuit of Secondary Meaning, 75 Tul. L. Rev. 1777, 1796-97 (2001).

[FN94]. Am. Dairy Queen Corp. v. New Line Prods. Inc., 35 F. Supp. 2d 727 (D. Minn. 1998).

[FN95]. Mark P. McKenna, The Right of Publicity and Autonomous Self-Definition, 67 U. Pitt. L. Rev. 225, 232 (2005).

[FN96]. Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823, 828 (C.D. Cal. 1998).

[FN97]. Carla Freccero, Our Lady of MTV: Madonna's “Like a Prayer,” 19 boundary 163, 165 (1992). Pepsi Corporation initially entered a $5 million endorsement deal with Madonna to promote Pepsi products in what was to be the “Like a Prayer” tour. Id. However, the furor of over Madonna's video to Like a Prayer resulted in Pepsi scuttling the deal and ending its association with Madonna. Id. at 173.

[FN98]. See, e.g., Schuyler M. Moore, Putting the Brakes on the Right of Publicity, 9 UCLA Ent. L. Rev. 45, 46 (2001).

[FN99]. Roberta Rosenthal Kwall, Fame, 73 Ind. L.J. 1, 39 (1997); see also F. Jay Dougherty, All the World's Not a Stooge: The “Transformativeness” Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art, 27 Colum. J. L. & Arts 1, 62-63 (2003).

[FN100]. See Parks v. LaFace Records, 329 F.3d 437, 441 (6th Cir. 2003).

[FN101]. See Seale v. Gramercy Pictures, 949 F. Supp. 331, 332-33 (E.D. Pa. 1996).

[FN102]. See Polydoros v. Twentieth Century Fox Film Corp., 67 Cal. Rptr. 2d 305, 306-07 (Cal. Ct. App. 1997).

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