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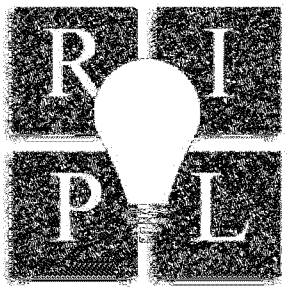

TRADEMARKS, IDENTITY, AND JUSTICE

RITA HEIMES

ABSTRACT

Intellectual property scholars have written extensively against expanding the scope of intellectual property laws, using social justice and distributive justice principles to support their arguments. A typical argument attacks broad adoption and enforcement of copyright laws that prevent access to information and therefore knowledge, or broad patent protection that reduces access to medicines and other important technologies. In recent years, a few scholars have begun to suggest that certain areas of intellectual property law—primarily copyright—may play a positive role in social justice. These arguments are founded on views of social and distributive justice that consider personal empowerment and freedom to pursue opportunity as viable goals. Very little has been written, however, on the role of trademark law and publicity rights on development and social justice. Several factors support examining these issues. Minorities in the United States are far less likely than non-minorities to seek trademark protection, placing the role of attorneys in assisting underrepresented populations with intellectual property acquisition into question. Additionally, social media has made overnight celebrity and personal branding a real possibility for many individuals, regardless of their socioeconomic status. This article explores the role of trademark and identity law in promoting self-sufficiency and self-reliance among underserved populations. It examines both areas of law through the lens of social justice and personal empowerment. It concludes that a basis in social justice for assisting individuals with acquiring and protecting trademark and identity rights may overcome the broad societal concerns about over-protection of intellectual property rights.

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INTRODUCTION

A Personal Branding Story

In 2010, Kevin Antoine Dodson, a resident of a housing project in Hunstville, Alabama, agreed to be interviewed by the local television news after an intruder entered the home he shared with his sister and her children.[1] The news broadcasted quickly and went viral online, as Mr. Dodson's look, style, and unique manner of speaking attracted the attention of millions of people worldwide.[2] Shortly thereafter, musicians and humorists calling themselves The Gregory Brothers created a song known as the "Bed Intruder Song" with an accompanying music video using clips from the television broadcast.[3] The song was one of the most viewed videos on YouTube, quickly became a top iTunes download, and even rose to the *Billboard* magazine's top 100 list.[4]

According to The Gregory Brothers, they agreed to share some of the proceeds from their song's commercial success with Mr. Dodson.[5] Mr. Dodson obviously acquired instant fame and notoriety.[6] He set up his own website to receive donations and garner additional publicity, and as a result has purportedly raised enough money to move his family to a better house in a safer neighborhood.[7]

The use—some might say exploitation—of Mr. Dodson's image and voice, turning his personal name into an overnight household sensation, invokes issues of trademark and identity law. As discussed *infra*, it is possible for an individual to acquire a trademark in his own name provided the name itself is associated with commercial activities (goods or services). Recent famous examples involve football players (e.g. Chad Ochocinco)[8] or politicians (Sarah Palin).[9] A person's image, voice,

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[1] *See, e.g.*, Antoine Dodson, *Antoine Dodson Bed Intruder Song*, ANTOINEDODSON.NET (Aug. 1, 2010), http://www.antoinedodson.net/.

[2] *Id.*

[3] Schmoyoho, *Auto-Tune the News: Bed Intruder Song!!! (now on iTunes)*, YOUTUBE (July 31, 2010), http://www.youtube.com/watch?v=hMtZfW2z9dw&list=SL&feature=sh_e_top.

[4] *See* Robert Mackey, *'Bed Intruder' Rant Earns Family a New Home*, N.Y. TIMES.COM (August 19, 2010), http://thelede.blogs.nytimes.com/2010/08/19/bed-intruder-rant-buys-family-a-new-home/.

[5] *Id.*

[6] *See* Dodson, *supra* note 1 (explaining that Antoine Dodson performed the "Bed Intruder" song at the BET Awards).

[7] *Id.*

[8] *See Official Website of Chad Ochocinco*, http://ochocinco.com. (last visited Oct. 16, 2011).

likeness, or other characteristics—his "identity" in a persona sense—are also potentially subject to commodification, as will be explored more fully in Part I.

Some were offended by the edited images and sounds of Mr. Dodson, who is African-American, by white musicians who profited by promoting a stereotype of an undereducated person living in poverty in the projects.[10] Others continue to support Mr. Dodson's celebrity persona, presumably with his encouragement and consent and to his personal financial advantage.[11]

As individuals' names and likenesses become easier to commodify and commercialize, potentially to the financial advantage of the individual, what social and distributive justice issues arise relating to the trademarks and identity rights involved? How should these issues shape the role of legal service providers assisting individuals with acquiring and protecting these rights? Is there a case to be made that economic empowerment is a form of freedom, and assisting with that empowerment process through the acquisition and enforcement of identity and trademark rights is a form of justice? This article explores these issues.

Framing Intellectual Property Social Justice Issues Globally

As "western" intellectual property regimes—including laws creating patent, copyright, and trademark interests—are adopted by developing nations across the globe,[12] scholars have questioned whether the foundations for these forms of property rights in fact result in the economic development outcomes they purport to encourage.[13] They have also questioned whether the acquisition and enforcement of intellectual property rights, particularly patents and copyrights, does more to harm individuals—as they seek access to essential medicines or knowledge, for example—than to promote their economic independence.[14]

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[9] SARAH PALIN, Registration No. 4,005,353.

[10] *See* Mackey, *supra* note 4.

[11] *Id.*

[12] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1869 U.N.T.S. 299 [hereinafter TRIPS], *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf. Intellectual property regimes, including patent, copyright and trademark law, have become more harmonized internationally following multilateral adoption of the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS"), a result of the 1994 Uruguay Round of trade negotiations.

[13] *See, e.g.,* Rex R. Perschbacher, *Welcoming Remarks: Intellectual Property and Social Justice,* 40 U.C. DAVIS L. REV. 559, 561 (2007).

[14] *See generally* Anupam Chander & Madhavi Sunder, *Forward: Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice,* 40 U.C. Davis L. Rev. 563, 567–68 (2007) (discussing competing views of ownership rights as it related to intellectual property); *see also* Mary W. S. Wong, *Toward an Alternative Normative Framework for Copyright: From Private Property to Human Rights,* 26 CARDOZO ARTS & ENT. L.J. 775, 830 (2009) (discussing the commonly-held belief that the current international IP regime espouses a utilitarian justification, which favors IP producers in developed Western countries, and should instead incorporate "self-actualization, freedom of choice, and human development" objectives); William W. Fisher and Talha Syed, *Global Justice in Healthcare: Developing Drugs for the Developing World,* 40 U.C. DAVIS L. REV. 581, 639–40 (2007) (noting that the pharmaceutical industry justifies drug patents on both grounds, arguing that the social welfare generated by new medicines outweighs the social welfare costs associated

In recent years, a few scholars have begun to suggest that certain areas of intellectual property law—primarily copyright—may play a positive role in social justice. They contend that selecting different rationales for intellectual property law—apart from strictly utilitarian ones—may assist with social utility and social justice outcomes.[15] They also argue that there is a role for intellectual property acquisition to help individuals achieve economic independence and personal empowerment.[16]

Little has been written on the role of trademark law on development and social justice, however, and even less on the role of identity protection as a mechanism for social justice and personal freedom. Several factors support examining these issues now. First, minorities in the United States are much less likely than non-minorities to seek trademark protection from the United States Patent and Trademark Office ("USPTO").[17] According to the USPTO, "minority owned businesses are seeking patents at rates almost ten times lower than their non-minority counterparts" and are "four times less likely to seek trademarks."[18] These statistics demonstrate that "some minority groups are not as likely to participate in the U.S. innovation system."[19] Minorities may be considered among the marginalized citizens worthy of consideration for targeted legal services as a form of social and distributive justice in the field of intellectual property.[20]

Partially in direct response to efforts by the USPTO, lawyers are beginning to offer pro bono services to intellectual property clients, and intellectual property clinics are emerging at law schools nationwide, indicating that the American legal community may consider offering low-cost or free counseling in intellectual property law, including trademark law, to be justified by social responsibility.[21] The right to prevent commercial exploitation of one's likeness and identity, a property interest

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with correspondingly high prices for drugs); JAMES BOYLE, SHAMAN, SOFTWARE AND SPLEENS (Harvard University Press 1996) (discussing concerns about copyright law fencing in information and knowledge on a global scale).

[15] *See* Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 313–19 (2006).

[16] *See* Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 99 (2009).

[17] David J. Kappos, Under Sec'y of Commerce for Intellectual Prop. & Dir. of the U.S. Pat. & Trademark Office, *Remarks as Prepared for the 2010 National Minority Enterprise Development Week Conference* (Aug. 26, 2010), *available at* http://www.uspto.gov/news/speeches/2010/Kappos_National_Minority_Enterprise.jsp.

[18] *Id.* (noting, however, that these statistics did not apply to companies owned by people identifying themselves as Asian-American).

[19] *Id.*

[20] *See* Mtima, *supra* note 16, at 122–23 (explaining that the "the tragic history of African-American and other marginalized members of society being systematically defrauded out of the commercial profits derived from their creative genius, is widely lamented as a quintessential example of social injustice within the intellectual property regime").

[21] *See, e.g.*, John Calvert, *Pro Bono Pilot Program in Minn. Helps Independent Inventors Gain Patent Counsel,* 2 INVENTORS EYE, no. 4, Aug-Sept. 2011, *available at* http://www.uspto.gov/inventors/independent/eye/201108/probono.jsp (discussing how United States Patent and Trademark Office ("USPTO") helped launch a "low bono" pilot program in Minneapolis to encourage intellectual property attorneys to assist independent inventors who are at 300 percent of the poverty level or below with patent advice and prosecution).

closely related to and sometimes grounded in trademark law, also merits attention as an area rife with commercial potential for the individual and yet equally vulnerable to misuse. This article explores the role of trademark and identity law in promoting self-sufficiency and self-reliance among underserved populations, and examines both areas of law through the lens of social justice and personal empowerment.

Part I explains the simple basics of trademark law and right of publicity legal doctrine, and how the two have merged in certain contexts. Part II examines social justice themes for trademarks and identity rights as applied not to society at large but instead to the "marginalized" individual. Part III explores the economic and philosophical arguments against the expansion of intellectual property regimes, and in favor of narrow interpretation of IP interests at the individual level, and focuses on how those arguments play out in trademark and identity law. Part IV concludes by suggesting that while social justice concerns are clearly challenged by a broadly-defined and enforced trademark system, which allows commodification of identity, they may be correspondingly served when individuals use these rights for self-expression and economic empowerment.

I. TRADEMARKS AND IDENTITY AS PROPERTY

A. An Introduction to Trademarks

Trademarks surround us. Commonly referred to as "brand names," trademarks adorn buildings, billboards, signs, websites, clothing, human flesh– virtually anything that can convey information.[22] They are symbols—if not drivers—of the age of consumption in which we live.

Trademarks are governed by the Federal Lanham Act, which defines a trademark as "any word, name, symbol, or device, or any combination thereof used by a person . . . to identify and distinguish his or her goods from those manufactured or sold by others and to indicate the source of the goods."[23] Even colors, sounds, smells, product packaging, or other devices can function as trademarks.[24]

To qualify as a trademark, the symbol in question must be sufficiently distinctive that it can function to identify and distinguish one owner's goods from those of another.[25] Marks that are not distinctive—usually because they merely

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[22] *See, e.g.*, JA Apparel Corp., v. Abboud, 682 F. Supp. 2d 294, 307 (S.D.N.Y. 2010) (equating brand names and trademarks).

[23] 15 U.S.C. § 1127 (2006). A service mark is defined in the same way but refers to services. *Id.* For purposes of this article, both types of marks are referred to as trademarks.

[24] *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 172–73 (1995) (acknowledging that color can serve as a trademark and noting that when Congress reenacted the Lanham Act in 1988 it intentionally retained the terms "symbol or device" so as not to preclude the registration of colors, shapes, sounds, or configurations where they function as trademarks"); *see also* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 6:6 (4th ed. 2011) [hereinafter MCCARTHY] (listing various source identifiers that can qualify as trademarks in comparison to patents and copyrights).

[25] 1 MCCARTHY, *supra* note 24, § 3:1.

describe the quality or nature of goods in question, the goods' geographic origin, or the last name of the goods' producer[26]—are not inherently distinctive and will fail to serve as trademarks unless and until they "acquire" source-identifying distinctiveness.[27]

In the United States, trademarks are recognized by and protected under common law, arising out of the broader law of unfair competition.[28] Their function as a property right begins with their use on and in connection with the sale of goods and services, and not from a formal registration process.[29] The rights may last indefinitely, so long as the marks are used consistently and exclusively in connection with the goods or services.[30] Nonetheless, registration with the USPTO can confer valuable rights and advantages, including nationwide protection for the mark, assistance from the United States Customs Service in preventing importation of counterfeit goods, and incontestability after five years of registration.[31] Registration remains in force for ten years,[32] but may be renewed repeatedly.[33]

The test for trademark infringement is whether a competitor's use of a mark "is likely to cause consumer confusion."[34] This test highlights one key feature of trademark law that is not found in other forms of intellectual property law like copyright and patent law: trademark law is designed to protect not just private property interests but consumers' interests as well.[35] Economists William Landes and Richard Posner have explained how trademark law creates incentives not necessarily to generate new ideas and expression, but instead to ensure consistent product and service quality on which consumers can rely.[36] Strong and reliable trademarks lower consumer search costs by allowing "the consumer to say to himself,

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[26] *See* 15 U.S.C. § 1052(e). Under the Lanham Act, a trademark shall not be refused registration unless it:

> [c]onsists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them, (2) when used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin may be registrable under section 1054, (3) when used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of them, (4) is primarily merely a surname, or (5) comprises any matter that, as a whole, is functional.

Id.

[27] *See, e.g.*, Playtex Prods., Inc. v. Georgia-Pacific, Corp., 390 F.3d 158, 163 (2d Cir. 2004) (explaining that descriptive words can acquire "secondary meaning," or acquire "distinctiveness," once the consuming public identifies the mark as a designator of the mark owner's goods or services).

[28] *See* Hanover Star Mill Co. v. Metcalf, 240 U.S. 403, 413 (1916).

[29] 3 MCCARTHY, *supra* note 24, § 19:8.

[30] 1 MCCARTHY, *supra* note 24, § 6:6 (explaining that a trademark's lifetime under common law is "as long as properly used as a mark").

[31] 15 U.S.C. § 1065.

[32] *Id.* § 1058.

[33] *Id.* § 1059.

[34] *Id.* § 1114.

[35] *Id.*

[36] WILLIAM A. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 168 (Belknap Press of Harvard Univ. Press. 2003).

'I need not investigate the attributes of the brand I am about to purchase because the trademark is a shorthand way of telling me that the attributes are the same as that of the brand I enjoyed earlier.'"[37]

Trademarks differ from copyright and patent law in other meaningful ways as well. Copyright and patent laws in the United States owe their origin to the so-called "Intellectual Property Clause" of the United States Constitution,[38] and are fundamentally based upon utilitarian theories incentivizing the creation of arts and sciences for the use and benefit of society. Copyright and patent law both create property rights to capture information that is subject to the public goods problem: Information is nonrivalrous and nonexcludable—once an idea is shared it cannot be recovered, and further may be possessed by many simultaneously without diminishing the enjoyment by any one individual.[39] If Jill, for example, were to create a novel invention or write an inventive novel, Jack could make and sell the same technology or pass off the novel as his own without patents and copyrights to protect Jill's creative efforts. To encourage creation and publication, therefore, patent and copyright statutes define property interests in inventions and expressions that would otherwise be instantly available for all to share without paying the appropriate rent.[40]

Trademarks are not public goods.[41] They exist as property rights only to designate a particular product and (generally speaking) cease to be trademarks once the goods are no longer for sale.[42] Indeed, trademarks are sometimes criticized as unworthy of "intellectual property" status because "they do not protect the creation of additional knowledge; rather they identify the origin of a product."[43] As Landes and Posner admit, "we do not need trademark protection to be sure of having enough words, though we may need patent protection to be sure of having enough inventions or copyright protection to be sure of having enough books, movies and musical compositions."[44]

Nonetheless, trademarks serve important economic and social functions beyond consumer protection and product-quality assurance. The presence of a trademark

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[37] *Id.* at 167.

[38] U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

[39] *See, e.g.*, John A. Rothchild, *The Social Cost of Technological Protection Measures,* 34 FLA. ST. U.L. REV. 1181, 1184 n.5 (providing a definition for a nonexcludable good and various views on what makes a good a "public good").

[40] *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE & SPLEENS xi (Harvard Univ. Press 1996) ("In market terms, information has significant 'public good' qualities; it is often expensive to create or generate, but cheap to copy. Economic theory tells us that 'public goods' will be underproduced because there will be too little incentive to create them.").

[41] LANDES & POSNER, *supra* note 36, at 172.

[42] *Id.*

[43] KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 48 (Inst. for Int'l Econ., 2000) (defending trademarks as having social value). Although Maskus questions strong patent and copyright regimes as appropriate for developing economies, he favors strong trademark laws, which reduce consumer search costs and encourage firms to improve product quality "in order not to erode the value of the marks." *Id.* at 48.

[44] LANDES & POSNER, *supra* note 36, at 171.

law framework in developing nations can provide, again from the view of economics, "incentives to develop brand recognition for domestically produced high-quality crafts, clothing and foods, among other goods and services."[45] A frequently cited example is that of a breed of trademarks known as geographic indications, discussed more fully in Part III. Geographic indications are a subset of certification marks that are applied to goods produced in a particular geographic region, such as agricultural goods, industrial products and handicrafts that are uniquely identified with a people or place.[46] Because, at least in the United States, trademark protection is associated with use of the mark as a designation of source for goods or services, their existence indicates commercial activity and thus entrepreneurship.[47]

B. The Modern Expansion of Trademark Rights

The trademark rights commonly accepted today are far greater than at early common law. This section first explains that the modern expansion of trademark law is to promote the private property side of the dual property/consumer-protection function of trademarks. Next, this section discusses recent developments in United States trademark law in that it recognizes enhanced property interests in trademarks. Finally, this section describes how the right of privacy tort known as the right of publicity has grown to overlap with federal trademark law.

1. Dilution and Famous Marks

Long ago, a trademark owner could sue for infringement only if the defendant was a direct competitor actually passing off (or "palming off") his goods for those of the plaintiff.[48] The rights matched the nature of commerce at the time, when individual manufacturers of goods were often known personally to their customers.[49] In a pre-industrial economy, "people were personally acquainted with the

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[45] MASKUS, *supra* note 43, at 179.

[46] *See, e.g.*, Bernard O'Connor, *Sui Generis Protection of Geographic Indications*, 9 DRAKE J. AGRIC. L. 359, 367–68 (2004) (internal citations omitted).

> Examples of industrial protected names are Kanchipuram silks and Kolhapuri Chappal in India, Hereke silk and wool hand-made carpets, Bergama hand-made carpets, Erzincan copper handicrafts in Turkey, Jablonecka bizuterie (Jablonec Jewellery), Cesky kristal (Bohemia Crystal), Vamberska krajka in the Czech Republic, Silk in Thailand, 'Gzhel,' 'Khokhloma,' 'Vologodskoe Kruzhevo,' 'Zhostovo,' and 'Pavlo Posad Shawls' in Russia.

Id.

[47] 15 U.S.C. § 1114 (2006).

[48] Gerard N. Magliocca, *From Ashes to Fire: Trademark and Copyright in Transition*, 82 N.C.L. REV. 1009, 1014–15 (2004) (discussing the elements of a common law cause of action for trademark infringement, which required proof that the defendant not only made the same goods as the plaintiff but also successfully diverted sales by representing that his goods were the plaintiff's; likelihood of consumer confusion was not enough).

[49] *Id.* at 1015.

manufacturers of their products. They were the proverbial butcher, baker, and candlestick maker who lived in the neighborhood."[50]

In a post-industrial, information-driven economy, trademarks have acquired major significance and their scope as property rights have correspondingly expanded.[51] Trademarks may be enforced against non-competitors on the basis that another's use of a similar (not necessarily identical) mark on related (but not necessarily the same) goods or services would likely cause consumer confusion.[52] Several courts have added a factor to the infringement analysis that considers whether "either party may expand his business to compete with the other."[53] The USPTO also has a practice of rejecting applications on the grounds that the mark in the application is too similar to a registered mark used on "complementary" goods,[54] further expanding the registered mark owner's rights through the USPTO's role in preventing consumer confusion.

Even the likelihood of consumer confusion is no longer a required element for so-called "famous" trademarks to have supreme property value.[55] The Federal Trademark Dilution Act of 1995 ("FTDA") expanded the scope of rights granted to marks that qualify as "famous" by permitting their owners to prevent uses of the mark that may dilute the distinctiveness of the brand.[56] Under the FTDA, the owner of a "famous"[57] trademark may enjoin anyone who "commences use of a mark . . . in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury."[58] Unlike traditional trademark infringement law, trademark dilution law is not founded on common law and is not "motivated by an interest to protect consumers."[59]

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[50] *Id.*

[51] *See generally* KEITH E. MASKUS, INTELLECTUAL PROPERTY AND DEVELOPMENT (Carsten Fink & Keith E. Maskus eds., 2005) (exploring the development of intellectual property rights, including trademarks).

[52] *See* 15 U.S.C. § 1114.

[53] AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 354 (9th Cir. 1979); *see* Champion Golf Club Inc. v. The Champions Golf Club, Inc., 78 F.3d 1111, 1121–22 (6th Cir. 1996) (finding that a positive finding will weigh in favor of likelihood of confusion, whereas a negative finding has no effect on the analysis); Fisons Horticulture, Inc. v. Vigoro Indus., Inc., 30 F.3d 466, 480–81 (3d Cir. 1994) (differentiating whether a consumer who purchased plaintiff's peat moss could reasonably assume it had expanded its product line to include fertilizer).

[54] *See, e.g.*, In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 1567–68 (Fed. Cir. 1984) (finding MARTIN'S could not be used by different parties on bread and on cheese products because of "an extensive pattern of complementary interests: the channels of trade, the types of stores, the commonality of purchasers, and the conjoint use").

[55] *See, e.g.*, Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 429 (2003) (explaining the removal of the likelihood of confusion requirement for famous marks).

[56] *See* 15 U.S.C. § 1125(c).

[57] *Id.* § 1125(c)(2) (defining a "famous" mark as one "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner" and provides several factors for courts to consider).

[58] *Id.* § 1125(c)(1).

[59] *See Moseley*, 537 U.S. at 429.

2. Identity Law: Publicity Rights and Section 43 of the Lanham Act

Another emerging form of property right tied exclusively to the individual, and requiring no formalities for acquisition, is of the right of publicity. Property interests in one's identity may be enforced through trademark law or the common law right of publicity.[60] Much of the case law developing identity as property stems from claims brought by entertainment and sports celebrities protecting the value of their image and brand from claims of misuse.[61] In most cases, the celebrities have already developed commercial value of their likenesses through their success in sports or entertainment and may even have endorsed other products or services.[62] Yet, as the Antoine Dodson example illustrates, opportunities to exploit or prevent exploitation of one's identity may affect those who are not already celebrities before their identity was exploited.[63] Generally, while only the wealthy can afford to litigate publicity claims, rights of publicity as a legal matter are not necessarily exclusive to those with pre-existing celebrity status.[64]

Section 43(a) of the Lanham Act, typically invoked for false advertising claims, may support a publicity-like claim if a plaintiff can establish that consumers are likely to be deceived or mislead into believing an individual endorses, sponsors, or approves of another's product or service.[65] Courts have allowed celebrities to sue under Section 43(a) to "vindicate property rights in their identities against allegedly misleading commercial use by others."[66] The false advertising provision applies to

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[60] *See, e.g.*, Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 387 n.10 (1999) (noting that litigation has been based on common law rights of publicity); *see also* PALIN, *supra* note 9 (exemplifying identity protection through trademark).

[61] *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1097 (9th Cir. 1992) (alleging false endorsement under the Lanham Act and misappropriation under California Law voice when famous singer's voice was imitated in a radio commercial).

[62] *See, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460, 463–64 (9th Cir. 1988) (noting that the defendant would not have even sought a sound-alike if their target voice, the voice of Plaintiff Bette Midler, did not have value to them).

[63] *See* Dodson, *supra* note 1.

[64] J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture—The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 134 (1995) ("The right of publicity protects everyone–both celebrities and non-celebrities. Of course, most of the case law concerns celebrities because usually, only a celebrity's right of publicity is worth enough to justify expensive litigation and appeals."); *see* Haemmerli, *supra* note 60, at 387 n.10 ("Although statutory and common law publicity rights generally apply to all, publicity rights, as a practical matter, usually concern celebrities.").

[65] Parks v. LaFace Records, 329 F.3d 437, 445 (6th Cir. 2003). Section 43(a) provides:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association or such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id.

[66] *Id.*

celebrities "because they possess an economic interest in their identities akin to that of a traditional trademark holder."[67] To prevail under Section 43(a), a plaintiff must show that consumers are likely to "believe that the products or services offered by the parties are affiliated in some way," or that the plaintiff is affiliated with, sponsors, or approves of the defendant's goods or services.[68]

Publicity claims may also arise out of state common law (as codified in the Restatement of Torts),[69] or state statutes like California Civil Code Section 3344[70] or New York's Civil Rights Law.[71] The Lanham Act has generally proved adequate for many celebrity plaintiffs, however, and there have been numerous calls for the federal trademark statute to be amended to incorporate publicity rights more explicitly.[72]

Under some circumstances, unauthorized use of names, alone, has given rise to successful Section 43(a) and publicity rights claims.[73] For example, basketball legend Kareem Abdul-Jabbar successfully sued General Motors Corporation ("GMC") following GMC's use in a television advertisement of Abdul-Jabbar's birth name, Ferdinand Lewis ("Lew") Alcindor, together with statistics from Alcindor's college basketball career at the University of California Los Angeles.[74] Similarly, civil rights

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[67] *Id.*

[68] *Id.* at 446 (internal quotation omitted).

[69] *See* RESTATEMENT (SECOND) TORTS, § 652(C) (1977) ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.").

[70] *See, e.g.*, White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) (holding that plaintiff successfully stated a cause of action under common law but not under California Civil Code Section 3344 where the *likeness* in question was robot impersonating celebrity).

> When a Samsung advertisement depicted a robot wearing a white dress and blonde wig turning letters as if in a game show, Vanna White prevailed in an action against Samsung under the Lanham Act, the common law right of publicity, and California Civil Code Section 3344, which provides, in pertinent part: "[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, . . . for purposes of advertising or selling, . . . without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof."

Id. In the case of California's statute, courts may find violations of common law, the Lanham Act, or section 3344, but often not all three at once. *Id.*; *see also* Midler v. Ford Motor Co., 849 F.2d 460, 463–64 (9th Cir. 1988) (holding common law, but not statutory, cause of action was applicable to appropriation of famous singer's voice by a voice-impersonator).

[71] *See, e.g.*, Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 617 (S.D.N.Y. 1985) (illustrating how actor Woody Allen successfully sued under Lanham Act, but failed in his claim based on sections 50 and 51 of the New York Civil Rights Law after a movie rental business used a celebrity look-alike bearing Allen's resemblance in an advertisement).

[72] *See, e.g.*, Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity*, 94 TRADEMARK REP. 1202, 1208–11 (2004) (summarizing efforts by the International Trademark Association and the American Bar Association to urge adoption of a federal right of publicity statute).

[73] *See, e.g.*, Abdul-Jabbar v. Gen. Motors Corp., 75 F.3d 1391, 1394–95 (9th Cir. 1996).

[74] *Id.* at 1393. This case involved a GMC television commercial that aired during 1993 NCAA men's basketball tournament in which "disembodied voice asks, "How 'bout some trivia?" . . . followed by the appearance of a screen bearing the printed words, "You're Talking to the Champ." *Id.* The voice then asks, "Who holds the record for being voted the most outstanding

icon Rosa Parks enjoined the use of her name as the title of a song by hip-hop music artists Outkast and their record producer, LaFace Records.[75]

Trademark law and common law publicity claims also may apply to misuse of "likenesses" whether look-alike or sound-alike.[76] For instance, famous actor Woody Allen prevailed under the Lanham Act against a video rental company that used a celebrity look-alike in its advertising.[77] Singer Tom Waits, resolutely unwilling to lease his name or voice for commercial purposes,[78] recovered damages from Frito-Lay, Inc. when it imitated his gravelly-sounding voice in a radio commercial for Doritos brand corn chips.[79] Bette Midler, another award-winning singer, successfully sued Ford Motor Company and its advertising agency under common law rights of publicity when the court found the commercial use of a voice imitating Midler's appropriated her "identity."[80] Similarly, Vanna White, the hostess of the television game show Wheel of Fortune, did not see the humor in Samsung Electronics' use in a print advertisement of a robot dressed in a wig and dress, turning large letters.[81] The Ninth Circuit reversed a grant of summary judgment on her right of publicity and Lanham Act claims, finding White had raised issues of fact regarding appropriation of her identity and likelihood of consumer confusion regarding her apparent endorsement of Samsung's products.[82]

The relevance of protecting identity from misuse is heightened exponentially by technological advancements in digital communication. Images can be copied from one location, edited, and reposted to another in myriad new ways—some flattering but many not—by anonymous Internet users generally beyond the reach of the law.[83]

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player of this tournament?" *Id.* In the screen appear the printed words, "Lew Alcindor, UCLA, '67, '68, '69." *Id.*

[75] Parks v. LaFace Records, 329 F.3d 437, 453–54 (6th Cir. 2003). This case involved the use of the Civil Rights activist, Rosa Parks, name as the title for a song. *Id.* The court explained that the song's lyrics "contain[ed] absolutely nothing that could conceivably, by any stretch of the imagination, be considered, explicitly or implicitly, a reference to courage, to sacrifice, to the civil rights movement or to any other quality with which Rosa Parks is identified." *Id.* The court further explained that the song would likely be found as "a flagrant deception on the public regarding the actual content of the song and the creation of an impression that Rosa Parks . . . had . . . approved or sponsored the use of her name." *Id.*

[76] *See Allen*, 610 F. Supp. at 616.

[77] *Id.* at 632.

[78] Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1097 (9th Cir. 1992). Tom Waits had a policy, which he had maintained for over ten years, to not do commercials. In fact, he had rejected numerous lucrative offers to endorse major products. Importantly, Waits' policy was a public one: in magazine, radio, and newspaper interviews he had expressed his philosophy that "musical artists should not do commercials because it detracts from their artistic integrity."

[79] *Id.*

[80] *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) ("Why did the defendants . . . studiously acquire the services of a sound-alike and instruct her to imitate Midler if Midler's voice was not of value to them? What they sought was an attribute of Midler's identity.").

[81] *See* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1992).

[82] *Id.* at 1401 (finding that "a reasonable jury, viewing Samsung's robot ad as part of a series with the same theme, could an intent to persuade consumers that celebrity Vanna White . . . was endorsing Samsung products.").

[83] *See*, Haemmerli, *supra* note 60, at 389 n.21.

> According to Wired News, 'virtual kidnapping' is now a 'hot issue' involving the purloining of individuals' likenesses with the possibility of their appearing on the

One of the foundations of the right to privacy—the famous Samuel Warren and Louis Brandeis article by that title—was inspired in part by one author's indignation that the "recent inventions" of instantaneous photographs and newspaper enterprises allowed for publication of private facts.[84] Today, the widespread accessibility and low publishing costs associated with the Internet have encouraged calls for enhancement in privacy and publicity laws to better protect the identity of private individuals, and not just celebrities.[85]

II. INTELLECTUAL PROPERTY AND SOCIAL JUSTICE THEMES: DEVELOPMENT ECONOMICS AND PERSONAL EMPOWERMENT

With the information age came direct and rapid growth of intellectual property law as a method of defining and controlling major business assets.[86] Although intellectual property law has changed and expanded repeatedly over the past century, the commodification of information, ideas and even identity has grown vastly in the so-called information age.[87] In response to the growth of electronic and global commerce, intellectual property regimes have expanded in geography and in scope. Scholars have voiced concern that wealthy property owners in the form of multinational corporate entities will encase valuable goods and knowledge assets in strong property interests, enforced by powerful governments and over-reaching property laws, and thereby deprive individuals (and poor people in particular) of such things as life-saving medicines, or life-altering knowledge and information.[88]

This section explores those concerns as they are leveled against intellectual property rights, including trademarks.

> Internet 'performing lewd or violent acts.' . . . One can readily imagine a public figure "appearing" in a fake infomercial on the Internet, or a secretly homophobic actor being made to host a gay men's health telethon. Despite the potentially informative or charitable nature of such uses, they would still amount to "virtual kidnapping.

Id. (internal citations omitted).

[84] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

[85] *See* Jennifer Carpenter, *Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 3, 5 (2001); *see also* Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 55 (1994) ("[T]he right of publicity has the potential for safeguarding from unauthorized use any marketable and publicly recognizable attribute of any individual, regardless of whether that person is a celebrity.").

[86] *See, e.g.*, Jacqueline Lipton, *Copyright in the Digital Age: A Comparative Survey*, 27 RUTGERS COMPUTER & TECH. L.J. 333, 358 (2001) (exemplifying how Copyright law in particular has grown in its scope of protection in response to global political and market pressures); *see also* BOYLE, *supra* note 40, at 2 ("Information . . . is a central feature of the international economy. . . . Intellectual property—which stretches beyond 'information' conventionally defined—has become a major area of international concern.").

[87] *See* Lipton, *supra* note 86, at 358; *see also* Steven D. Jamar & Lateef Mtima, *The Centrality of Social Justice for an Academic Intellectual Property Institute*, 64 SMU L. REV. 101, 102 (2011).

[88] *See* Jamar & Mtima, *supra* note 87, at 129.

A. Development Economics and Intellectual Property Law

The conflict over the role of intellectual property law in economic development, social justice, and culture is often played on the battlefield of economics. The United States Constitution provides for patent and copyright law as a means to "promote the Progress of Science and the useful Arts,"[89] almost universally understood to rest on a utilitarian notion of incentivizing creativity for the benefit of society.[90] Economic analysis of intellectual property dates back at least to the classical economists,[91] but truly flourished beginning in the 1970s.[92] As nations, including the United States, saw the need to incentivize technological innovation in order to maintain global competitiveness, the importance of intellectual property grew in the national and world economy, as did a widespread call for expanded property rights.[93] Intellectual property developers complained of weak intellectual property laws and inconsistent enforcement standards around the globe, producing evidence of widespread copyright piracy and trademark infringement, and calling for international standardizing of IP rights.[94]

The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"),[95] a result of the 1994 Uruguay Round of trade negotiations, reflects a concern to "reduce distortions and impediments to international trade . . . taking into account the need to promote effective and adequate protection of

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[89] U.S. CONST. art. I, § 8, cl. 8.

[90] *See, e.g.* LANDES & POSNER, *supra* note 36, at 11 ("Because intellectual property is often copiable by competitors who have not borne any of the cost of creating the property, there is fear that without legal protection against copying the incentive to create intellectual property will be undermined."); *see also* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989) ("The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the "Progress of Science and useful Arts."); David S. Olson, *Taking the Utilitarian Basis for Patent Law Seriously: The Case for Restricting Patentable Subject Matter*, 82 TEMP. L. REV. 181, 182–83 (2009) ("[W]ithout patent grants, too little innovation will occur because the rational inventor will not bother to invent knowing that she will not be able to recoup the cost of invention."); *but see, e.g.*, Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation and Context*, 41 U.C. DAVIS. L. REV. 477, 510 (2007) (arguing that utilitarian rationales for copyright have their place, but can also fail to consider the "varied economic and noneconomic motives" for acts of creation).

[91] LANDES & POSNER, *supra* note 36, at 1 (citing "brief discussions by Stuart, Bentham, Mill" and others).

[92] *Id.* at 2. Landes and Posner acknowledge but do not explore other theories supporting intellectual property rights, such as Wendy Gordon's arguments in favor of recognizing natural law theories of intellectual property, and "personhood" theories of property ownership based on German philosopher G.W.F. Hegel. *Id.* at 4, nn.18–19 (citing Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1539 (1993); ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 2–12 (2d ed. 2000)); *see also* Margaret Jane Radin, *Property and Personhood,* 34 STAN. L. REV. 957, 972–73 (1982) ("Hegel concludes that the person becomes a real self only by engaging in a property relationship with something external.").

[93] LANDES & POSNER, *supra* note 36, at 2.

[94] MASKUS, *supra* note 43, at 15.

[95] TRIPS, *supra* note 12; *see generally* Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979 (2009) (discussing the TRIPS Agreement).

intellectual property rights."[96] Theories supporting the adoption by developing nations of the TRIPS Agreement's standards for intellectual property rights include the notion that an IP rights regime stimulates domestic innovation by solving the public goods problem and by encouraging foreign direct investment, which has the benefit of transferring knowledge into a local economy.[97] Of course, even economists who agree with the utilitarian incentives-basis for encouraging innovation also recognize that an IP regime that is too strong will impose excess social costs by preventing access to goods or knowledge.[98]

In parallel to the modern economic rationale for a global IP regime, development economists emphasized the value of measuring individual wealth and capabilities instead of focusing exclusively on gross national product or other macro-economic factors.[99] In his influential work, *Development as Freedom*, Amartya Sen encourages development economics to "be more concerned with enhancing the lives we lead and the freedoms we enjoy."[100] He suggests a "different view of poverty," one that is concerned with the "deprivation of basic capabilities" rather than merely low income.[101] Philosopher Martha Nussbaum further advanced these notions of human capabilities as the foundation for distributive justice.[102] "The basic institution from which the capability approach begins," she argues, "is that certain human abilities exert a moral claim that they should be developed."[103] William Fisher and Talha Syed summarize the Sen/Nussbaum approach as follows:

> [F]irst, we should determine what 'functionings' are central to a flourishing human life; next, we should discern what 'capabilities' are necessary to be

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[96] TRIPS, *supra* note 12, at Preamble.

[97] *See* MASKUS, *supra* note 43, at 4 ("[G]overnments are increasingly convinced that (1) greater linkages to globalization processes through access to technology and information are critical to growth, and (2) stronger IPRs can play an important role in providing that access."); *see also* Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2863 (2006). Chon also points out the flaws to this approach:

> Integrating intellectual property standards through TRIPS is supposed to result in long term economic growth through innovation across all member states, at the cost of short term decreases in access to goods because of higher prices. For developing countries, this innovation-driven growth (created primarily through foreign direct investment and accompanying technology transfer) may be an abstract or perhaps even non-existent benefit. Firms may not enter into the poorest countries regardless of the level of intellectual property protection they offer because no profit is likely to be made where consumers cannot pay.

Id. at 2866 (footnotes omitted).

[98] *See, e.g.*, MASKUS, *supra* note 43, at 30 ("Because IPRs are incapable of operating so precisely, they are second-best remedies for the underlying market distortions. Protection might be too weak, resulting in foregone innovation, or too strong, generating surplus transfers to inventors and sacrificing benefits from consumer access.").

[99] *See, e.g.*, AMARTYA SEN, DEVELOPMENT AS FREEDOM 14 (Alfred A. Knopf, Inc. 1999) (exploring what reasons society may have for wanting more wealth and how those reasons allow it to do the substantive freedoms that it values).

[100] *Id.* at 14.

[101] *Id.* at 20, 119.

[102] MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 5 (Cambridge Univ. Press 2000).

[103] *Id.* at 83.

> able to attain those functionings; and, finally, we should identify and rectify those differences among people's natural and social situations that create important deviations from an egalitarian ideal of 'universal basic capability.'[104]

One measure of development and distributive justice, then, is in the mechanisms by which opportunities and access to capabilities are made available to all, means by which inequalities "in the distribution of substantive freedoms and capabilities" are reduced.[105] These freedoms and capabilities could well include property interests in intangibles such as intellectual property. Access to them could certainly assist with improved self-help, self-reliance, and self-confidence, the deprivation of which is a form of poverty.[106]

A. Economic Opportunity through Intellectual Property

Professors Lateef Mtima and Steven Jamar at Howard University Law School are among the most outspoken proponents of social justice foundations for intellectual property law, as well as acquisition of intellectual property by individuals. In particular, Professor Mtima has argued that the Copyright Act is founded not just on social equity values, but on social justice ones as well.[107] He contends that access to copyright for marginalized communities is crucial, in particular in light of the digital environment.[108]

Mtima acknowledges and explains the "social utility" function of Copyright as supported by Article 1, Section 8, clause 8 of the Constitution and proceeds to explore whether, in judicial interpretation and actual practice, the Copyright Act can also serve a social justice function.[109] In arguing for a broader sensitivity among the bench, bar, and academy to "copyright social justice," Mtima posits that it is first necessary to appreciate the myriad examples of "copyright social injustice":

> For example, the tragic history of African American and other marginalized members of society being systematically defrauded out of the commercial profits derived from their creative genius, is widely lamented as a quintessential example of social injustice within the intellectual property regime. Often unaware of the opportunities and protections afforded by the intellectual property law, and sometimes simply lacking the legal or economic resources to secure and enforce their rights, these artists and innovators saw their rightful rewards misappropriated by white artists,

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[104] Fisher & Syed, *supra* note 14, at 639–40.

[105] *See* SEN, *supra* note 99, at 119.

[106] *Id.* at 20–21.

[107] *See* Mtima, *supra* note 16, at 99–100.

[108] *See id.* at 101.

[109] *Id.* at 119 ("The fact that the Constitution requires that the copyright law perform a function of social utility, however, does not automatically mean that it also work as an engine for social justice.").

> publishers, entrepreneurs, and promoters, and sometimes even academics and scholars, all of whom had access to the financial and racial capital essential to commercial development and exploitation of artistic and innovative works.[110]

Among other ills, Mtima notes that systematic deprivation of access to copyright's economic opportunities can lead marginalized artists not to record their creative works, and potentially not even to share them, both of which fly in the face of the purpose of the Copyright Act.[111] Mtima proposes that in light of the ease with which artists can now create and share using digital information technologies, the time is ripe for his so-called "social utility/social justice interdependence" paradigm to influence the judiciary (and, presumably, the bar).[112] "[E]quipped with at least a working knowledge of the applicable intellectual property rights and protections, and of the intellectual property commoditization system as a whole, the marginalized amateur creator can negotiate her initial agreements more effectively, or at least negotiate strategically with respect to future agreements, when her bargaining position is likely to have improved."[113] In other words, if artists have knowledge of copyright, and accessible opportunities to exploit its protections, it follows that they can fully participate in the social utility outcomes copyright law encourages, which advances social justice interests as well.

Mtima's principal argument is that the Copyright Act itself is based upon social justice as well as social utility foundations.[114] He notes that one can always apply copyright law to prevent injustice, but that adequate support resides in the Intellectual Property Clause itself for copyright law to be a mechanism of social justice as a matter of constitutional law.[115] Actions that prevent institutional manipulation of copyright law to the detriment of minorities and the poor obviously advance "copyright social justice and intellectual property empowerment," he writes, but in addition such actions are "vital to the Constitutional mandate of copyright social utility."[116]

This argument does not neatly apply to trademarks and publicity/identity law, however, as such areas of law arise from common law unfair competition doctrines and not the Intellectual Property Clause of the Constitution.[117] Instead, the best arguments to support a social justice foundation in trademark and identity law rest on notions of preventing unfair competition and unjust enrichment.[118] These policy goals for recognizing enforceable publicity rights in persona or identity protect the individual as effectively as the corporation.

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[110] *Id.* at 122–23 (internal citations omitted).

[111] *Id.* at 127 (calling these outcomes "fixation disincentives" and "artistic xenophobia").

[112] *Id.* at 129.

[113] *Id.* at 143 (footnote omitted).

[114] *Id.* at 100.

[115] *Id.* at 128–29.

[116] *Id.*

[117] *See supra* notes 36–47 and accompanying text.

[118] *See* Carpenter, *supra* note 85, at 14 ("This moral argument reflects a basic societal belief that it is wrong for 'free-riders' or 'parasites' to appropriate (and profit from) another person's hard work.").

Turning from the foundational to the applied notions of social justice in intellectual property, and copyright in particular, Professor Mtima and his colleague Steve Jamar have very recently argued in support of law schools' opportunities (if not obligations) affirmatively to establish clinical legal education programs designed to assist disenfranchised and marginalized individuals with acquiring intellectual property protection.[119] "A principal justification for protecting intellectual property is to encourage the creation and dissemination of information and knowledge," they note.[120] "[T]he ultimate efficacy of this civic agenda is dependent upon the pervasiveness of its reach: every citizen should have effective access to both."[121]

Jamar and Mtima proceed to argue that the social justice obligations of law schools and lawyers compels their efforts to make opportunities to learn about and acquire intellectual property, particularly copyrights and patents, available to everyone.[122] In particular, they rely upon the American Bar Association standards for law school accreditation, which obliges schools to "understand the law as a public profession calling for the performance of pro bono legal services."[123] The Model Rules of Professional Conduct, moreover, urge lawyers to "devote professional time and resources and civic influence to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel."[124] When these obligations are met in the form of legal assistance—through a law school clinic, pro bono representation by practicing attorneys, or a combination of the two—the result may be to aid entrepreneurial activity, a key aspect of individual economic empowerment leading to "social uplift and advancement of marginalized groups."[125]

The USPTO supports the acquisition of patents and trademarks by entrepreneurs, including minorities.[126] Undersecretary of Commerce and USPTO Director David Kappos urges entrepreneurs to pursue patents, which "are fundamental to successfully launching start-ups and growing small businesses which create two out of every three American jobs."[127] To this end, the USPTO is actively encouraging patent attorneys to offer pro bono legal services to independent inventors and small companies that cannot afford the typical cost of filing a patent application.[128] Working with Minnesota law firms in Minneapolis and St. Paul, the

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[119] *See* Jamar & Mtima, *supra* note 87, at 103.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 104–05.

[123] *Id.* (quoting AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS viii (2010)).

[124] *Id.* (quoting AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 6).

[125] *See id.* at 120 ("One aspect of empowerment is economic empowerment and one path toward economic empowerment is entrepreneurship—a path which has long been trod for social uplift and advancement of marginalized groups.").

[126] *See* Kappos, *supra* note 17 ("The economic security of this country and its minority communities continues to depend on its ability to innovate. But, the key to economic success lies not only in innovative product and service development, but in Intellectual Property protection, which allows innovators to capture value from their creativity.").

[127] *Id.*

[128] *See, e.g.*, Press Release, Patterson Thuente Christensen Pedersen, P.A., Minnesota to Pioneer Pro Bono Patents (Feb. 11, 2011), *available at* http://www.ptslaw.com/news/Pro_Bono.pdf.

USPTO encouraged a pioneering pilot program to assist low income independent inventors with patent acquisition.[129] These efforts represent a new trend in viewing intellectual property law as a potentially appropriate area of pro bono legal services by the private bar. The USPTO has also launched a pilot initiative to encourage law school legal clinics to offer patent and trademark services to the public.[130] The program certifies law students to prosecute (file) patent or trademark applications on behalf of clients under the supervision of a qualified clinical professor or supervisor.[131] The program's purpose is to help law students learn the practical aspects of practicing before the USPTO. An implied social justice function exists because of the program's affiliation with law school clinics which tend to serve populations that are unable to afford private legal services.

In addition to focusing on the pragmatic, functional aspects of individual attorneys assisting individual entrepreneurs with access to intellectual property protection, a strong case can be made that normative considerations underlying intellectual property law can serve social justice functions as well. For instance, scholars have made the case that intellectual property law may not be exclusively—or even appropriately—based upon classic, economic "incentives" justifications.[132] Instead, many argue that a better rationale is one based on social and cultural values.[133] This view, in the context of development economics in particular, perceives of intellectual property rights for the poor, marginalized, and/or underserved populations as a means to fulfill their inherent desire for self-expression and a place in history.[134]

> [P]oor people's turn to property is surely about economics, but is about social and cultural values as well . . . . [T]he relationship between intellectual property and development goes beyond [Gross Domestic Product]. People, rich and poor alike, want recognition of their creativity and contributions to science and culture. This capacity for innovation, work, and cultural sharing is part of what makes us human.[135]

This conveniently removes the greed factor so prevalent in the utilitarian, incentives-based perception of IP rights, and replaces it with a culture-generating and society-enhancing viewpoint that is more palatable to those promoting wider societal interests. It does not remove the question of balance, of course, between appropriate protection for the benefit of enhancing culture and over-protection at culture's expense. Because it remains an "outward looking" perception of intellectual property's function and purpose, this analysis is not wholly satisfying to those who

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[129] *Id.*

[130] *See Law School Clinical Certification Pilot*, U.S. PAT. & TRADEMARK OFFICE, http://www.uspto.gov/ip/boards/oed/practitioner/agents/law_school_pilot.jsp#heading-5 (last updated Oct. 14, 2011).

[131] *Id.*

[132] *See, e.g.*, Sunder, *supra* note 15, at 299–301 (explaining that the GI Act, for example, was based on a notion of protecting one's recognition, reputation, tradition, and income).

[133] *Id.*

[134] *Id.*

[135] *Id.* at 301.

would consider the individual's personal empowerment as a worthy social and distributive justice goal. Those issues are explored next.

B. Trademarks and Individual Empowerment

Mtima and Jamar focus primarily on copyright law as a vehicle for individual economic opportunity and, therefore, social justice.[136] Few scholars have applied this analysis to trademark law, although as a feature of commercial activity[137] trademarks are naturally connected to entrepreneurship and, logically, to personal empowerment. Indeed, scholars concerned with trademark law's potential for overprotection and commodification tend to view "the problem through an outward normative lens that focuses on economic rights."[138] These sound "criticisms of the dangers of legally sanctioned propertization" are, in Professor David Troutt's words, "rendered weak against individuals" who might choose to commodify their business marks or their own identity as the law permits.[139]

Because trademarks and publicity rights can serve as strong personal property interests, it bears considering, in examination of social and distributive justice principles, whether there is a justice-based argument to be made for helping individuals acquire and protect trademarks and publicity rights. In other words, just as Mtima and others have urged that social justice concerns underlie copyright protection for creative individuals in marginalized communities, perhaps such concerns also support providing opportunities for access to trademark and identity protection for underserved individuals.[140]

Even those who are most concerned that social justice demands a restriction of the scope and application of intellectual property rights to accommodate the needs of the poor cite examples of how helping individuals acquire trademarks is itself an act of social justice.[141]

> In Copenhagen, the artist and activist group Superflex helps developing country farmers brand their products in the same fashion as large multinationals, so that these farmers can exploit trademarks in products they cultivated. These are not merely fringe efforts, tilting at windmills, but rather practical engagements with real world problems, from increasing access to medicines and culture to fostering socially useful innovations and economic development. Nor are these activities necessarily hostile to

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[136] *See* Mtima, *supra* note 16, at 100; Jamar & Mtima, *supra* note 87, at 102.

[137] *See, e.g.*, 15 U.S.C. § 1125(a)(1) (2006) (illustrating that use in commerce is a requirement for relief under the Lanham Act).

[138] David Dante Troutt, *A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification, and Redescription*, 38 U.C. DAVIS. L. REV. 1141, 1173 (2005).

[139] *Id.* at 1173–74.

[140] *See* Mtima, *supra* note 16, at 122–23, 151.

[141] *See, e.g.*, Chander & Sunder, *supra* note 14, at 567.

> intellectual property; rather, many seek to harness intellectual property for social ends.[142]

A leading example of trademarks as opportunities for empowerment in nations across the globe is the subset known as "geographic indications."

The French—with Roquefort cheese[143]—pioneered the application of special marks to designate certain goods of particular geographic origin that could be protected against infringement by imposters using the same or confusingly similar "appellations of origin."[144] The term and its legal scope proved inadequate on a global scale, and were thus expanded to be "geographic indications" pursuant to the TRIPS Agreement.[145] Under the TRIPS Agreement, "geographic indications" are defined as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."[146]

Geographic indications ("GIs") have been hailed, in Madhavi Sunder's words, "as the poor people's intellectual property rights."[147] They are well suited to craftspeople, weavers, farmers, and others who produce goods whose reputation for quality is based upon their geographical or environmental origin.[148] GIs accommodate collective rights, as might be important to an artisans' association, and they are relatively inexpensive to acquire.[149]

Under the TRIPS Agreement, however, GIs are not recognized as broadly applicable property rights.[150] Instead, Article 22(2) of TRIPS requires interested

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[142] *Id.* at 564–65.

[143] O'Connor, *supra* note 46, at 361 n.7 (citing James T. Ehler, *Roquefort Cheese*, FoodReference.com, http://www.foodreference.com/html/froquefortcheese.html (last visited Oct. 16, 2011) ("In 1411 Charles VI of France gave sole rights to the ageing of Roquefort cheese to the village Roquefort-sur-Soulzon, and all Roquefort still must be aged in the caves there today.").

[144] *Id.* at 360–61.

> A protected appellation of origin is the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.' This definition contains three elements: (1) the appellation must be the geographical name of a country, region or locality; (2) the appellation of origin must serve to designate a product originating in the country, region or locality referred to; and (3) a qualitative link between the product and the geographical area, or in other words, the 'quality and characteristics' must be due exclusively or essentially to the geographical environment.

Id. (quoting Lisbon Agreement for the Protection of Origin and their International Registration, Oct. 31, 1958, *as amended* Sept. 28, 1979, art. 2(1)).

[145] *Id.* at 362.

[146] TRIPS, *supra* note 12, art. 22(1).

[147] Sunder, *supra* note 15, at 301.

[148] *Id.*

[149] *Id.*

[150] *See generally* Tunisia L. Staten, *Geographic Indications Protection Under the TRIPS Agreement: Uniformity not Extension*, 87 J. PAT. & TRADEMARK OFF. SOC'Y 221, 225–26 (2005) (exploring the existing TRIPS protection of geographical indications).

parties to pass laws that prevent the use of geographic indications in a manner that misleads the public as to the true origin of goods or results in unfair competition.[151] This puts a burden of proof on those claiming GI rights to demonstrate public confusion or unfair competition before they can prevail.[152] TRIPS does not extend broad *per se* exclusions of GI usage except for wine and spirits.[153]

Still, GIs as a form of trademark protection are one opportunity for historically poor or disempowered groups to generate a unique brand and potentially advance themselves economically through trademark law. This is accomplished on a collective rather than individual level.[154] Indeed, one option that could include a geographic indicator is a "collective mark," which is a mark used by members of a cooperative or other organization and may include indications of membership in the group.[155] Another is a "certification mark," which may also include indications of geography or other signifier of quality, and which may be used by multiple entities or individuals simultaneously, but which may not be used by the entity that manages the mark.[156] An example would be certification as "Responsibly Harvested" for

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[151] *Id.* at 225; *see* TRIPS, *supra* note 12, art. 22(2).

> In respect of geographical indications, Members shall provide the legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; (b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).

Id.

[152] Staten, *supra* note 150, at 228.

[153] TRIPS, *supra* note 12, art. 23(1).

> Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like.

Id.

[154] *See* Sunder, *supra* note 15, at 299–301.

[155] 15 U.S.C. § 1127 (2006). Defining the term "collective mark" as:

> a trademark or service mark—(1) used by the members of a cooperative, an association, or other collective group or organization, or (2) which such cooperative, association, or other collective group or organization has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, and includes marks indicating membership in a union, an association, or other organization.

Id.

[156] *Id.* The term "certification mark" is defined as:

> any word, name, symbol, or device, or any combination thereof—(1) used by a person other than its owner, or (2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this chapter, to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.

seafood, which could be used by individual fishermen or corporate harvesters alike, and is administered by a neutral third party.[157]

C. Publicity Rights and Individual Empowerment

A great deal of scholarship, some of which was explored above, has focused on how intellectual property laws can be used "defensively" to prevent "psychological harms from cultural misrepresentation" or other demeaning images of various ethnic or cultural minorities.[158] These same laws can assist individuals with acquiring their own affirmative intellectual property rights by allowing them to claim authorship in works or trademarks for their wares.[159] Rights in identity or publicity are similarly valued and deserving of protection.

In her article exploring the conflict between an individual's publicity rights and society's First Amendment interests, Professor Roberta Rosenthal Kwall acknowledges the validity of "morally based objections" to another's use—commercial or otherwise—of one's persona.[160] Some economically-based objections can be remedied through monetary payment and perhaps injunctive relief.[161] But morally based objections arise when the plaintiff's image or persona is used in a context or manner that conflicts with the plaintiff's own values and interests.[162] Professor Kwall further describes the fundamental social interests vindicated by the right of publicity, which include: "fostering creativity, safeguarding the individual's enjoyment of the fruits of her labors, preventing consumer deception, and preventing unjust enrichment."[163]

Much of publicity-rights law, as mentioned above, has been formed through cases brought by celebrities.[164] This leads to a lack of sympathy, generally, for the

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Id.

[157] *See* U.S. Trademark Application Serial No. 85,139,142 (filed Sept. 27, 2010).

[158] Sunder, *supra* note 15, at 270. Sunder describes the "politics of recognition" or "identity politics" as articulated by Charles Taylor.

> Taylor eloquently described the emergence of a new paradigm for understanding equality. Minority groups decried not material deprivation but psychological injury deriving from demeaning and misleading cultural images expressed in mainstream media and markets. 'Nonrecognition or misrecognition' of one's identity, Taylor wrote, "can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.' Power derives from the ability to shape and influence culture; inversely, those who do not have power to create and contest culture 'truly are powerless.'

Id. at 267 (internal citations omitted).

[159] *Id.* at 271.

[160] *See* Kwall, *supra* note 85, at 72–73.

[161] *Id.* at 71.

[162] *Id.* at 70–71.

[163] *Id.* at 54.

[164] *See, e.g.*, Abdul-Jabbar v. Gen. Motors Corp., 75 F.3d 1391, 1394–95 (9th Cir. 1996) (noting that famous basketball player, Kareem Abdul-Jabbar, brought suit against GM for using his former name in a television commercial without his consent).

individual whose rights are promoted.[165] It has also led, some argue, to a primarily Lockean view of publicity rights "grounded in labor, rather than persona."[166] And it detracts from the role of consumers themselves in creating the celebrity's own value, and in establishing the cultural meaning represented by that celebrity's persona or identity.[167]

Another view, supported by Alice Haemmerli among others, is a right of publicity based on Immanuel Kant's moral philosophy of human will and freedom.[168] She notes that Kant's system in which "the exercise of human capacity for reason is an assertion of human freedom . . . and the notion of individual control and self-determination is fundamental."[169] Haemmerli finds support for the right of publicity in Kantian philosophy because "[a]utonomy implies the individual's right to control the use of her own person, since interference with one's person is a direct infringement of the innate right of freedom."[170] She finds further support for publicity rights as property rights under Kant's view of property, which "is an outgrowth of human freedom."[171] Because under Kantian philosophy "property is inseparably associated with one's 'personhood,'" Haemmerli argues that there is "no logical reason" why one "should not be able to claim a property right in the use of her objectified identity" and every reason why such claims should take priority over other people's use of that identity.[172]

In his fascinating and creative exploration of the limits of trademark and identity law through the case of an African-American advertising executive—MarCus—seeking to be the first human to trademark himself, Professor Troutt takes on the critics of and dangers presented by legally sanctioned propertization of

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[165] *See, e.g.*, Michael A. Cooper, *An Economy in Crisis: Law, Policy, and Morality During the Recession: Publicity Rights, False Endorsement, and the Effective Protection of Private Property*, 33 HARV. J.L. & PUB. POL'Y 841, 849 (2010) (discussing a trend that wealthier plaintiffs are not getting the full protection of the rights they have because of their status).

[166] Haemmerli, *supra* note 60, at 403. Prof. Haemmerli discusses how courts have "treated the right of publicity as an economic property right with two variants." *Id.* at 392. The first relates to how a person uses her identity for the purpose of selling or promoting goods, e.g. the face on a t-shirt, and the other relates to the preventing the appropriation of identity for a commercial performance. *Id.* Haemmerli discusses the only U.S. Supreme Court case affirming the right of publicity, *Zacchini v. Scripps-Howard Broad., Co.*, 433 U.S. 562, 573 (1977), which held that a human cannonball performer's rights of publicity could be enforced against a television broadcasting company and that the broadcast company's actions were not immunized by the First Amendment. *Id.* at 401. She criticizes the Court for analogizing the right of publicity to copyright and patent law and using an "incentive-to-creation argument . . . in upholding the right of publicity against a First Amendment defense." *Id.* at 401–02.

[167] Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 140–41 (1993) (discussing how consumers appropriate products by investing them with meaning, and how individuals and subcultures "generate or negotiate meanings that relate to their own experiences and positions" rather than merely accepting what is served up to them by "the culture industries").

[168] Haemmerli, *supra* note 60, at 414.

[169] *Id.* at 416.

[170] *Id.*

[171] *Id.* at 417.

[172] *Id.* at 418 ("[I]f one's own image, for example, is treated as an object capably of 'being yours and mine,' why should it not be claimed by the person who is its natural source? To the extent it is available as some person's property.").

identity.[173] "These outer-directed critiques do not really reach MarCus's inner-directed bargain."[174] Troutt relies on Haemmerli's view of a Kantian system of personhood to support MarCus's case.[175] Acknowledging the dangers of losing the self to a property right in identity, Troutt and Haemmerli support a "distinction between an underlying personhood and an outward personality—a self and a persona."[176] Name, voice, and distinctive characteristics can be "things" the injury to which a court may award relief even while "the internal self" remains separate.[177]

> "Nothing stops us from borrowing the intimation that we have a deeper self from modernism, while borrowing the freedom to dress up the self in new personalities from postmodernism." This should be nothing novel or difficult for African-Americans, especially those like MarCus who have been viscerally affected by systematic public condemnations of their external identities while living inside the "real world" of their more private humanity. One is rarely ever who one appears to be. But, a person must choose whether or not to accept that this simultaneous disconnection and reconnection of self and persona poses no threat to self-identity.[178]

The philosophical reasons for promoting individual ownership of identity complement the economic ones, at least from a social justice perspective. One is morally entitled to self-define and even to commercialize one's own persona. At the same time, the opportunity to exploit identity for commercial gain—as has Antoine Dodson, by taking advantage of accidental fame—is one additional opportunity for empowerment through entrepreneurship. As Professor Kwall asserts, "whatever the means through which an individual's persona comes to have value, that value should be attributable to the persona of the publicity plaintiff who has a right to participate in decisions about how her persona is utilized by others."[179] In the social justice context, supporting these individual interests and values is warranted provided the broader societal interests in cultural development and freedom of expression are taken into consideration.

Attacking intellectual property law in the aggregate is similar to considering economic development in the aggregate; it may overlook individuals' needs and abilities to improve their own lives. Professor Sunder embraces the "capabilities approach" described by Sen and Nussbaum as applied to individual acquisition of intellectual property rights, including trademarks and identity rights.[180] "Development must entail not only economic growth," he writes, "but also a life that

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[173] *See generally* Troutt, *supra* note 138, at 1172–77 (commenting on the ambiguity of legal identity).

[174] *Id.* at 1174.

[175] *Id.* at 1174–75.

[176] *Id.* at 1175.

[177] *Id.* at 1176.

[178] *Id.* (quoting Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 781 (1997)).

[179] Kwall, *supra* note 85, at 55–56.

[180] Sunder, *supra* note 15, at 313–14.

is culturally fulfilling."[181] Intellectual property ownership can be a component in development on a cultural and economic level. "Recognizing people's humanity requires acknowledging their production of knowledge of the world. This recognition, in turn, fuels remuneration to new creators."[182]

An individual's interests in identity protection should not be lesser than—or greater than—First Amendment interests or other social and cultural norms law seeks to foster and protect. They are central to the individual's rights to self-determination and freedom. Indeed, although courts are not as likely to recognize for non-celebrities the powerful publicity rights granted to people like Rosa Parks, there is no justification under social justice theories to deprive other individuals of the right to prevent misappropriation of their identities or commercial exploitation by others. If we are to allow commodification of identity we should give universal access to such rights. Admittedly, on an aggregate or outward-looking level the increased commodification of identity does potentially chill speech and restrict other social values. On an individual level, however, the freedom to acquire, and protect, such property seems a matter of justice as well. Otherwise, the marginalized—i.e. poor—individual would be deprived of a property interest available under the law.

III. PROCEEDING WITH CAUTION: THE SOCIAL JUSTICE CONCERNS RAISED BY OVERPROTECTION OF TRADEMARKS AND IDENTITY RIGHTS

Critics of the expanded global IP Regime, among them Margaret Chon, attack intellectual property's presumed goal of "pure wealth or utility-maximization" as a measure of social welfare.[183] Citing Sen and Nussbaum, Chon argues that "intellectual property globalization" must be more mindful of and informed by the human capabilities approach to development.[184] "Intellectual property should include a substantive equality principle, measuring its welfare-generating outcomes not only by economic growth but also by distributional effects."[185] Chon and others argue that intellectual property regimes, rather than enhance economic opportunities for the poor, deprive individuals of basic necessities.[186] These arguments must be heeded in any analysis of trademarks and identity rights as mechanisms for personal empowerment. In other words, although assisting individuals with property acquisition and using common law rights to prevent exploitation are both supported under distributive if not social justice theories, the overall scope of these rights as applied to society's interests in free expression and related rights is not to be ignored.

Trademarks are often not discussed in intellectual property social justice debates because they do not present property-based barriers to goods or

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[181] *Id.* at 314.

[182] *Id.*

[183] Chon, *supra* note 97, at 2831.

[184] *Id.* at 2875–77.

[185] *Id.* at 2823.

[186] *See, e.g.*, Perschbacher, *supra* note 13; *see also* MASKUS, *supra* note 43, at 6 ("The international strengthening of IPRs raises concerns that it will reduce the ability of poorer countries to imitate foreign products and technologies, which would be available only at higher costs, deteriorating their terms of trade.").

information.[187] Of course, as icons of consumerism, they can drive up the costs of goods beyond the means of the poor.[188] In the academy, moreover, there is a general normative distaste for things that are "commercial" in nature, as such matters are "deemed less worthy"[189] of various legal defenses such as fair use[190] or First Amendment rights.[191] Indeed, daily the newspapers tell of consumers misled by commercial icons lending their names to investments or products—such as when Donald Trump licensed his name to dubious real estate ventures where individual investors lost millions,[192] or the commodification of national icons like Disney Entertainment's application to register the mark SEAL TEAM 6[193] following the raid on Osama Bin Laden's compound in Pakistan.[194] It is difficult to defend trademarks in a culture so devoted to consumerism.

This section explores the social justice concerns scholars and judges have voiced regarding the growing scope of trademark and identity property interests, and its impact on speech, human identity commodification, racial subordination, and even consumer confusion.

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[187] *See* 15 U.S.C. § 1127 (2006) (defining trademark as "any word, name, symbol, or device or any combination thereof . . . to *identify* and distinguish his or her goods") (emphasis added).

[188] Troutt, *supra* note 138, at 1193 ("[M]arket capture raises the price of endorsed or trademarked merchandise, much of which is popular among teenagers and poor people. Thus, higher prices reinforce current trends in wealth inequality by filtering more revenue upward while draining wealth disproportionately from those consumers with the fewest resources.").

[189] Haemmerli, *supra* note 60, at 391 n.24.

[190] *See* 17 U.S.C. § 107 (2006). One of the factors to be considered in fair use analysis is whether the use is "commercial" in nature. *See also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (noting "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright," whereas "noncommercial uses are a different matter").

[191] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) (internal citations omitted) (explaining "The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

[192] *See* Michael Barbaro, *Buying a Trump Property, or So They Thought*, N.Y. TIMES, May 12, 2011, at A1, A23, *available at* http://www.nytimes.com/2011/05/13/nyregion/feeling-deceived-over-homes-that-were-trump-in-name-only.html?pagewanted=all (discussing how Mr. Trump licensed his marks to real estate developers and even made personal appearances to "woo buyers" of the Trump-branded residential and commercial properties). Barbaro notes that many of the projects were never completed and "buyers lost millions of dollars in deposits even as Mr. Trump pocketed hefty license fees." *Id.* at A23.

[193] On May 3, 2011, Disney Enterprises, Inc. filed three applications with the USPTO under section 1(b) of the Lanham Act (15 U.S.C. § 1051(b)) seeking to register the mark SEAL TEAM 6 on various goods, including clothing (Serial No. 85310957); toys, hand-held electronic games, Christmas stockings, ornaments, and snow globes (Serial No. 85310966); and entertainment and education services (Serial No. 85310970).

[194] *See* Peter Baker et al., *Bin Laden is Dead, Obama Says*, N.Y. TIMES, May 1, 2011, at A1, *available at* http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html?pagewanted=all.

A. First Amendment and the Public Domain

Publicity rights as property rights threaten to shrink the "cultural commons."[195] Images of celebrities and others whose images have acquired commercial value should, according to Professor Madow, be "freely available for use in the creative of new cultural meanings and social identities, as well as new economic values."[196]

Indeed, one of the most impassioned criticisms of intellectual property rights expansion was by Judge Alex Kozinski dissenting opinion in Vanna White's trademark and publicity case against Samsung:

> Private property, including intellectual property, is essential to our way of life. It provides an incentive for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad medicine. . . . Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.[197]

In *Parks v. LaFace Records*, the Sixth Circuit grappled with First Amendment arguments raised by a hip-hop musical group and its record publisher defending their use of Rosa Park's name as the title of a song.[198] Parks claimed the group infringed her right of publicity, including creating a likelihood of association or endorsement confusion under Section 43(a) of the Lanham Act, as well as defamation of character and interference with an ongoing business relationship.[199] The district court granted summary judgment for the defendants finding the First Amendment barred Parks's publicity claims and outweighed any potential consumer confusion.[200]

The Sixth Circuit reversed.[201] It found that the musicians had made "trademark use" of the Rosa Parks name, noting "Rosa Parks clearly has a property interest in her name akin to that of a person holding a trademark" and that defendants' use of the mark could cause consumers to falsely believe Ms. Parks was affiliated with or approved of their song.[202] The court then struggled with the appropriate test to apply in analyzing the defendants' rights under the First Amendment to incorporate names and other expressive material into their songs.[203] It rejected the traditional

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[195] Madow, *supra* note 167, at 239.

[196] *Id.* at 144–46 ("What it comes down to is that the power to license is the power to suppress . . . . [T]he right of publicity] gives her (or her assignee) a substantial measure of power over the production and circulation of meaning and identity in our society.").

[197] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from the order rejecting the suggestion for rehearing *en banc*) (citing Wendy J. Gordon, *supra* note 92, at 1556–57).

[198] *See* Parks v. LaFace Records, 329 F.3d 437, 445 (6th Cir. 2003).

[199] *Parks*, 329 F.3d at 443.

[200] *Id.* at 444.

[201] *Id.* at 463.

[202] *Id.* at 447.

[203] *See generally id.* at 448–49 (noting that none of the approaches utilized by the lower courts accord adequate weight to the First Amendment interests in this case).

"likelihood of confusion" test applied in trademark infringement cases as well as the "alternative avenues" test under which "a title of an expressive work will not be protected from a false advertising claim if there are sufficient alternative means for an artist to convey his or her idea."[204] Instead, the Sixth Circuit adopted the Second Circuit's test from *Rogers v. Grimaldi*,[205] that a title of a song is protected expression under the First Amendment "unless it 'has no artistic relevance' to the underlying work, or, if there is artistic relevance, the title 'explicitly misleads as to the source or content of the work.'"[206] Because, apart from the line "move to the back of the bus" repeated throughout the song, the song otherwise is not intended to be and is not about Rosa Parks, the court found reasonable persons could find no connection between the use of Rosa Parks's name in the title and the song itself.[207] Further, the court was clearly unimpressed with the lyrics ("laced with profanity" and "pure egomania")[208] as expressive content, noting "they contain absolutely nothing that could conceivably, by any stretch of the imagination, be considered, explicitly or implicitly, a reference to courage, to sacrifice, to the civil rights movement, or to any other quality with which Rosa Parks is identified."[209] Accordingly, the Sixth Circuit elevated Rosa Park's name as a trademark above any speech or cultural expression claims by defendants.[210]

When trademarks and identity rights can dominate over artistic freedom, and leave to judges the tasks of finding "relevance" in the lyrics of modern music or other art, Judge Kozinski's concerns about overprotection of private property gain prescience.

As Professor Troutt acknowledges:

> [T]he expansion of both trademark and rights of publicity clearly has a negative effect upon the size and vitality of the public domain. This is especially true as the culture draws more and broader meanings from entertainment media, advertising and other forms of popular culture. Together with an increasingly lax concern for preserving First Amendment freedoms, courts have allowed intellectual property law to become an enabler of increased propertization for no consistent reason.[211]

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[204] *Id.* at 447–48.

[205] *See* Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989).

[206] *Parks*, 329 F.3d at 448 (quoting *Rogers*, 875 F.2d at 999).

[207] *Id.* at 453 ("*Back of the Bus,* for example, . . . would not have the marketing power of an icon of the civil rights movement. Choosing Rosa Parks'[s] name as the title to the song unquestionably enhanced the song's potential sale to the consuming public.").

[208] *Id.* at 454. The Sixth Circuit continued to demonstrate impatience for hip-hop music in later cases as well. *See* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 393 (6th Cir. 2004) (holding DJ Shadow was not entitled to "sample" portions of other sound recordings, no matter how brief or unrecognizable the sample, without a license from the copyright owner).

[209] *Id.* at 453–54 (noting that the Sixth Circuit condemned Outkast's use of Rosa Parks's name as merely a "good marketing tool").

[210] *See id.*

[211] Troutt, *supra* note 138, at 1192.

By putting image and language control in the hands of celebrities, their estates or assignees, moreover, critics of expanded publicity rights worry that the rest of society will be deprived of "our collective cultural heritage and the ability to reflect upon the historical significance of the celebrity aura."[212]

The valid social justice concerns identified here relate to the ability of members of American society, at least, to exercise rights in speech and expression that are embedded in our rich culture and expressly protected in our Constitution. To allow individual private property interests in words, designs, and names—especially ones that have acquired universal recognition and thus have inherent expressive meaning—to chill creativity disserves social and cultural enhancement in the aggregate.

A. Universal Commodification

As *Rosa Parks* demonstrates, a claim of misused identity that once would have struggled to succeed under a tort-like "right of privacy" analysis can now flourish as a powerful property interest.[213] The case "gave rise to a new asset: a legally authenticated commodification of identity, granted at the expense of artistic freedom."[214] As explained above, this raises concerns about society's freedom to use of names and images to enhance our culture. Not surprisingly or without justification, critics worry about the propertization of "each and every thing" including "commodification of that which is most personal to us: our very identity."[215]

Beyond threatening society, moreover, the endorsement of human identity commodification using market rhetoric can also, according to legal philosopher Margaret Jane Radin, alienate the individual from herself.[216] Radin explores the extremes of universal commodification and its opposite: declaring certain things market-inalienable, namely, "outside the marketplace but not outside the realm of social intercourse."[217] She describes situations in which things may be partially market-inalienable, a sort of sliding-scale into which certain assets may be deemed commodifiable and saleable in certain circumstances or to a certain degree.[218] Radin explicitly rejects adopting universal commodification theories with regard to human identity which she regards as "threatening to the notion of 'human flourishing.'"[219]

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[212] Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1876 (1991).

[213] *See* Troutt, *supra* note 138, at 1167–68.

[214] *Id.* at 1172.

[215] Sunder, *supra* note 15, at 275.

[216] Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1853–54 (1987).

[217] *Id.* at 1853.

[218] *Id.* at 1855–56 ('debates about some kinds of regulation can be seen as contested incomplete commodification, with the contest being over whether to allow full commodification (a *laissez-faire* market regime) or something less").

[219] Troutt, *supra* note 138, at 1182.

> Market rhetoric, the rhetoric of alienability of all 'goods,' is also the rhetoric of alienation of ourselves from what we can be as persons. One way to see how universal market rhetoric does violence to our conception of human flourishing is to consider its view of personhood. In our understanding of personhood we are committed to an ideal of individual uniqueness that does not cohere with the idea that each person's attributes are fungible, that they have a monetary equivalent, and that they can be traded off against those of other people. Universal market rhetoric transforms our world of concrete persons . . . into a world of disembodied, fungible, attribute-less entities possessing a wealth of alienable, severable "objects."[220]

Radin is also concerned with libertarian notions of freedom. "Commodification of the person" may wreak "havoc with liberal notions of freedom, justifying market-inalienability of things personal."[221]

On the other hand, Radin rejects those who would universally deny commodification on distributive justice grounds.[222] She rightly cautions that, for instance in the context of tort recovery for loss of consortium or damages to other values unique to an individual, complete rejection of commodification theories would "compound the injury to tort victims under the present social structure, in which we have not put into practice other measures that would take care of them in better ways or prevent their injuries in the first place."[223]

In the end, Radin proposes a "non-ideal" middle ground in which she promotes a continuum allowing commodification in degrees, depending on context.[224] She acknowledges that "commodification and human flourishing exist in a moving context," which provides an opening for property interests in identity under publicity and trademarks theories.[225]

Professor Troutt describes another concern with identity commodification and, more accurately, the rise of consumerism generally.[226] The legal acknowledgment of extensive property interests in an individual's identity may cause unintended and short-sighted market harms to the collective whole.[227] In particular, Troutt warns, "[m]arket capture raises the price of endorsed or trademarked merchandise, much of which is popular among teenagers and poor people."[228] If strong property interests in marks and identity are tied exclusively to celebrities, or expanded to all individuals whose persona may—even briefly—command commercial value, this may create higher prices for goods appealing to the least able to afford them, thereby reinforcing

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[220] Radin, *supra* note 216, at 1884–85 (internal footnotes omitted).

[221] Troutt, *supra* note 138, at 1185 (citing Radin, *supra* note 216, at 1906).

[222] Radin, *supra* note 216, at 1869–71.

[223] *Id.* at 1877 (discussing Richard Abel's proposal to replace the tort system with one that treats people equally).

[224] *Id.* at 1917–18.

[225] *See* Troutt, *supra* note 139, at 1191 (citing Radin, *supra* note 216, at 1903).

[226] *Id.* at 1193.

[227] *Id.*

[228] *Id.*

trends in wealth inequality.[229] As social justice is generally concerned with the rights and capabilities of the poor,[230] strong property interests in the marks and identities associated with consumer goods may be counterproductive.

B. Racial Subordination

The Lanham Act creates a presumption in favor of registration, but creates an exception for "immoral" or "disparaging" marks.[231] This provision has been cited by interest groups in attempts to cancel registered trademarks or oppose their registration in the first place.[232]

A well-known example is that of the protracted litigation by members of the Native American community against the Washington Redskins professional football team.[233] In *Pro Football, Inc. v. Harjo*, seven Native Americans petitioned the United States Trademark Trial and Appeal Board ("TTAB") to cancel registration of six REDSKINS trademarks on the grounds they were "impermissibly disparaging towards members of their ethnic group."[234] The TTAB cancelled the registered marks containing the word "redskins" on the grounds that a "substantial composite of the general public" considered it a derogatory term and that it was disparaging to Native Americans.[235] The Court of Appeals for the Federal Circuit ultimately affirmed dismissal of the case on the grounds of laches, based on the plaintiffs' long delay in bringing the cancellation action, but carefully noted the limits of its decision to the procedural posture of the case.[236]

Generally, the USPTO and the TTAB can be called upon to police offensive marks and thereby limit or prevent government sanctioning of racial stereotypes.[237] In an examination of social and distributive justice concerns, however, the potential for marks, symbols and other commercial imagery to offend racial and ethnic (and

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[229] *Id.* ("[H]igher prices reinforce current trends in wealth inequality by filtering more revenue upward while draining wealth disproportionately from those consumers with the fewest resources.").

[230] Chander, *supra* note 14, at 564 ("Social justice, after all, is generally taken to require significant obligations towards the poor.").

[231] *See* 15 U.S.C. § 1052(a) (2006) (stating "No trademark . . . shall be refused registration on account of its nature unless it . . . [c]onsists of or comprises immoral, deceptive or scandalous matter, or matter which may disparage or falsely suggest a connection with persons . . . or national symbols . . . or bring them into contempt, or disrepute . . . .").

[232] *See* Pro Football, Inc. v. Harjo, 565 F.3d 880, 882 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 631 (2009).

[233] *Id.*

[234] *Id.*

[235] Harjo v. Pro Football, Inc., 50 U.S.P.Q.2d (BNA) 1705, 1749 (T.T.A.B. 1999).

[236] *Harjo*, 565 F.3d at 886. The TTAB had dismissed the laches defense, "finding petitioners asserted an interest in preventing 'a substantial segment of the population' from being held up 'to public ridicule,' and that insofar as that interest reached 'beyond the personal interest being asserted by the present petitioners,' laches was inappropriate." *Id.* at 882 (quoting Harjo v. Pro Football Inc., 30 U.S.P.Q. 2d (BNA) 1828, 1831 (T.T.A.B. 1994)).

[237] *See* U.S. PAT. & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1203.01 (7th ed. 2010), *available at* http://tess2.uspto.gov/tmdb/tmep/ (last visited Oct. 16, 2011).

cultural) groups requires examination of trademark law, on its face a "race-neutral" legal regime, in the context of potential racial inequality.[238]

As Professor KJ Greene notes, Section 2(a) of the Lanham Act merely prevents *registration* of racially derogatory trademarks, but does not prohibit their use.[239] Professor Greene points to several examples in American consumer history where trademarks reflected, created or exacerbated prevailing racial stereotypes, for instance describing the "Aunt Jemima" logo as "a smiling 'mammy' type" and "Ratus, the Cream of Wheat chef" as "a smiling 'coon' type."[240] He cautions that although our society has made progress in social and race relations, such that marks which previously would be acceptable are now acknowledged to be offensive and disparaging, racial stereotypes still play a role in trademarks and advertising.[241]

C. Consumer Confusion

As previously considered, consumer protection is one function of trademarks.[242] Keeping this aspect of trademark law strong is crucial to one of its social justice functions, namely, to protect individuals and society at large from being misled, confused or defrauded. As intellectual property law takes on global dimensions and the "property" aspects of trademarks grows in significance in the United States and elsewhere, the potential for trademark law to forget its consumer-protection roots is magnified.

Indeed, Professor Margaret Chon proposes that public trademark law must be updated to keep pace with private, market-driven standards.[243] She explains that industry is self-certifying with little oversight, potentially misleading consumers to even greater degrees.[244] Just acknowledging the potential for intellectual property—including trademarks—to serve development goals through "grassroots participation, the inclusion of local knowledge, and flexibility," she expresses concern over inadequate regulatory participation in the "privatized global neoliberal framework."[245] Citing the example of "fair trade" coffee certification, Chon notes that the hype over acquiring such a designation may raise the costs of participation to the point of excluding the very farmers it was purported to support.[246] Furthermore, as a certification mark, or a subset thereof such as a geographic indication, acquires

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[238] K.J. Greene, *Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship*, 58 SYRACUSE L. REV. 431, 433 (2008).

[239] *Id.* at 437.

[240] *Id.* at 436.

[241] *Id.* at 444.

[242] *See supra* notes 51–52 and accompanying text.

[243] *See generally* Margaret Chon, *Marks of Rectitude*, 77 FORDHAM L. REV. 2311, 2317 (2009) (noting that "an updated public law framework for this growing trend towards market-based regulation seems not only sensible but critically overdue").

[244] *Id.* at 2316 ("Currently, consumer trust in certified goods and services can only operate at the caveat emptor level, because so much of the standard-setting and certification process is beyond public oversight.").

[245] *Id.* at 2341.

[246] *Id.* at 2341–44.

greater value to the producer, it may fail to properly designate the qualities consumers expect.[247] At a minimum, rather than serve to reduce consumer search costs, specific certification standards may "not [be] available in a form that provides meaningful shorthand to consumers" forcing them to "engage in a fair amount of research to compare and contrast the various standards."[248]

Consumer confusion can also be a significant feature of publicity rights, when an individual's name becomes a trademark.[249] When a noteworthy individual lends his name to a project, as Donald Trump did by licensing the "Trump" brand for real estate development projects that he personally did not oversee, the consumer can be misled into costly reliance.[250] In such cases, terms and conditions in contracts will be used to relieve the trademark licensor of liability, but that does not remove the general concern that consumers can be encouraged to transfer their own assets to those who scarcely need more. From a social justice perspective, then, there is a clear case to be made for enhanced consumer education regarding reliance on marks and celebrity endorsements.

Finally, in many instances under modern trademark law, the role of consumer protection is greatly diminished as Congress and the courts accord greater property value to marks. As discussed above, famous trademarks may be protected from unauthorized use, even in the absence of consumer confusion.[251] Legal commentators have expressed concern about the "expansion of property rights at the expense of the public domain" and worry that expansive dilution laws "[stifle] expression, [hamper] commercial communication or [reduce] competition."[252] Indeed, Congress expressly diverted from trademark's common law roots in passing the Federal Trademark Dilution Act,[253] recognizing the substantial investment product producers make in their marks and seeking to ensure that the United States continues to set standards for "strong worldwide protection of intellectual property."[254] Laws like this put a thumb on the scale of property interests over broader societal interests– including

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[247] *Id.* at 2343–44.

[248] *Id.* at 2346.

[249] *See* Barbaro, *supra* note 192, at A1.

[250] *Id.*

[251] *See* 15 U.S.C. § 1125(c)(1) (2006) (explaining that dilution may occur "regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury").

[252] Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029, 1030 n.8 (2006) (citing Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI-KENT L. REV. 1295, 1305 n.29 (1998) ("Modern trademark law is moving . . . towards a . . . property rights regime."); Wendy J. Gordon, *Symposium Introduction*, 108 YALE L.J. 1611, 1614–15 (1999) (expressing concern about dilution law's ability to undermine comparative advertising and parody); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 900 (1997) (commenting on JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)) (stating that trademark owners "are well on their way to owning the exclusive right to pun")).

[253] Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 429 (2003) ("Unlike traditional infringement law, the prohibitions against trademark dilution are not the product of common-law development, and are not motivated by an interest in protecting consumers.").

[254] Long, *supra* note 252, at 1035 (quoting H.R. REP. NO. 104-374, at 4).

freedom of expression and freedom from confusion—and lend fuel to complaints against intellectual property rights expansion in the social justice context.[255]

IV. CONCLUSION

Whether one embraces a classic economic theory of intellectual property, including trademark law, as offering incentives to create, or a social and cultural rationale as a "broader normative purpose" for IP rights,[256] there is room for individual ownership of intellectual property under social justice theories. The most persuasive of these theories is the "capabilities approach" fostered by Sen and Nussbaum.[257] This emphasis on individual human capabilities and income generation as a measurement of development is often cited as a cautionary yellow flag to those who would insist upon utilitarian notions of intellectual property as a foundation for economic development in an aggregate sense.[258] The same capabilities approach, however, can also be used to support the individual's rights to acquire and protect intellectual property, from patents and copyrights, to trademarks and identity rights.

There is a way for both views to be right. Scholars insisting that social justice concerns require restrictions on the global spread of IP rights and that developing nations should not be forced to adopt a one-size-fits-all Western notion of IP[259] pursue a valid point about the definition and scope of intellectual property as applied to all. Courts interpreting intellectual property rights must balance the breadth of those rights against important social goals and values such as freedom of expression and freedom to create. Those who encourage marginalized individuals to learn about and take advantage of existing IP regimes, however, are also supported by traditional social justice themes as they apply to access to justice and universal opportunities for wealth generation. As property interests presumably blind to the economic or social status of those who would acquire them, they should be made available to all regardless of income or ethnicity.

Antoine Dodson, the opening example, is one of many individuals whose sudden and inadvertent celebrity provided him with economic opportunity.[260] Assisting such individuals to capture the value of their identity by commercializing it is an act of distributive justice, and falls as well within Amartya Sen's notions of personal empowerment as a form of social justice generally. Identity rights by trademark acquisition, as well as common law publicity rights, can be a fundamental step on the path to personal financial empowerment.

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[255] Professor Clarisa Long shows, however, that dilution claims are difficult to prove and increasingly unsuccessful. *Id.* at. 1052 (showing a decrease in successful dilution claims, number of injunctions, and even claim filings).

[256] *See* Sunder, *supra* note 15, at 331–32.

[257] *See* SEN, *supra* note 99, at 10, 119; *see also* NUSSBAUM, *supra* note 102, at 88.

[258] *See* Sunder, *supra* note 15, at 313–19.

[259] *See, e.g.*, Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1344–45 (1996) (discussing the potential for a "one-size-fits-all" global IP regime to cause widespread inequalities in access to information).

[260] *See* Mackey, *supra* note 4.

Trademarks can be inexpensive to acquire[261] and are often associated with a meaningful effort to produce goods or services for sale. They can epitomize the entrepreneurial efforts of one or more individual undertaking a serious endeavor to create opportunities for income and self-reliance. Assisting individuals with their acquisition fulfills a social justice function even if, on an "outward looking" societal scale, trademarks and identity rights can sometimes be enforced to stifle free expression, cultural advancement, or the occasional attempt at humor. Nussbaum states:

> Human beings are creatures such that, provided with the right educational and material support, they can become fully capable of all these human functions. . . . . When these capabilities are deprived of the nourishment that would transform them into the high-level capabilities that figure on the list, they are fruitless, cut off, in some way but a shadow of themselves. They are like actors who never get to go on the stage, or a musical score that is never performed.[262]

Martha Nussbaum's description of human capabilities fits well with trademarks and identity rights. This is not to say that assisting individuals with acquisition of property interests—and their enforcement against legitimate fair use, free expression or other worthy endeavor—could not contribute to a large-scale misuse of intellectual property law to the aggregate demise of other social goals. Nor is this to say that individuals necessarily benefit in all ways from celebrity status, personal branding, or otherwise exploiting their own identity for commercial gain.[263] This is simply to say that it would be unfair and unjust to prevent the least powerful and the most economically deprived from property acquisition simply because scholars have noted harms on the societal level. Those issues must be resolved in a way that applies to all.

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[261] *See* 15 U.S.C. § 1051(a) (2006) (explaining what constitutes as "actual use"); *id.* § 1051(b) (2006) (explaining what constitutes as a "bona fide intention to use"). To register a trademark with the USPTO one completes an electronic form through the Trademark Electronic Application System ("TEAS") at www.uspto.gov/trademarks. The TEAS process is designed to be fairly simple and user-friendly; while legal advice is always recommended, it is not required that an applicant appoint counsel. Fees range from $275 to $325 for a single classification of goods or services, with an additional $100 fee required if the applicant files under section 2(b) of the Lanham Act, indicating an "intent to use" the mark in commerce rather than current, actual use.

[262] MARTHA C. NUSSBAUM, HUMAN CAPABILITIES, FEMALE HUMAN BEINGS, IN WOMEN, CULTURE AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61, 88 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

[263] Indeed, Antoine Dodson was arrested in April 2011 for marijuana possession, a factor that may or may not be attributable to his internet fame, but which is known by far more people because of it. *See, e.g., Antoine Dodson Arrested for Marijuana Possession,* HUFFINGTONPOST (April 23, 2011), *available at* http://www.huffingtonpost.com/2011/04/23/antoine-dodson-arrested-marijuana_n_852858.html ("The problem with being a viral star is that everyone knows when you get in trouble, too.").