Applying Genericide to the Right of Publicity

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ABSTRACT

This article proposes applying genericide to the right of publicity as a way to cabin the over-expansion of publicity rights. The article offers a different approach than previous proposals, which seek to either narrow the definition of publicity rights or bolster defenses, such as the First Amendment. Like trademark genericide, the celebrity’s image comes to refer to an idea, not to the identity of the source of the product or to the identity of the celebrity. This article proposes a test: whether the aspect of the celebrity’s persona at issue has been used in the public dialogue with a clearly separate meaning over a long period of time. This test is designed to determine when the primary significance to the public of the celebrity’s image is no longer the celebrity’s personal identity. Genericide would enhance free speech by putting cultural icons fully in the public domain. At the same time, this article argues that celebrities would not substantially lose the right to control use of their identities because, at the point at which a celebrity’s image would be subject to genericide, the public has already appropriated the image and imbued it with a new meaning.

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In the age of mass media and the Internet, celebrities are always with us. Generations ago, Americans may have alluded to characters from the Bible and from books, but celebrities have increasingly become our society’s mode of reference—”the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation.”1 It is hardly groundbreaking to point out that the names and images of celebrities acquire meaning independent from their function of simply identifying the human being behind the face. For example, when someone calls you an “Einstein,” she is not stating that you actually are the medium-height man from Central Europe who expounded the theory of general relativity. Einstein has become a synonym for “smart.” Indeed, the process by which a celebrity’s persona acquires independent cultural meaning closely parallels the process of genericide in trademark law. This article will argue that once the primary significance to the public of the celebrity’s persona is no longer to identify the individual human being but to function as a metaphor or symbol, the celebrity’s public persona should enter the public domain in the same way as a generic trademark.

Genericide offers a novel solution to the over-expansion of the right of publicity so often criticized by commentators. Previous proposals to curb the right of publicity fall roughly into two camps: (1) narrower definitions of publicity rights2 and (2) strengthened

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2. See, e.g., Stacey L. Dogan, An Exclusive Right to Evoke, 44 B.C. L. REV. 291 (2003) (arguing that courts should cabin the right to evoke in order to avoid chilling free
privileges and defenses to the right of publicity.³ Genericide is a different and perhaps more radical solution: after relatively high hurdles have been surmounted, the celebrity would simply lose the publicity right altogether.

This proposal would not, however, throw the baby out with the proverbial bath water. Instead, genericide protects the essence of the right of publicity while addressing the most serious criticism: the stifling of free speech. Genericide would return the name or image of a celebrity to the public domain precisely at the point at which the celebrity’s persona functions more as expressive speech than as an identifier. Up to that point, celebrities would retain the right to control the use of their identities. However, after that point the public would obtain the right to expressive content, which the public itself had largely poured into the celebrity’s persona. More importantly, the celebrity would lose the right to maintain a monopoly over ideas that can only be expressed by the use of her name or image.

This article takes as its starting point a limited view of the right of publicity. This approach, which is codified in the Lanham Act, justifies the right of publicity as a way to protect the public against false endorsement.⁴ Genericide makes the most sense in this context. Just as a trademark serves to link a manufacturer to a product, the celebrity’s name or image links the celebrity to the “product,” thereby serving as a personal endorsement. By the process of genericide, however, the celebrity’s name or image comes to convey some other idea and no longer primarily signifies the identity of the celebrity to the public. At that point, the celebrity’s image does not function as an endorsement and does not deserve protection under the endorsement rationale.

Even when other rationales for the right of publicity, such as human dignity, are considered, however, genericide still serves as a


useful counterweight to a right that seems to be metastasizing. In the last twenty years, the right of publicity has expanded to cover almost any identifying feature of a celebrity.\(^5\) This has led to protection against look-alikes,\(^6\) sound-alikes,\(^7\) and advertisements that merely evoke a celebrity.\(^8\) However, a genericide analysis would winnow out the elements that have a generic meaning and do not deserve protection. For example, in *White v. Samsung Electronics America, Inc.*, the Ninth Circuit found that an advertisement that displayed a robot with a blonde wig, an evening gown, standing on what appeared to be the set of *Wheel of Fortune*, turning a block letter on a game board, and holding a game-show hostess pose, established a claim that the advertiser violated Vanna White’s right to publicity.\(^9\) Perhaps if White’s face had been used in the image, the non-endorsement justifications for the right of publicity might give her a claim.\(^10\) However, the clothes and pose have become a generic expression of a game show hostess in our culture and should not be protected.

Part I of this article describes the right of publicity and lays out the principal criticisms of it. Part II covers how genericide operates in trademark law, and argues that, because of the parallel between trademark and publicity rights, genericide makes sense in the right of publicity. Part III discusses how genericide can be adjusted to fit the right of publicity given several important differences from trademarks. Next, in order to show how genericide would work in practice, Part IV proposes a test for publicity rights genericide:

\(^5\) See, e.g., Dogan, *supra* note 2, at 304-07 (discussing specific instances where an attribute or reference other than a celebrity’s likeness, such as a catchphrase or symbol, was found to violate publicity rights); Westfall & Landau, *supra* note 2, at 91-93 (providing examples in California common law of different identifying features, such as nicknames and identifiable dress, found to violate a celebrity’s publicity rights); Sudakshina Sen, Comment, *Fluency of the Flesh: Perils of an Expanding Right of Publicity*, 59 ALB. L. REV. 739, 748-51 (1995) (discussing the Ninth Circuit’s application of the right of publicity to the evocation of a celebrity’s identity).


\(^9\) *White*, 971 F.2d at 1396, 1399.

\(^10\) The court found she did have a claim, but under a pure endorsement analysis, it seems unlikely that the public would interpret the image as an endorsement by White herself. See id. at 1399.
whether the aspect of the celebrity’s persona at issue has been used in the public dialogue with a clearly separate meaning over a long period of time. Based on analysis of uses in entertainment and news contexts, a court could determine what the public understands by the celebrity’s name or image. The test is demonstrated in a case study of how the test would be applied to the “Terminator” character from the popular movie trilogy. Part V attempts to answer likely objections to applying genericide to the right of publicity.

I. THE RIGHT OF PUBLICITY

The right of publicity originated in the right of privacy.11 Privacy rights had become inadequate to justify the courts’ and state legislators’ sense that celebrities should still have some control of their images, even when they appeared to have forfeited the right of privacy by actively seeking the spotlight.12 Thus, the term “right of publicity” was first coined in a landmark case in 1953, Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.13 The right of publicity has since become a widely accepted right, one that is codified in the statutes of at least eighteen states,14 the Third Restatement of Unfair Competition,15 and the Lanham Act.16 Another eighteen states include some form of publicity rights in their common law.17 The right of publicity usually,
though not always, involves three elements: (1) the plaintiff must indeed be a celebrity; (2) an identifying feature of the celebrity must be used; and (3) the use must cause damage to the commercial value of the celebrity’s persona. The requirements under the Lanham Act are similar, but focus more heavily on consumer confusion as to the source of a product on which the celebrity’s name or image has been placed. Specifically, the Lanham Act requires that a celebrity show that the use of her name is likely to confuse consumers as to whether the celebrity has endorsed or sponsored the product by suggesting an “affiliation, connection, or association” between the celebrity and the defendant’s goods or services, or the celebrity’s participation in the “origin, sponsorship, or approval” of the defendant’s goods or services.

Both state statutes and the Lanham Act reserve the right of publicity to commercial uses, such as advertising and merchandising. Under current law, the public is generally free to use the celebrity’s identity for informational and entertainment uses.

Certainly, a lot is at stake with regard to who owns the right of publicity. To give examples, Tiger Woods had grossed almost $647 million in endorsements in his career at the end of 2006. Elvis Presley Enterprises, the for-profit organization that controls Elvis’ right of publicity, trademarks, and Graceland, generated $40 million in 2004 alone.

Despite its century of existence and the well-developed state of the identity-merchandising industry, the right of publicity is widely

18. See, e.g., CAL. CIV. CODE § 3344; FLA. STAT. ANN. § 540.08; KY. REV. STAT. ANN. § 391.170; MASS. GEN. LAWS ANN. ch. 214, § 3A; N.Y. CIV. RIGHTS LAW § 50; VA. CODE ANN. § 8.01-40; see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46.


20. See, e.g., 15 U.S.C. § 1125(a); CAL. CIV. CODE § 3344; FLA. STAT. ANN. § 540.08; KY. REV. STAT. ANN. § 391.170; MASS. GEN. LAWS ANN. ch. 214, § 3A; N.Y. CIV. RIGHTS LAW § 50; VA. CODE ANN. § 8.01-40; see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46.

21. See e.g., 15 U.S.C. § 1125(a); CAL. CIV. CODE § 3344; FLA. STAT. ANN. § 540.08; KY. REV. STAT. ANN. § 391.170; MASS. GEN. LAWS ANN. ch. 214, § 3A; N.Y. CIV. RIGHTS LAW § 50; VA. CODE ANN. § 8.01-40; see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46.

22. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47; Peter L. Felcher & Edward L. Rubin, Privacy, Publicity, and the Portrayal of Real People By the Media, 88 YALE L.J. 1577, 1601-05 (1979); Madow, supra note 1, at 130-32; Westfall & Landau, supra note 2, at 96-97.


criticized in legal literature. In fact, some commentators question whether the right of publicity should exist at all, and many think it is too expansive. In particular, the right of publicity's growth in recent years to include a right to evoke, descendability, and rights to the sound of a voice, to name a few areas, has fueled debate.

Probably the most serious critique of the expanded right of publicity is that it violates the First Amendment right of free speech. The argument is two-pronged, focusing first on the importance of celebrities to speech and, secondly, on the value of commercial speech. With regard to the first prong, proponents point out that, for better or for worse, celebrities are key features in the cultural landscape. Everybody is familiar with celebrity images and, as a result, they are quickly drafted into the service of our cultural dialogue. They become metaphors and symbols capable of delivering punchy, concise messages. They allow like-minded people to identify each other and to form interest groups—fan clubs are an obvious example. They help to provide a rich public domain from which a vibrant, common

25. See, e.g., Dogan, supra note 2, at 295; Madow, supra note 1, at 238-40 (concluding that the case for the right of publicity is "not proven"); Westfall & Landau, supra note 2, at 121-23; Sen, supra note 5, at 751-60.
26. See, e.g., Madow, supra note 1, at 134; see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (noting that "[t]he rationales underlying recognition of a right of publicity are generally less compelling than those that justify rights in trademarks or trade secrets").
31. See Carrier, supra note 27, at 139-41; Madow, supra note 1, at 138-47; Sen, supra note 5, at 752-60.
32. Carrier, supra note 27, at 139-42; Madow, supra note 1, at 138-147; Sen, supra note 5, at 753-55.
34. See id. at 138; Eugene Volokh, Freedom of Speech and the Right of Publicity, 40 HOUS. L. REV. 903, 910 (2003).
35. Dreyfuss, We Are Symbols, supra note 33, at 139.
culture draws. Therefore, celebrities should not be allowed to control
the meanings associated with their images or to stifle dissenting interpretations.

With regard to commercial speech, commentators argue that
differentiating between paintings and t-shirts, and between sitcoms
and advertisements, creates a false distinction between commercial
and non-commercial uses, and between high and low art. Both are
for sale and both are expressive. Commercial speech, therefore,
should also be fully protected under the First Amendment.

The right of publicity is also criticized as exacerbating imbalance in the distribution of power and money. Firstly, the
right of publicity supports the haves against the have-nots in economic
competition. Only large corporations can afford to pay for the use of a celebrity’s image for advertising and merchandising, to the
disadvantage of smaller companies who cannot afford access to the
selling power of a celebrity’s persona. Secondly, the right of publicity
skews more money to already successful and wealthy stars. Moreover, competition suffers because only those who control the
celebrity image can sell merchandise bearing that image.

Publicity rights also cause an over-investment in “celebrity production.” That is, the public receives vastly more information
about glamorous professions, like athletics and entertainment, than about other more mundane lines of work. Arguably, this causes
people whose talents would be of better use to society as engineers, for example, to waste phenomenal amounts of effort striving to become

36. See Steven Cordero, Cocaine-Cola, the Velvet Elvis, and Anti-Barbie: Defending the Trademark and Publicity Rights to Cultural Icons, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599, 653 (1998); see also Sen, supra note 5, at 759.
37. See Volokh, supra note 34, at 908-10; see also Stacey Dogan & Mark Lemley, What the Right of Publicity Can Learn from Trademark Law, 58 STAN. L. REV. 1161, 1162, 1175-78, 1217-18 (2006) [hereinafter Dogan & Lemley, What the Right of Publicity Can Learn].
38. See id.
40. See Madow, supra note 1, at 223-24.
41. See id. at 136-37.
42. See Stacey Dogan & Mark Lemley, The Merchandising Right: Fragile Theory or Fait Accompli?, 54 EMORY L.J. 461, 481-82 (2005) [hereinafter Dogan & Lemley, The Merchandising Right]. Though this Dogan & Lemley article focuses on trademark merchandising, the same principle should apply to publicity rights merchandising.
43. Madow, supra note 1, at 216-18. “Celebrity production” is the cultural output resulting from celebrities—the jokes and songs we would not otherwise hear, the slam dunks and dance moves we would not otherwise see.” Id. at 216.
celebrities. At the same time, celebrities may have too much influence over society in the first place. Why, for example, should the political opinions of Britney Spears be sought out and broadcast to the nation?

Proponents of the cultural studies movement argue that celebrities’ images have public meaning to which the public has a stronger right than does the celebrity. That is, they contend that celebrities have no particular right to their public image because their images are created by the public. The most influential work on public ownership of the right of publicity is Michael Madow’s *Private Ownership of Public Image: Popular Culture and Publicity Rights*. This critique is related to the First Amendment argument in that cultural studies proponents agree that fencing off celebrity names and images from public discourse inhibits free speech. The cultural studies movement, however, takes this argument a step further by contending not only that celebrity personas are necessary for public discourse, but also that the public created (or at least had a large part in creating) the celebrity’s public meaning in the first place. The cultural studies argument is based on the idea that the public does not just uncritically consume mass media wholesale. Rather, consumers “recode” cultural and even industrial commodities in ways that better serve their particular needs and interests.” They pour new meaning

44. See id. at 216.
45. Id. at 227-28.
47. See, e.g., Madow, supra note 1.
48. Madow, supra note 1.
49. See Madow, supra note 1, at 139.
50. Id. at 139; see also Gaines, supra note 39, at 228-40.
51. See Madow, supra note 1, at 139; see also Jessica Litman, *Breakfast with Batman*, 108 YALE L.J. 1717, 1730 (1999). For example, in the early 1990s, the television show character, Murphy Brown, became a heavily-contested symbol of single motherhood. JOHN FISKE, *MEDIA MATTERS: EVERYDAY CULTURE AND POLITICAL CHANGE* 21-29 (1994). Madow notes that John Wayne and Judy Garland were film stars whose images were recoded by the gay community to take on new meanings. Madow, supra note 1, at 144-45, 194-95. For the gay community, instead of representing untroubled masculinity, John Wayne came to represent the sense of being trapped by the requirements of machismo. See id. at 144-45. John Wayne’s image was displayed on a greeting card wearing bright red lipstick with the caption, “It’s such a bitch being butch.” Id. at 144. Similarly, Judy Garland’s wholesome “girl next door” image was reworked to signify the fragile self-image of gay males. See id. at 194-95. “[A]fter Garland’s firing by MGM and her suicide attempt, urban gay men found in Garland’s image, particularly her androgyny and fragile façade of normality, a powerful means of speaking to each other about themselves.” Id. at 194.
into mass media images and symbols, appropriating them to create their own language.52

Finally, critics argue that, regardless of whether or not a precise harm can be identified, the law should not grant a right where there is no clear benefit for doing so. The critics in this camp point out that the right of publicity is unnecessary because aspiring celebrities do not need additional incentives to become famous.53 Rather, celebrities who can capitalize on their publicity rights are generally wealthy and successful already.54 Moreover, celebrity endorsements are hardly a scarce commodity that must be privately owned in order to prevent a tragedy of the “celebrity commons.”55 There is little evidence to show that more use decreases the value of a celebrity’s image.56 As regards moral arguments, such as labor rights and unjust enrichment, it is not at all clear that celebrities “deserve” the entire commercial value of their images. Celebrities’ images generally borrow heavily from the public domain,57 and owe much of their popularity to pure luck58 and to the meaning the public invests into them.59 Additionally, to the extent that a celebrity’s image is created through labor, much of the labor is contributed by others, including screenwriters, advertising executives, make-up specialists, and publicists.60

53. Madow, supra note 1, at 207-15.
54. Id.
55. Id. at 220-25.
56. Id. at 221-22.
57. Lange, supra note 52, at 161-63, 171-72. For example, Madonna drew on a long tradition of ultra-glamorous Hollywood blondes to construct her charged, sexual image. See Madow, supra note 1, at 196 (“[J]ake Madonna, whose entire persona . . . is an ironic rework of the Hollywood myth of ‘the Blonde.’ How much does she owe to Marilyn Monroe? To the directors . . . who made the films in which Monroe appeared? . . . In short, . . . how much has Madonna ‘invented’ and how much has she ‘converted.’” (internal citations omitted)).
58. Madow, supra note 1, at 185-91. In particular, Madow discusses how Einstein’s fame was “by no means inevitable.” Id. (quoting Marshall Missner, Why Einstein Became Famous in America, 15 SOC. STUD. SCI. 267, 288 (1985)).
59. See id. at 139, 192-96; see also CULTURE, MEDIA, LANGUAGE: WORKING PAPERS IN CULTURAL STUDIES, supra note 52, at 134-39; Lange, supra note 52, at 165.
60. See Madow, supra note 1, at 191-92.
II. GENERICIDE AS A SOLUTION TO THE OVER-EXPANSIVE RIGHT OF PUBLICITY

As has been mentioned, proposals to curb the right of publicity basically take two approaches: those that suggest the right of publicity should be more narrowly defined and those that would strengthen privileges and defenses against the right of publicity.

With regard to the first line of attack, Stacey Dogan, for example, in *An Exclusive Right to Evoke*, contends that the right of publicity should not be used by the courts to prohibit blindly any evocation of the celebrity in the mind of the public. Dogan suggests instead that publicity rights be rigorously limited to cases in which the public is likely to be confused as to whether the celebrity endorsed the use.

Others, such as David Westfall and David Landau, in *Publicity Rights as Privacy Rights*, argue that if the right of publicity is to be considered a property right, careful thought should be given to limiting publicity rights to only certain metaphorical sticks in the bundle of property rights. Just because the right of publicity can be conceived of as a property right, they point out, does not mean that publicity rights should have the same status as traditional forms of property, like real estate. Alice Haemmerli, in *Whose Who? The Case for a Kantian Right of Publicity*, even suggests regrounding the right of publicity in Kantian principles of personal autonomy.

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61. See, e.g., Dogan, supra note 2, at 320 (proposing limiting evocation rights in the right of publicity context to those "cases involving likelihood of confusion as to endorsement"); Haemmerli, supra note 3, at 411-22 (proposing a new basis for publicity rights grounded in Kantian principles of autonomy); Westfall & Landau, supra note 2, at 122 (suggesting that publicity rights should be limited to just some property rights—for example, to the right to assign—but not to descendability rights).

62. See, e.g., Diacovo, supra note 3, at 80-92 (proposing a first sale doctrine defense to right of publicity actions); Dougherty, supra note 3, at 467-73 (proposing a "medium of distribution" test for the First Amendment defense against the right of publicity); see also Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 418-24 (1990) [hereinafter Dreyfuss, Expressive Genericity] (proposing that the expressivity of a trademark be a defense against trademark rights). Dreyfuss' expressive genericide idea could be applied to publicity rights, as well as trademark rights.

63. See Dogan, supra note 2, at 319-21 (arguing, however, that the right to evoke should encompass an exclusive right to evoke when evocation is likely to cause confusion).

64. Id. at 320.

65. See Westfall & Landau, supra note 2, at 121-23.

66. See id. at 80-83.

67. Haemmerli, supra note 3, at 411-22 ("[I]n a Kantian system, property is inseparably associated with one’s ‘personhood’ because property grows out of freedom and freedom is essential to personhood. As to whether a person should be able to claim a
In the second line of attack, commentators have suggested defenses to the right of publicity, such as more liberal First Amendment approaches and copyright law’s First Sale Doctrine. One line of First Amendment reasoning focuses on commercial speech. Diane Leenheer Zimmerman, in Who Put the Right in the Right of Publicity?, points out that the right of publicity is so dependent on expressive forms of commercial speech that if commercial speech were to be more closely guarded, as trends in First Amendment jurisprudence indicate, the right of publicity might not survive. Critics have argued more generally that the right of publicity stifles cultural dialogue. They variously propose new transformative tests, a greater parody exception, an exception for metaphors, and exceptions for cultural icons.

Genericide would constitute a third approach to limiting the right of publicity. Instead of a mediation between stricter definitions and competing rights, genericide would simply abolish the right of publicity at the point where the primary significance to the public of the celebrity’s name or image was no longer that of the individual celebrity. This would be a standard of last resort. The celebrity would have achieved iconic status and would probably already be deceased.

I do not suggest that genericide is some sort of cure-all—far from it. However, genericide has the advantage of a drawing a line beyond which the right of publicity could not go, thereby cabining the trend of expansion. The following discussion will show how to apply the trademark principle of genericide to the closely related field of publicity rights.

68. Diane Leenheer Zimmerman, Who Put the Right in the Right of Publicity?, 9 DEPAUL-LCA J. ART & ENT. L. 35, 53-82 (1998); see Madow, supra note 1, at 140-43; Sen, supra note 5, at 755-60. See generally Dougherty, supra note 3, at 71-73 (proposing a “medium of distribution test,” which would require “judges to decide what works of visual art qualify as First Amendment-protected speech”); Volokh, supra note 34, at 908-13 (discussing the right of publicity from a First Amendment perspective).

69. See generally Diacovo, supra note 3, at 58 (asserting that “the first sale doctrine is a viable and necessary defense in publicity actions”).

70. See Zimmerman, supra note 68, at 53-82.

71. Madow, supra note 1, at 142-47.

72. See Volokh, supra note 34, at 916-24.

73. See Sen, supra note 5, at 755-60.


75. See Cordero, supra note 36, at 639-53.
A. Genericide

At common law, genericide was a natural corollary to trademark law and, therefore, came into existence with the modern definition of trademark.\textsuperscript{76} This is because modern trademark rights have traditionally been rooted in a competition-promotion rationale.\textsuperscript{77} The reasoning proceeds as follows: manufacturers have no incentive to build a good product unless consumers can match a particular product to a particular manufacturer.\textsuperscript{78} Consumers reward manufacturers who create high-quality products by buying more from those manufacturers.\textsuperscript{79} As a result, when a trademark no longer serves to identify the source of a product, no justification remains for its existence. The process by which trademarks come to indicate the product itself, rather than the source of the product, is known as genericide.

The Ninth Circuit, in \textit{Coca-Cola Co. v. Overland, Inc.}, stated the process of genericide clearly: “An originally non-generic, valid trademark becomes generic and invalid when the \textit{principal} significance of the word to the public becomes the indication of the nature or class of an article, rather than the indication of the article’s origin.”\textsuperscript{80} Thus, genericide occurs when the trademark comes to refer either to the nature of a product or to a class of products. The genericide of the term “thermos” is a good example.\textsuperscript{81} Originally, “Thermos” referred only to the brand of containers made by the King-Seeley Thermos Company.\textsuperscript{82} However, the term came to signify the nature of the product itself: an airtight, insulated drink container.\textsuperscript{83}

\textsuperscript{76} Although guild practices had required the use of marks to prevent the passing off of false or defective wares since the Middle Ages, systematic legal protection for trademarks did not begin until the early nineteenth century. \textit{Paul Goldstein, Copyright, Patent, Trademark and Related State Doctrines} 219 (4th ed., Foundation Press 1997) (1973). The tort of trademark infringement originated in unfair competition. \textit{Id.} Specifically, defendants were found to violate trademark law when marks used on products were intended to confuse consumers as to the source of the product. \textit{Id.}


\textsuperscript{78} Landes \\& Posner, \textit{supra} note 77, at 268-70.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{692 F.2d 1250, 1254 n.10 (9th Cir. 1982) (citing Helene Curtis Indus. v. Church \\& Dwight Co., 560 F.2d 1325, 1332 (7th Cir. 1977)).}

\textsuperscript{81} \textit{See} King-Seeley Thermos Co. v. Aladdin Indus., Inc., \textit{321 F.2d 577 (2d Cir. 1963)}.

\textsuperscript{82} \textit{Id.} at 578.

\textsuperscript{83} \textit{Id.} at 578-79.
that King-Seely Thermos Company’s competitors were free to use the term (confined by the court to use with a lower-case “t” only) to describe their products.\textsuperscript{84} Other examples of generic names that originated in trademarks are escalator,\textsuperscript{85} aspirin,\textsuperscript{86} yo-yo,\textsuperscript{87} cellophane,\textsuperscript{88} trampoline,\textsuperscript{89} and cube steak.\textsuperscript{90}

Genericide is also codified in section 14(3) of the Lanham Act.\textsuperscript{91} The U.S. Patent and Trademark Office may, upon petition, “cancel a registration of a mark” when “the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered, or is functional.”\textsuperscript{92} The test used to determine whether a mark has become generic, the “primary significance test,” is included in the same section of the Lanham Act: “The primary significance of the registered mark to the relevant public rather than purchaser motivation shall be the test for determining whether the registered mark has become the generic name . . . .”\textsuperscript{93}

\textbf{B. Genericide Applied to the Right of Publicity}

This article’s limited view of the right of publicity is based on an endorsement rationale. Arguably, the right of publicity makes the most sense as a mechanism to protect the public from false endorsement.\textsuperscript{94} As will be discussed, the other justifications for the right of publicity have been seriously criticized.\textsuperscript{95} The endorsement rationale, at a minimum, protects consumers from confusion. Genericide should apply to the right of publicity as the logical corollary to a publicity right based on endorsement. Even if the right of publicity is not limited to protection against false endorsement, however, genericide makes sense because the connection between the

\textsuperscript{84} Id. at 581.
\textsuperscript{86} See Bayer Co. v. United Drug Co., 272 F. 505, 510 (S.D.N.Y. 1921).
\textsuperscript{87} See Donald F. Duncan, Inc. v. Royal Tops Mfg. Co., 343 F.2d 655, 657 (7th Cir. 1965).
\textsuperscript{88} See DuPont Cellophane Co. v. Waxed Prods. Co., 85 F.2d 75, 76 (2d Cir. 1936).
\textsuperscript{90} See Spang v. Watson, 205 F.2d 703, 704 (D.C. Cir. 1953).
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} See Dogan & Lemley, \textit{What the Right of Publicity Can Learn}, supra note 37, at 1190-91.
\textsuperscript{95} See infra Part V.
celebrity and her image becomes so attenuated when the public no longer sees her in the image, but rather assigns an independent meaning to the image. At that point, the celebrity no longer has control over the image. The meaning of the image has essentially been constructed and overtaken by the public.

Like the trademark right, the right of publicity grants a right to profit from the goodwill built up in a name.\(^{96}\) Focusing on the right of publicity’s endorsement justification narrows the gap still more. In both, the boundary of the right of publicity is defined by the confusion of the consumer.\(^{97}\) Trademark infringement occurs when use of the registered mark causes confusion in consumers as to the source of the mark.\(^{98}\) Similarly, in the right of publicity, infringement occurs when the use of the celebrity’s persona confuses the consumer as to whether the celebrity endorsed the use.\(^{99}\) Otherwise, any golf ball manufacturer, for example, could put Tiger Woods’ picture on its golf ball can. On the federal level, the right of publicity protects the source-identifying function of the right of publicity. Section 43(a)(1) essentially prohibits commercial use that falsely suggests endorsement.\(^{100}\) In fact, the right of publicity codified in the Lanham Act uses language similar to the language establishing the federal trademark right.\(^{101}\)

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96. See, e.g., Ali v. Playgirl, Inc., 447 F. Supp. 723, 728 (S.D.N.Y. 1978) (“This common law publicity right is analogous to a commercial entity’s right to profit from the ‘goodwill’ it has built up in its name.”); Grant v. Esquire, Inc., 367 F. Supp. 876, 879 (S.D.N.Y. 1973) (“The ‘right of publicity’ is somewhat akin to the exclusive right of a commercial enterprise to the benefits to be derived from the goodwill and secondary meaning that it has managed to build up in its name.”); William L. Prosser, Privacy, 48 CAL. L. REV. 383, 423 (1960) (noting that appropriation cases “create in effect, for every individual, a common law trade name, his own, and a common law trade mark in his likeness”).


98. See Lanham Act § 32(1), 15 U.S.C. § 1114(1) (2000) (“Any person who shall, without the consent of the registrant—(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.”).


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
Given the fact that trademark law and the right of publicity are so similar, it makes sense to apply the limiting principle of genericide from trademark law to the right of publicity. In the U.S., genericide has been part of common law since at least the 1830s. It has become a flexible, well-articulated, and nuanced rule over the last two centuries. Certainly, it seems simpler to employ an already well-established limitation than to create new ones from whole cloth, as commentators such as Haemmerli have suggested.

Genericide would operate with regard to the right of publicity in a manner parallel to the way it does with trademarks. The name and image of a famous person, at the beginning of his or her ascent to fame, refers only to that human being. Over time, however, through increased fame, the name and image of the celebrity begin taking on independent meaning from the person underlying the public persona. The celebrity’s name or image begins to refer to a concept, behavior, attitude, or style. For the sake of convenience, this article will refer to a celebrity’s name and image collectively as his “persona”: the combination of aspects that constitute the celebrity’s public personality. The celebrity’s public persona is distinct from the unique, personal identity of the individual human being.

The primary significance of the celebrity’s persona eventually refers not to the source of the celebrity—the individual human being—but to an independent meaning. Using the previously mentioned Einstein example, “Einstein,” in common speech, more often than not, 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 of 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, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,

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.


102. See, e.g., Thomson v. Winchester, 36 Mass. 214, 216-17 (1837).


104. See generally Haemmerli, supra note 3 (proposing that Kantian notions of autonomy should be applied to right of publicity actions).

105. Madow, supra note 1, at 194-96 (giving the example of Judy Garland’s appropriation by urban gay males); see supra note 51.

106. See GAINES, supra note 39, at 228-40; Madow, supra note 1, at 193-95; Sen, supra note 5, at 753-54.
does not refer specifically to the human being who grew up in Germany and died in Princeton, New Jersey; instead, it is an adjective describing a thinker of extraordinary insight and deep understanding of the universe—“Einstein,” in short, has become a synonym for “genius.”

Courts have already recognized the layering of meaning onto the persona of a celebrity. Elvis Presley Enterprises v. Capece is a good example. The defendant, Barry Capece, established a nightclub, called “The Velvet Elvis,” with a 1960s era theme. Among other Elvis Presley-inspired features, the nightclub displayed a painting of Elvis on velvet. Elvis Presley Enterprises, the organization that inherited Elvis Presley’s trademark and publicity rights, sued Capece on several grounds, including violation of Elvis’ right of publicity. Specifically, Elvis Presley Enterprises objected to Capece’s use of Elvis’ name in “The Velvet Elvis,” and to the use of Elvis’ image throughout the club. The court ruled in favor of Capece on the right of publicity, stating that the phrase “The Velvet Elvis” did “not amount to an unauthorized commercial exploitation of the identity of Elvis Presley” so much as an “art form reflective of an era that Elvis helped to shape.”

In fact, the court in Elvis Presley Enterprises, Inc. essentially described genericide without using the word:

[T]his phrase is not the thumbprint, work product, or tangible expression of Elvis Presley’s celebrity identity. The mere association of a phrase or expression with a

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110. Id. at 788.

111. Id.

112. Id. at 789.

113. Id.

114. Id. at 802. Notably, the district court’s opinion was reversed by the Fifth Circuit on appeal. Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 207 (5th Cir. 1998). However, the Fifth Circuit did not overturn the district court’s ruling on the right of publicity, holding that it did not have to reach the issue of publicity rights because the court could grant Elvis Presley Enterprises the remedy it sought on trademark infringement alone. Id. at 205 n.8. Given the Fifth Circuit’s reasoning on the trademark issues, however, it seems almost certain that it would have overturned the district court’s decision on the right of publicity had it reached that issue. See id. at 200-05 (analyzing a claim of trademark infringement).
celebrity without the intent or effect of exploiting his identity or persona is insufficient cause for a violation of publicity rights.\textsuperscript{115}

Thus, the court distinguished between the individual human being and the layering of association onto the celebrity's persona by the public.

The court in \textit{Elvis Presley Enterprises, Inc.} recognized a common phenomenon: that the use of a celebrity's persona can be purely expressive and removed from the underlying human being.\textsuperscript{116} The court described the process unambiguously: “Here, the image of Elvis, conjured up by way of velvet paintings, has transcended into an iconoclastic form of art that has a specific meaning in our culture, which surpasses the identity of the man represented in the painting.”\textsuperscript{117} To analogize to trademark law, “thermos” has come to mean more than the source (the manufacturer). The public understands “thermos” to refer to the nature of the product itself: an airtight, insulated container. Similarly, the word “Elvis” and Elvis’ image have come to mean more than just the name or identity of the man. It refers to a layering of associations and meanings superimposed by the public, and “The Velvet Elvis” has become a byword for the gaudy, overblown style of the 1960s.

In fact, someone as famous as Elvis has many different meanings and associations. To name two immediately understood images, there is “young Elvis”—an icon of virility and rock and roll—and “old Elvis”—symbolizing the flamboyant, bizarre excess of superstardom. These meanings are instantaneously apparent to a member of American culture (perhaps even of world culture). Meanwhile, Elvis has entered our language. For example, the phrase “Elvis has left the building” has come to mean “death” or “the show is over.”\textsuperscript{118} The fact that Elvis cannot be distilled into one adjective, as

\textsuperscript{116.} \textit{See id.}
\textsuperscript{117.} \textit{Id.} (emphasis added).
\textsuperscript{118.} “When Elfan Jerry Glanville resigned as Houston Oilers coach in 1990, and was fired by the Atlanta Falcons in 1994, the media could not resist the convenient ‘Elvis has left the building’ leads and farewells in their coverage.” \textsc{George Plasketes}, \textit{Images of Elvis Presley in American Culture, 1977–1997: The Mystery Terrain} 153 (1997). The phrase has entered popular entertainment culture as well: In the similarly sinister setting of \textit{Bad Influence} (1990), the secretly depraved Alex (Rob Lowe) utters an Elvis catchphrase to pronounce a person dead. Standing over the still-warm body, the creepy character casually intones, “Elvis has left the building,” as if administering his victim’s last rites. The same phrase punctuates a triumphant strike in a battle against earth invaders in \textit{Independence Day} (1996). \textit{Id.} at 216; \textit{see also} \textsc{Frank Zappa}, \textit{Elvis Has Just Left the Building, on Broadway the Hard Way} (Zappa Records 1988).
“Einstein” can be into “genius,” does not mean that the associations with Elvis are vague and illusory—quite the opposite. Elvis not only has a variety of associations in our culture,119 but his persona stands for meanings that cannot be accurately expressed without the word “Elvis” or Elvis’ image.

As Rochelle Dreyfuss observed in Expressive Genericity: Trademarks as Language in the Pepsi Generation, the meaning of a word can often only be expressed by that word.120 In addition to its core denotation, a word trails a host of associated meanings.121 For example, the core denotation of “Einstein” may be the same as the core denotation of “genius,” but “Einstein” also carries unique connotations: a bushy-haired, absent-minded, loveable type of genius. Moreover, the particular associations of a word enhance understanding: “[P]articular usages [of a word] can require listeners to consider several denotations, their respective connotations, and the connections between them. This effort can lead to a new level of understanding, which might not have been achieved by words lacking the same associational set.”122

Aside from linguistic studies, it is a generally understood principle in First Amendment jurisprudence that forbidding use of a particular word impermissibly suppresses meaning and expression. As the Supreme Court stated in Cohen v. California, “we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”123 As a matter of common sense, Mark Twain’s observation rings true: “The difference between the almost-right word [and] the right word is really a large matter—it’s the difference between the

120. See Dreyfuss, Expressive Genericity, supra note 62, at 413-16.
121. Id. at 413-14.
122. Id. at 414.
123. 403 U.S. 15, 26 (1971). But see San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 546-47 (1987) and MGM-Pathe Communications Co. v. Pink Panther Patrol, 774 F. Supp. 869, 877 (S.D.N.Y. 1991), for cases that have required defendants to use substitute words, even when the words at issue have an arguably unique meaning.
lightning bug and the lightning." The same principle should apply to expressive use of iconic celebrities.

C. Trademark Law and the Right of Publicity

One might object that publicity rights are not a perfect parallel to trademark rights. The right of publicity’s concern with endorsement might seem significantly removed from trademark’s concern with source identification. For example, consumers might believe that when “Corningware” is stamped on their dish the Corning Corporation actually made the dish. In contrast, when people see Madonna’s face on a mug, no one assumes that Madonna actually made the mug. However, trademark rights cover a wide range of uses. The use of sports logos, in particular, is comparable to the use of a Madonna’s face; consumers certainly do not think the Red Sox franchise actually wove the hat that bears the Red Sox logo. In fact, the connection between the manufacturer and the brand is quite remote in most products. The majority of retail items are manufactured by contractors in developing countries across the world. Moreover, a single trademark may cover an array of products as diverse as alarm clocks and maple syrup. When a corporation decides to put its trademark on a product, the consumer can only hope that the corporation has enforced some standard of quality in the creation of the product. This tenuous connection between the corporation and its trademarked products is quite similar to an endorsement by the celebrity of a product bearing the celebrity’s image.

Even if the endorsement justification for the right of publicity is equivalent to the source identification function of a trademark, there is still the objection that the right of publicity rests on justifications independent of endorsement. The Third Restatement of Unfair Competition gives five rationales, in addition to the endorsement rationale, for the right of publicity: (1) protection of the individual’s interest in personal dignity and autonomy; (2) protection

of the labor invested into creating a public personality; (3) prevention of unjust enrichment by those exploiting the celebrity’s persona; (4) prevention of excessive use that dilutes the commercial value of the identity; and (5) creation of an incentive to become a celebrity.\textsuperscript{127}

Given these widely different justifications for a right of publicity, knocking out the endorsement leg with genericide still leaves the right of publicity standing securely on five other legs.

Part V of this article will address possible criticisms of right of publicity genericide based on the independent justifications for the publicity right. Without going into detail, however, the other rationales for publicity rights have been widely criticized.\textsuperscript{128} Indeed, in the cases in which genericide would apply, these rationales are strained to the breaking point. Genericide would recognize that celebrities should not have control over meanings created by the public with only an attenuated connection to their personal identities.

At the same time, the right of publicity is seen by many as too broad.\textsuperscript{129} Thus, the solution to the mushrooming of the right of publicity may well be a re-grounding within the traditional and well-established strictures of trademark law.\textsuperscript{130}

III. ADJUSTING GENERICIDE FOR THE RIGHT OF PUBLICITY

The endorsement and source identification rationales of publicity and trademark rights are similar, but the subjects covered by these rights still differ greatly. The trademark right protects a specific mark: a word, for example, created in someone’s imagination.\textsuperscript{131} The publicity right, in contrast, protects the identity of a real human being.\textsuperscript{132} A person is not the same as a product.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{127} See Restatement (Third) of Unfair Competition § 46 cmt. c (1995).
\item \textsuperscript{128} See Madow, supra note 1.
\item \textsuperscript{129} See supra text accompanying notes 25-60.
\item \textsuperscript{130} See Dogan & Lempley, What the Right of Publicity Can Learn, supra note 37, at 1220 (arguing that “trademark law should serve as the baseline for defining and limiting the right of publicity”).
\item \textsuperscript{131} Lanham Act § 45, 15 U.S.C. § 1127 (2000) (“The term ‘trademark’ includes any word, name, symbol, or device, or any combination thereof . . . .”).
\item \textsuperscript{132} Restatement (Third) of Unfair Competition § 46 (“One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability . . . .”).
\item \textsuperscript{133} Of course, many trademarks represent people. Sports team and musical group trademarks represent groups of people and often come to be closely identified with a lead player or singer. See, e.g., Beck, Trademark Registration No. 3,130,525 (filed July 18, 2003) (a trademark for musical recordings by the musician, Beck Hansen.). Movie and television show trademarks stand for the actors involved. For example, Oprah Winfrey uses her first name as a trademark for her television show. See Oprah, Trademark Registration No.
obviously, the differences between a human being and a product or mark are profound. For the purpose of this inquiry, however, two basic distinctions seem relevant: people are more complex than trademarked products, and people are not interchangeable in the same way that products are.

A. Adjusting Genericide to the Complexity of Human Beings

With regard to the complexity of people, there may not even be a way to describe the extent of different facets and layers that go into the constitution of a human being. On a superficial level, a famous person’s public face may be completely different from the face he shows to his family. On a deeper level, people have emotional, intellectual, spiritual, and social aspects. How can this compare to a product, even the most complex? More to the point, how can a whole person become “generic”?

As discussed above, applying genericide to the right of publicity would occur when a celebrity’s persona has acquired independent meaning. However, a celebrity presents many different sides to the public. Not all sides of a celebrity have equal exposure to the public or acquire independent meaning. The multifaceted nature of a human being should mean, therefore, that only aspects of the celebrity that have acquired independent meaning should become generic.

A good example of a celebrity who may not have acquired independent meaning as a whole is Jackie Onassis. Many Jackie O. images, such as those depicting her as a child, a publisher, and so on, do not signify anything other than a representation of the person herself. On the other hand, the image of Jackie wearing a scarf and large sunglasses may have taken on its own meaning in our culture. Arguably, the image symbolizes inaccessible, high-class glamour.

1,726,373 (filed May 24, 1991) (a trademark for use with “entertainment services rendered through the medium of television in the nature of a variety talk show series”). Service marks stand for the services provided by people. Lanham Act § 45, 15 U.S.C. § 1127 (“The term ‘service mark’ means any word, name, symbol, or device, or any combination thereof— . . . [used] to identify and distinguish the services of one person . . . . ”). Moreover, even trademarks that do not represent people often represent complex, abstract concepts—what Jessica Litman, in Breakfast with Batman, calls “atmospherics.” Litman, supra note 51, at 1730 (noting, for example, that women who use a L’Oreal™ product may associate using the product with boosting their self-esteem, murmuring to themselves “and I’m worth it.”).


136. See FLAHERTY, supra note 135, at 50-53.
A possible objection to the idea of dividing a celebrity’s public persona into different aspects is that even one aspect might be too broad. That is, if Jackie’s scarf and sunglasses alone are enough to signify inaccessible, high-class glamour, why should members of the public who want to use the image get to use Jackie’s face as well? Each “aspect” of the celebrity’s persona could be broken down into its elements, with an analysis of whether each one was necessary to express the idea. A critic might argue, for example, that Jackie’s face should not be used unless it was both necessary to express the idea and the image as a whole was generic (i.e., the primary significance is communicative). Such an analysis would arguably provide the perfect balance between a celebrity’s right to her image and the public’s right to the ideas expressed by the image.137

However, this analysis goes too far. It is true that genericide in publicity rights has a certain paradoxical result. On the one hand, the more famous and expressive the image, the fewer elements of the image that are needed to express whatever idea the image holds. For example, an image can suggest Groucho Marx using only a bushy mustache, eyebrows, and round glasses. On the other hand, the more famous the image, and the more it begins to take on an independent meaning, the more generic it becomes. That is, the genericizing effect of fame militates toward the celebrity losing control over what her image means.

If the justification for the right of publicity is source identification, the only issue that should matter is whether the primary significance of the image is source identifying to the public or symbolizes something else. In that case, as long as people understand the picture of Jackie with sunglasses and a scarf primarily to mean high-class glamour and only secondarily to depict Jackie, there is no need to analyze each element separately.

If other justifications for the right of publicity besides the endorsement rationale are given credence, a balancing test may make sense. The celebrity’s right to control her image would be balanced against the extent to which elements of her image had entered the

137. This is more or less what courts do to determine whether a work infringes a copyright or trademark. See, e.g., Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub’g Group, Inc., 886 F.2d 490, 494-95 (2d Cir. 1989) (balancing, in a trademark case, between “allowing artistic expression and preventing consumer confusion”); Yankee Pub’g Inc. v. News Am. Publ’g Inc., 809 F. Supp. 267, 276 (S.D.N.Y. 1992) (balancing, in a trademark case, between “exclusive right to use a set of words or symbols in trade . . . [and the] free speech rights of others”); Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 712 (S.D.N.Y. 1987) (balancing, in a copyright case, between protection of the “particular expression of an idea . . . [and protection of] the idea itself”).
public domain. At the least, this line of reasoning would eliminate “evocation” cases, such as White v. Samsung Electronics America, Inc.\textsuperscript{138} In \textit{White}, the court found that a robot “dressed in a wig, gown, and jewelry” and acting like a game show hostess potentially violated the publicity rights of Vanna White, the famous hostess of the TV show \textit{Wheel of Fortune}.\textsuperscript{139} White herself, however, was nowhere in the picture. The only elements that appeared had a clear, independent meaning: an attractive, blonde figure turning a letter block simply symbolizes a generic game show hostess. Under this analysis, White might have a right of publicity claim if her face were in the image because her face was not necessary to express the idea, but she would not have a valid objection against the generic elements.

Only in extreme cases would the \textit{whole} person become generic. By this, I mean that all names and images associated with the celebrity would enter the public domain, even personal images that have no relationship to the famous person’s public self. For example, photographs of the celebrity as a child would not be protected. Of course, if such images are unrelated to the famous person’s public image and, therefore, are not well known, they might not have commercial value anyway. Genericide of the whole person would be quite unusual because genericide itself is a rather extreme case. Indeed, in trademark law, trademarks only rarely become generic.\textsuperscript{140}

Given that people continually reinvent themselves during their lifetimes, creating new personas or changing the meaning of existing personas, it seems that genericide of the whole person should apply only after the person’s death. After death, celebrities can no longer reinvent themselves and reclaim the public meaning of their identities. Furthermore, it is much less likely that a dead celebrity’s image on a product would be interpreted as an intentional endorsement, since the celebrity did not have a choice in the matter. After death, the personas created by the celebrity are essentially frozen in time. Additional meaning poured into the persona is largely created by the public and should belong to the public.

\textsuperscript{138} 971 F.2d 1395 (9th Cir.), \textit{amended by No. 90-55840, 1992 U.S. App. LEXIS 19253 (9th Cir. Aug. 19, 1992).

\textsuperscript{139} \textit{Id.} at 1396, 1399.

\textsuperscript{140} Naturally, the trademark must be quite well known to become a synonym for the product. In addition to the genericized trademarks discussed \textit{supra} in Part II.A, I have only been able to find two more. \textit{See Kellogg Co. v. Nat’l Biscuit Co.}, 305 U.S. 111, 116-18 (1938); \textit{Murphy Door Bed Co., Inc. v. Interior Sleep Sys., Inc.}, 874 F.2d 95, 101-02 (2d Cir. 1989).
B. Adjusting Genericide to the Uniqueness of Human Beings

Just as people are vastly more complex than products, people are also vastly more individualized. For example, it is relatively easy to create two identical photocopiers; it is impossible to create two identical human beings.\textsuperscript{141} The problem that arises from this difference is that the celebrity’s image or name will always refer, to a certain extent, to the celebrity herself. Thus, “thermos” might refer to all airtight, insulated beverage containers, but the name “Elvis” will always refer, at least partly, to the person—there is only one Elvis Presley. This raises the question of how to separate the person from the independent meaning.

Trademark law resolves the problem of dual meanings fairly simply with the primary significance test. The primary significance test recognizes that people may simultaneously recognize “thermos” as referring to a class of products and to a brand.\textsuperscript{142} The test, then, is what the primary significance of the word is to the consumer, not all the associations a consumer may have with the word “thermos.”\textsuperscript{143} In the same way, the primary significance to the public of an image of fat Elvis in a white, sequined jumpsuit may represent a particular style and era, rather than just the identity of the human being, Elvis Presley.

The stakes are higher, however, in the right of publicity context than in trademark law because the public’s association with the individual celebrity is likely to be greater than a consumer’s association with a brand. As discussed, a human being is so unique that the individual celebrity’s name or image will always have a strong role as identifier. As a result, it is harder to extricate the independent meaning from the identification function of the celebrity’s image.

The tendency to recognize a human face immediately may have more to it than just the uniqueness of each human being. Scientific studies suggest that human brains are wired to recognize and distinguish individual faces.\textsuperscript{144} Indeed, face recognition appears to be

\textsuperscript{141} It may be frivolous to point out that even if you could clone people, you could not imbue those people with exactly the same experiences.


\textsuperscript{143} See id.

\textsuperscript{144} John J. Ratey, M.D., A User’s Guide to the Brain: Perception, Attention, and the Four Theaters of the Brain 316 (2001); see also Daniel Tranel & Antonio R. Damasio, Neuropsychology and Behavioral Neurology, in Handbook of Psychophysiology 119, 132-33 (John T. Cacioppo et al. eds., 2d ed. 2000) (discussing prosopagnosia—the ability to recognize faces). Specific parts of the brain are dedicated to recognize human faces. Ratey, supra, at 316. Studies show that people with damage in
tied to specific parts of the brain that seem to have evolved for the purpose of distinguishing individuals.\textsuperscript{145} The ability to distinguish words, in contrast, is not so closely linked to recognizing a specific person.\textsuperscript{146} As a result, it is probably more difficult to re-direct a person’s understanding of the primary significance of a face from its source-identifying function to some independent meaning.

Arguably, this difference between celebrities and trademarks is just a question of degree. It would simply be more difficult to find genericide in the right of publicity than in trademarks using the primary significance test. However, this does not make it impossible to apply genericide to publicity rights. On the contrary, courts distinguish fine shades of meaning all the time.\textsuperscript{147}

Moreover, it makes sense that the hurdle before losing the right of publicity through genericide should be higher than the hurdle for trademark. As discussed above, there are other justifications for the right of publicity besides the source-identification function.\textsuperscript{148} In particular, an individual’s control over her image is widely acknowledged to be important to her sense of personal dignity and autonomy.\textsuperscript{149} Thus, the hurdle to losing control of one’s persona (or an aspect of one’s persona, as discussed above) should be higher than it is in trademark.

these parts of the brain cannot recognize or distinguish faces, even those of people they have known their whole lives. \textit{Id.}; Tranel & Damasio, \textit{supra}, at 132-33. But see Caroline Williams, \textit{Hello, Strangers}, \textsc{New Scientist}, Nov. 25, 2006, at 34-37, for cognitive neuroscientist Isabel Gauthier’s counter-argument that the ability to recognize faces is simply part of the brain’s general ability to make distinctions.

\textsuperscript{145} \textsc{Ratey, supra} note 144, at 314-16. Ratey notes:

Being able to recognize faces is an important part of the human repertoire of social behaviors. For one thing, it is essential for survival, a key to determining whether a friend or foe is approaching. It is also essential to maintaining social relationships, and even social status (another kind of survival), by identifying others of a higher, lower, or similar status and regulating behavior accordingly, and impairment here can be devastating.

\textit{Id.} at 315.

\textsuperscript{146} The ability to distinguish other characteristics is generally not impaired by damage to the parts of the brain that control the ability to recognize faces. \textit{Id.} at 316-17; Tranel & Damasio, \textit{supra} note 144, at 132-33.

\textsuperscript{147} \textsc{See supra} note 137.

\textsuperscript{148} \textsc{See supra} text accompanying note 127.

\textsuperscript{149} \textsc{See \textsc{Restatement (Third) of Unfair Competition} § 46 cmt. c (1995); Haemmerli, \textit{supra} note 3, at 385-86. The right of publicity, after all, originated in the right of privacy. \textsc{See Thomas Phillip Boggess, \textit{Cause of Action for an Infringement of the Right of Publicity}, 31 \textsc{Causes of Action} 2d 121 (Clark Kimball & Mark Pickering eds., 2006); 1 J. Thomas McCarthy, \textsc{The Rights of Publicity and Privacy} § 2:1-2, at 81-83 (2d ed. 2007). As Shakespeare noted: “He that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed.” \textsc{The Columbia Dictionary of Shakespeare Quotations} 306 (Mary Hoakes & Reginald Poakes eds., 1998).
However, using the primary significance test sets the hurdle at the right point. When the primary significance of a celebrity’s name to the public has an independent meaning—such as “Einstein”—the celebrity has already lost control. The celebrity’s persona, or the aspect of the celebrity’s persona, has become so well known that the public has appropriated it into the public dialogue. At that point, society defines what the word or image means; it has passed beyond the control of the celebrity into the public domain.

Moreover, there is no need to create a higher hurdle than the primary significance test because the primary significance test will naturally be a high hurdle in the context of the right of publicity. Given the human tendency to recognize an individual by her face, the symbolic meaning of an image would have to be quite overwhelming to become of primary significance to the viewer. As a result, it seems that the difference between trademark and publicity rights holds the answer in how to treat them. The remaining question becomes how to extricate independent meaning from an image’s source-identifying meaning. In other words, what do people understand when they look at an image of the celebrity?

Fortunately, there is a fairly easy way to determine whether a celebrity’s persona has acquired meaning in the public domain independent from the source-identifying meaning. Part IV of this article proposes a test to make that determination. The right of publicity tends to protect only against commercial use, not against informational or entertainment use. Consequently, the names and images of famous people are bandied about constantly in the entertainment and informational media. Informational uses are probably not very useful for determining multiple meanings, but entertainment uses, like parody, jokes, dramatic representations, and so on, clearly demonstrate the additional meanings and associations with a celebrity’s persona.

IV. PRACTICAL APPLICATION OF GENERICIDE TO THE RIGHT OF PUBLICITY

The preceding Part attempted to parse out the principal differences in how genericide would apply to publicity rights. Human

151. See Felcher & Rubin, supra note 22, at 1602-06.
beings are obviously not perfect parallels to the products at issue in trademark law. However, these differences could be overcome by separating out generic aspects of a celebrity from the celebrity’s identity as a whole, and by setting a high bar to distinguish between the identifying function and independent meaning of a celebrity’s persona. This Part will show how a court would determine whether an aspect of a celebrity’s persona had become generic.

A. The Test

The test to prove genericide should be whether the aspect of the celebrity’s persona at issue has been used in the public dialogue with a clearly separate meaning over a long period of time. The intent of this test is to show that the primary significance to the public of a celebrity’s persona has an autonomous meaning, separate from its function of identifying the individual. The test does so by requiring that the public has not only appropriated and invested the celebrity’s persona with independent meaning, but that the particular use of the celebrity’s persona has become embedded in the culture.

In conducting this test, it makes sense to consider the celebrity’s written name separately from the celebrity’s visual image for two reasons. Firstly, a name is not as distinct as an image. Many people have the same name, but, except for identical twins, faces and bodies are quite unique. Secondly, as discussed above, the human brain seems uniquely adapted to recognizing and distinguishing faces. Therefore, a celebrity’s image should be analyzed independently from her name because the primary significance of each to the public is likely to be different.

The “clearly separate meaning” would be the most difficult element of the test to prove, especially in the context of the use of a celebrity’s name. A court would have to look to popular language and the media to see how the celebrity’s persona is used in public communication and what the use means to the public. Trademark law has well-established tests for genericide that can be readily translated to the right of publicity. A court could look to whether the word is commonly used as a verb or adjective, rather than just as a noun. For example, if people commonly said, “I got Elvis-ed” to describe

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152. See supra text accompanying notes 144-46. The old trope, “I may have forgotten the name, but I never forget a face,” certainly rings true in common experience.
153. For similar reasons, a celebrity’s voice should be analyzed separately as well.
154. See Ingram, supra note 103, at 161-62.
getting dressed up in a white, sequined jumpsuit, it would be a strong indication that the use has become generic. Use of the celebrity’s name in the creation of new words provides another indicator of genericide.\footnote{156}{Dreyfuss, Expressive Genericity, supra note 62, at 421.}

These tests work for words, but images are more difficult. As discussed above, it is harder to extricate independent meaning from a celebrity because a celebrity’s persona has an inherently stronger identifying function.\footnote{157}{See supra Part III.B.} Rochelle Cooper Dreyfuss, in \textit{Expressive Genericide: Trademarks as Language in the Pepsi Generation}, provides a helpful articulation of the difference between the identifying function of a mark and its independent meaning—which she calls the “expressive” function.\footnote{158}{See Dreyfuss, Expressive Genericity, supra note 62, at 400.} Dreyfuss notes that many trademarks have expressive functions beyond mere source identification.\footnote{159}{See id. at 418.} She gives the word “olympic” as an example.\footnote{160}{See id. at 404-20.} “Olympic” has been designated by law to be the trademark for the Olympic Games,\footnote{161}{36 U.S.C. §§ 220501-220529.} but, at the same time, “olympic” serves “[t]o recall the tenets of the ancient Greeks and to evoke their spirit of cooperation, mutual acceptance, and international friendship.”\footnote{162}{Dreyfuss, Expressive Genericity, supra note 62, at 413.} Dreyfuss seems to be suggesting that a trademark owner cannot hold a monopoly over an idea, only over a source-identifying mark.\footnote{163}{See id. at 404-20.} The King-Seeley Thermos Company, for example, could not stifle trade in airtight, insulated drink containers by retaining control over the one word, “thermos,” that described the product.\footnote{164}{King-Seeley Thermos Co. v. Alladin Indus., Inc., 321 F.2d 577, 578-79 (2d Cir. 1963).} Drawing a parallel to publicity rights, Elvis Presley Enterprises could not hold a monopoly on the Elvis style by refusing to allow his name or image to be used at “The Velvet Elvis” lounge.\footnote{165}{See supra notes 109-17 and accompanying text.}

For Dreyfuss, then, the determinative issue in finding a mark to be generic is whether the meaning of the mark can be expressed in an alternative way.\footnote{166}{Dreyfuss, Expressive Genericity, supra note 62, at 418, 421-22. Dreyfuss argues that this test goes to the heart of genericide. See id. She contends that we should “drop the fiction of consumer confusion, and instead focus on the primary concern, which is the expressive significance of the mark.” Id. at 419. An objection to using Dreyfuss’ concept of “expressive significance” is that expressive significance is not the standard for genericide in trademark law. The standard for genericide in trademark law is that “the principal
then ownership of the word or image has come to monopolize the ideas the word expresses.\textsuperscript{167} This indicates clearly that the mark has a non-source-identifying meaning because it is essential to communication.

Dreyfuss' alternative word or image test is an excellent final test to prove that a celebrity's persona has independent meaning. For example, if the overblown, gaudy style of the 1960s cannot be expressed without a picture of Elvis painted on velvet, then clearly that image of Elvis has attained an independent meaning. Not only does this aspect of Elvis' image express a definite meaning, but, also, it is so unique and robust that no other image or words can adequately replace it.

Finally, whether a celebrity is deceased should be an important factor in determining whether their image or name has attained independent meaning.\textsuperscript{168} People are unlikely to think that a dead celebrity endorsed a particular product. Even if the right of publicity is inheritable, the connection between the product and the star is considerably attenuated when the celebrity's estate makes the merchandising decision.

After showing that an independent meaning exists, a defendant attempting to establish genericide would next have to show

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significance of the word to the public becomes the indication of the nature or class of an article, rather than the indication of the article's origin.” Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1254 n.10 (9th Cir. 1982). To a certain extent, the “nature or class” meaning of a word is the word’s “expressive significance,” as opposed to the word’s source-identifying significance. Thus, the “nature or class” meaning and the “expressive significance” can be conflated. Dreyfuss, however, goes further by finding that the “expressive significance” is a function of context. Dreyfuss, \textit{Expressive Genericity}, supra note 62, at 420. For example, a nonprofit group selling t-shirts with a message involving a trademark would have a better “expressive genericide” defense than a purely commercial company selling a similar t-shirt. See id.

I would stay closer to the traditional trademark definition of genericide than Dreyfuss' definition. Dreyfuss seems to take genericide closer to the First Amendment by requiring an analysis of how much expression—or speech—is suppressed by enforcing the trademark monopoly. Id. at 419-22. She would even take into account the intent of the party using the trademark. Id. at 419. The primary significance test, in contrast, is not contextual. See Murphy Door Bed Co., Inc. v. Interior Sleep Sys., Inc., 874 F.2d 95, 101 (2d Cir. 1989); Donald F. Duncan, Inc. v. Royal Tops Mfg. Co., 343 F.2d 655, 666-67 (7th Cir. 1965); Bayer Co. v. United Drug Co., 272 F. 505, 509 (S.D.N.Y. 1921). Rather, the primary significance test is concerned with either what the average consumer, see \textit{Donald F. Duncan, Inc.}, supra note 62, or what a “substantial majority of the public,” see \textit{Murphy Door Bed Co.}, supra note 62, would understand in the average situation. It is a higher bar, because it does not take account of special situations (e.g., a nonprofit) to the extent that Dreyfuss advocates. See Dreyfuss, \textit{Expressive Genericity}, supra note 62, at 420-21.

\textsuperscript{167} Dreyfuss, \textit{Expressive Genericity}, supra note 62, at 418.

that the meaning of the celebrity’s persona has entered popular language. The purpose of this inquiry would be to establish that anyone familiar with mainstream culture would understand this meaning of the celebrity’s persona. A defendant would have to show use across the media gamut: books, newspapers, magazines, Internet, radio, television, movies, etc.169 Given the easily-accessible data on distribution and viewership, it should not be hard to prove that the average American would be familiar with a given meaning of a celebrity. The Internet makes the analysis of what the public thinks even easier since, in some measure, it captures actual conversation across blogs, chat rooms, and the like. Another aspect of the test might be whether the defendant’s use of the celebrity’s image would be viewed by the segment of the population familiar with the independent meaning, or to a segment to which the use would appear to be an endorsement. Naturally, in the former use, the defendant would have a stronger genericide defense.

The final prong is whether the use has occurred over a long period of time. The goal here is to prove that the meaning associated with the famous person is not a mere cultural “flash in the pan,” but has permanently entered the lexicon. At least ten years would be necessary to observe this effect, although the choice of a particular number would be somewhat arbitrary.170


170. The test for genericide proposed in this article echoes the test to determine whether a mark is “famous” in trademark dilution: “(i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties;[;] (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark; and] (iii) The extent of actual recognition of the mark.” See 15 U.S.C.S. § 1125(c)(2)(A) (Supp. 2007). Similarly, the test introduced in this article attempts to determine whether a celebrity’s persona has a famous independent meaning. As in the trademark dilution test, duration is a helpful measure of famousness because it helps to show that the meaning has become entrenched in the public consciousness over time. The trademark dilution test is a totality test. Id. (“In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including . . . .”). The test proposed here could also be a totality test rather than a required factor test. For the time being, however, the test proposed uses conservative, minimum requirements rather than requiring a balancing of factors. While any choice of a duration requirement is arbitrary, this article proposes ten years because it conservatively doubles the time required under the Lanham Act as prima facie evidence that a trademark that has been used continuously in commerce has acquired secondary meaning. See 15 U.S.C. § 1052(f) (2000) (“The Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant’s goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of
B. The Terminator: A Case Study

Elvis is a fairly easy case of a celebrity whose image has become partly, if not completely, generic. Taking a more marginal case better demonstrates how genericide would work in practice. Arnold Schwarzenegger is a celebrity who has achieved worldwide fame due to his bodybuilding, acting, and, most recently, political careers. He is still alive and in the process of changing his image to suit his political ambitions. Nevertheless, his most famous image is probably the “Terminator”—a humanoid robot programmed to be a perfect fighting machine that appeared in three popular movies. If any aspect of Schwarzenegger has become generic, it would be the “Terminator” character.

Imagine a hypothetical case in which an insect extermination company developed a new name for the business, “Terminator.” The new logo features a large, muscular man, looking somewhat like Schwarzenegger, wearing black leather and sunglasses, and holding an extermination kit. In most states that recognize the right of publicity, Schwarzenegger would have a strong case for violation of his right of publicity. The extermination company has used his “name, likeness [and] indicia of identity” for its commercial gain.

The question of whether Schwarzenegger has rights in the terminator persona is far from merely academic. In 2005, for example, Schwarzenegger inked an endorsement deal with several fitness magazines that earned him at least five million dollars. Moreover, Schwarzenegger actively protects his rights by suing infringers. In Schwarzenegger v. Fred Martin Motor Co., for example, distinctiveness is made.


172. TERMINATOR 3: RISE OF THE MACHINES (C-2 Pictures 2003); TERMINATOR 2: JUDGMENT DAY (Canal+ 1991); THE TERMINATOR (Hemdale Film 1984).

173. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) is typical of state statutes: “One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability.” See, e.g., CAL. CIV. CODE § 3344 (West 1997 & Supp. 2007); MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2005); TENN. CODE ANN. § 47-25-1103 (West 2001).


175. See, e.g. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 799 (9th Cir. 2004).
Schwarzenegger sued an Ohio car dealership for printing advertisements with an image of the “Terminator” and the words, “Arnold says: ‘Terminate EARLY at Fred Martin!’”\textsuperscript{176}


While the “Terminator” originally was only a movie character, the word “terminator” is almost certainly generic.\textsuperscript{177} First of all, it meets the classic trademark tests for genericide. “Terminator” is used as an adjective in a wide variety of contexts; it has also been formed into new words.\textsuperscript{178} Thus, for example, Tara Lipinsky was termed the “Taranator” after her figure-skating win in the 1998 Winter Olympics.\textsuperscript{179} More famously, Schwarzenegger has been called “The Governator” after winning the governorship of California.\textsuperscript{180}

Secondly, it has a distinct meaning that is readily apparent from the variety of contexts in which it is used. Essentially, it seems now to mean an unstoppable agent that overwhelms all opposition. It has taken on the connotation of professional dominance, such as in the sentence “It’s not Chief Gates behind the desk; it’s Terminator Gates: he can’t be reasoned with, he can’t be argued with, he’s programmed only to go forward.”\textsuperscript{181} It can also mean athletic excellence. For example, Nancy Reno’s friends call her “The Terminator” in women’s professional volleyball.\textsuperscript{182} The connotation of excellence and invulnerability is used to describe products too, as in the article describing Mercedes’ G-wagen, \textit{The Terminator of SUVs}.\textsuperscript{183} Even scientific literature uses the term. The title of an article on chemical termination of protein synthesis at the cellular level ran, \textit{The

\textsuperscript{176} Id. at 799. The suit was dismissed for lack of personal jurisdiction. Id. at 807.
\textsuperscript{177} Terminator is also a trademark owned by Studiocanal Image S.A., but I will not consider the possibility that the trademark itself has become generic and, instead, will focus on right of publicity genericide. See Terminator, Trademark Registration No. 2,249,579 (filed Apr. 20, 1998).
\textsuperscript{178} For tests of genericide, see Ingram, supra note 103, at 161-62, and McKinney, supra note 103, at 30-31. Turning the word “terminator” into a verb is a moot point because the word “terminate” already exists.
\textsuperscript{179} Randy Harvey, \textit{In Stunner, Lipinsko Becomes Youngest Olympic Figure Skating Challenge}, L.A. TIMES, Feb. 21, 1998, at N1.
\textsuperscript{180} Paul Harris, \textit{Governator Set for Hit Sequel}, \textit{THE OBSERVER (ENGLAND)}, Aug. 20, 2006, at 26.
\textsuperscript{181} BLITZ & KRASNIEWICZ, supra note 171, at 105 (internal quotation omitted).
\textsuperscript{182} Id. at 106 (internal quotation omitted).
\textsuperscript{183} Kathleen Kerwin, \textit{The Terminator of SUVs: Mercedes’ Pricey G-wagen Outguns its Off-road Rivals}, BUSINESS WEEK, Apr. 24, 2000, at 182.
Methylator Meets the Terminator.\textsuperscript{184} The wide range of contexts in which “terminator” is employed goes to show its sturdy independence from its original source. A word with only a narrow source-identifying meaning would not be so useful. Now, however, “terminator” makes sense in very different uses because it refers to the abstract concept described above.

Further, the term and concept of “terminator” has become irreplaceable. The definition provided above—an unstoppable agent that overwhelsms all opposition—is certainly long and unwieldy. Even that definition does not convey the impact and connotations of “terminator.” The connotation of a humanoid fighting machine holding an automatic gun is necessary to the word’s usefulness. Nothing else quite conveys the “unstoppability.”

The second step in the test shows that the word is understood to have this meaning across American culture. The preceding examples certainly indicate that “terminator” has entered the language in many different ways. However, the test should require proof that the average American has been exposed to this use. In the case of “terminator,” the prevalence of the word’s use indicates that the average American understands the non-source-identifying meaning. The “Taranator” reference above, for example, appeared in The Los Angeles Times, a newspaper with a distribution of approximately one million.\textsuperscript{185} Business Week, a magazine with circulation of nearly one million,\textsuperscript{186} published the title, “The Terminator of SUVs.”\textsuperscript{187} References have occurred in The New York Times\textsuperscript{188}—with a circulation of roughly 1 million\textsuperscript{189}—People Magazine\textsuperscript{190}—with a circulation of 3.7 million\textsuperscript{191}—and Time


\textsuperscript{186} BusinessWeek Selects EDS to Manage CRM Subscription Fulfillment, PR NEWSWIRE, Apr. 20, 2001.

\textsuperscript{187} Kerwin, supra note 183, at 182.


\textsuperscript{190} Christina Cheakalos & Johnny Dodd, Kid Friendly: Successful as an Author, Mellower About Hollywood, Jamie Lee Curtis Learns to Laugh Over Spilled Milk, PEOPLE WKLY, Sept. 25, 2000, at 127 (“She was so driven and frenetic, Curtis says, friends called her Terminator.”).
The use of “terminator” in such mainstream publications certainly indicates that the independent meaning of “terminator” as an “unstoppable agent” is understood by the average American.

The third prong of the test requires that the word have been used with independent meaning over at least ten years. “Terminator,” it turns out, has been used with independent meaning for more than twenty years. In 1985, for example, Herbert Hafif, a successful trial lawyer, described himself during trial: “I can get myself into a zone of competitiveness where I’m the Terminator.” The use of “terminator” as an independent descriptor in the language applicable in many different contexts has spanned a generation. As a result, “terminator” appears to be fully ensconced in the national language. Clearly, the word “terminator” has become generic.

2. “Terminator”—The Image

It is naturally more difficult for the non-source-identifying meaning of an image to have primary significance to the public. As discussed, the public’s association of a celebrity’s image with his identity is probably always stronger than with the celebrity’s name. Nevertheless, I would argue that the image of the “Terminator” has also become generic.

First of all, the image has the same clear, independent meaning as the word: an unstoppable killing machine that looks like a super human. The image is quite distinctive. As the Ninth Circuit stated in Schwarzenegger v. Fred Martin Motor Co.: “Throughout much of the film, Schwarzenegger, as the Terminator, maintains a stern demeanor and wears black sunglasses. This image of Schwarzenegger is highly distinctive and immediately recognizable by

192. Ron Stodghill, *Ending the Whitewash*, TIME MAG., Dec. 27, 1999, at 141 ("The N.A.A.C.P. president cast himself as the leading man, a swaggering yet politically correct Terminator of all things racist about Tinseltown.").
194. Kim Masters, "Trial Heavyweight on a Roll," LEGAL TIMES, Nov. 11, 1985, at 1; see, e.g., Robbie Andreu, *Wisconsin Badgers, Bullies Miami 88-66*, SOUTH FLORIDA SUN-SENTINEL, Dec. 8, 1985, at Sports 1, ("Ripley and Weber, who are both 6-foot-7 and weigh 215 pounds, were twin terminators. Ripley scored 19 points and had 13 rebounds and Weber had 11 points and 11 rebounds."); Marc Fisher, "Reborn' Colson Keeps the Faith," MIAMI HERALD, Nov. 11, 1985, at 1B ("In the White House days, Chuck Colson, Richard Nixon's political terminator, never gave interviews.").
much of the public.”195 A combination of some, but not necessarily all, of the following characteristics immediately conveys the idea: a large, muscular man wearing sunglasses and a leather jacket, carrying a machine gun, with one red eye, and part of the face torn off to reveal steel and wires. Thus, for example, the head of a pig with one red eye wearing sunglasses clearly evokes the “Terminator,” although the other elements are missing.196 Indeed, the presence of Schwarzenegger himself in the image is not necessary to convey the idea.

At the same time, however, when Schwarzenegger’s face is used in the image, the use still does not necessarily convey endorsement. The image is typically used to convey the idea of overwhelming unstoppability, rather than to express a connection to Schwarzenegger the person. For example, Mad TV created a skit with a Schwarzenegger look-alike in which the “Terminator” goes back in time to save Jesus from being crucified.197 The joke of the skit was that even Jesus could not stop the “Terminator” from foiling the divine plan.198 This example of a parody may not be pure commercial use, but it does show what the image means to the public.

Moreover, as with the word “terminator,” this independent meaning of the image is understood by the average American as evidenced by its pervasive presence in the popular media. For example, the skit on Mad TV was watched by approximately 2.7 million people.199 There have also been skits on Saturday Night Live.200 The “Terminator” has even become an internationally understood symbol, from masks in the United Kingdom201 to comic books in New Zealand.202 Like the use of the word, the “Terminator” image has been used with a clear, independent meaning for at least

195. 374 F.3d 797, 799 (9th Cir. 2004).


198. Id.


200. See, e.g., Saturday Night Live: Linda Hamilton/Mariah Carey (NBC television broadcast Nov. 16, 1991) (featuring a skit entitled “The Tooncinator,” where staple character Toonces, a driving cat, appears as a cyborg dressed in a black leather jacket and sunglasses, impervious to car crashes and gun fire).


ten years. The “Terminator” image has also clearly acquired iconic status.

V. OBJECTIONS TO APPLYING GENERICIDE TO THE RIGHT OF PUBLICITY

The advantages to applying genericide to the right of publicity can be summed up quickly, but they go to the heart of the flaws in publicity rights. The primary criticism of the right of publicity is that it curtails free speech. Genericide alleviates this problem by making many of the expressive elements of a celebrity’s persona available in speech. Ideas that cannot be expressed without using an aspect of a celebrity’s image would be returned to the public domain when the idea is the primary significance of a celebrity’s aspect to the public. Secondly, genericide addresses the cultural studies critique that the right of publicity gives celebrities ownership of meanings created by the public. When an element of a celebrity’s persona has independent meaning for the public, it would enter the public domain. Thirdly, genericide provides a logical, common law limit to a too-expansive right. That is, when a celebrity has effectively lost control of his image to the public, genericide simply recognizes that reality.

Objections to genericide would most likely stem from the fact that the right of publicity is supported by justifications foreign to trademark law. This Part will address whether genericide makes sense in light of the five rationales (other than endorsement) for publicity rights. In addition, trademarks have defenses against genericide that the right of publicity lacks. This Part will also discuss whether these rationales and defenses should affect genericide in the right of publicity.

One of the justifications for the right of publicity is a labor-based Lockean argument. A celebrity, so the argument goes, should own the commercial value of the public image she has built through persistent effort over the years. Assuming even that an icon’s fame is really due to her hard work, labor invested has never been a bar to

203. See Saturday Night Live, supra note 200 (showing independent meaning dating back to at least 1991).
204. See supra text accompanying notes 31-38.
205. See supra text accompanying notes 48-52.
206. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995); Madow, supra note 1, at 182-83.
207. See Madow, supra note 1, at 182-83.
208. Id. at 182-96.
genericide in trademark law.\textsuperscript{209} A trademark rarely achieves widespread recognition without the expenditure of millions of advertising dollars.\textsuperscript{210} Nevertheless, neither this effort nor even the effort expended by a company to prevent its trademark from becoming generic averts genericide.\textsuperscript{211} A celebrity's rights to the investment in creating her image seem particularly weak in comparison to trademark law because it is very rare that the celebrity's own money is spent to build her public persona.\textsuperscript{212} While the owner of the trademark typically spends the money to advertise the brand, most celebrities become famous due to advertising expenditures made by the movie studio or recording company, or simply because the media picks up her story.\textsuperscript{213} In short, in trademark law, a company is only allowed rights to a word because it serves to identify the source of the product, not as a reward for expending money and effort to build the brand.\textsuperscript{214} It is hard to explain why the same calculus should not apply to the right of publicity.

The other side of the labor rationale is the unjust enrichment rationale. Not only should a celebrity be allowed to reap what she has sown, goes the argument, third parties should not be allowed to reap what someone else has sown.\textsuperscript{215} In other words, other people should not be allowed to profit from another individual's identity. The same arguments apply here as apply to the labor rationale. There does not

\textsuperscript{209} Ingram, supra note 103, at 159-60 (noting that the genericide process “can be a harsh one for it places a penalty on the manufacturer who has made skillful use of advertising and has popularized his product” (quoting King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577, 581 (2d Cir. 1963))).

\textsuperscript{210} See, e.g., CareFirst of Md., Inc. v. First Care, P.C., 434 F.3d 263, 266 (4th Cir. 2006) (“This umbrella organization has spent millions of dollars advertising its mark; in all of its advertisements, it denominates itself ‘Carefirst BlueCross BlueShield,’ often accompanied by the distinctive Blue Cross Blue Shield logo.”); Savin Corp. v. Savin Group, 391 F.3d 439, 450 (2d Cir. 2004) (“[Plaintiff] spent over $20 million on advertising in 2002 and has achieved annual revenues of $675 million.”).

\textsuperscript{211} For example, in the case of the formerly trademarked term “thermos,” the Second Circuit court found “that the generic use of ‘thermos’ had become so firmly impressed as a part of the everyday language of the American public that plaintiff’s extraordinary efforts commencing in the mid-1950s came too late to keep ‘thermos’ from falling into the public domain.” King-Seeley Thermos Co., 321 F.2d at 579. See also Donald F. Duncan, Inc. v. Royal Tops Mfg. Co., 343 F.2d 655, 667 (7th Cir. 1965), where the trademark owner of “yo-yo” tried to popularize a generic substitute to the word, but “yo-yo” was still found to be generic. The Seventh Circuit stated: “Plaintiff has made a herculean effort to fasten upon the toy the generic term, ‘return top,’ as is evidenced by the many—perhaps hundreds—of times which the term is employed in its pleadings.” Id. at 662.

\textsuperscript{212} See Madow, supra note 1, at 191-96.

\textsuperscript{213} Id.


\textsuperscript{215} RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995); Madow, supra note 1, at 196-205.
seem to be a strong reason that the celebrity should profit from her fame when it may often be a matter of luck.\textsuperscript{216} This is particularly the case in genericide when the public has often appropriated the image and infused it with a new, independent meaning.

A more utilitarian justification for the right of publicity is the idea that publicity rights provide an incentive for people to become famous. This justification has been criticized on two grounds. Firstly, it is questionable whether we want to encourage people to become famous, because they often become famous for reasons that contribute little to the public’s welfare.\textsuperscript{217} Secondly, people already have adequate incentive to become famous in terms of wealth, attention, and adulation.\textsuperscript{218} Genericide is just an extension of the second criticism. At the point that a celebrity is so wildly famous (and, therefore, probably wealthy) that his name or image has become a byword, the loss of a few merchandising dollars would not discourage aspiring celebrities.

Nor does the right of publicity make sense in the case of reluctant celebrities, such as those who become famous because of a scandal. If the celebrity is embarrassed by the attention, it is unlikely that she would want to merchandise the embarrassing image that has become generic. Therefore, the reluctant celebrity does not suffer a financial loss when others exploit the merchandising market. With regard to a reluctant celebrity’s humiliation, if the persona has become famous enough for genericide, she has already been ridiculed in entertainment and informational contexts. The commercial context is unlikely to make a difference.

A second utilitarian rationale is that publicity rights should be privately owned in order to prevent dilutive commercial use.\textsuperscript{219} In the first place, excessive use does not seem to dilute the value of a name or image. As Michael Madow pointed out, “[a] Madonna T-shirt may be worth more, not less, to consumers precisely because millions of her fans are already wearing them.”\textsuperscript{220} Madow explains this phenomenon by a desire to belong. However, genericide may provide an additional explanation. An image gains new meaning partly due to the fact it is widely used. Only well-known images can take on a new meaning because an image must be broadly understood in order to have a

\begin{itemize}
\item\textsuperscript{216} Madow, supra note 1, at 185-91.
\item\textsuperscript{217} Id. at 216-19.
\item\textsuperscript{218} Id. at 206-15.
\item\textsuperscript{219} Restatement (Third) of Unfair Competition § 46 cmt. c; Madow, supra note 1, at 220-25.
\item\textsuperscript{220} Madow, supra note 1, at 222.
\end{itemize}
communicative function—that is, everyone has to get the joke. An image’s communicative function provides more reason to wear the image. Therefore, the addition of a new meaning increases the value of the image or name rather than diluting it. Moreover, if the image has obtained a new, independent meaning because of extensive use, this new meaning has probably been created by the public. Consequently, it makes less sense to reserve to the celebrity opportunities to exploit the image’s increased value.

The last justification for publicity rights is a moral argument that control over one’s image is necessary for personal dignity and autonomy. Alice Haemmerli, in Whose Who? The Case for a Kantian Right of Publicity, argues that individuals have a personal bond to their image and name, and that this connection should constitute a separate basis for a property right. Although this makes intuitive sense, it is an innovation that has not actually been applied to any area of property law. In any case, the idea loses some of its force in a case of genericide. In genericide, an image or name has lost its source-identifying primary significance to an independent meaning created by the public. As a result, a celebrity’s connection to the image is more attenuated.

Moving back to a comparison with trademark genericide, the right of publicity lacks the dilution cause of action to defend itself from genericide. As commentators have noted, the introduction of anti-dilution laws has slowed the process of genericide for many existing trademarks. Trademark holders can enjoin uses that involve peripheral meanings of the trademark, thereby nipping the creation of new meaning in the bud. The right of publicity has no similar cause of action. However, there are strong arguments that anti-dilution laws are overbroad and harmful. Those same arguments apply against introducing the dilution to the right of publicity.

Arguably, another problem with extending genericide to the right of publicity is that celebrities do not have the same ability to fight genericide as do companies holding trademarks. This problem has two parts. The first is that even quite successful celebrities would

221. See Haemmerli, supra note 3, at 411-22.
222. See id. at 423-24.
not have the same resources as a corporation to create an anti-genericide advertising campaign. Although a movie studio, a music producer, or the media may have paid for the advertising that created the value of the celebrity’s image in the first place, these corporations have little interest in protecting the celebrity’s right of publicity. For example, a movie studio might want to protect a trademark it owns for a movie that stars the actor, but not the actor’s own right to publicity. This argument, however, just re-emphasizes the extent to which the value of a celebrity’s persona is essentially a windfall for that celebrity. It does not make sense to argue that law should protect the publicity side-benefit to the celebrity of advertising paid for by others.

Secondly, celebrities might find it difficult to create alternatives for their names and images. However, entertainers could potentially come up with screen names instead of their given names. Images could possibly be replaced with stylized evocations. Trademark owners are also often challenged to think of a catchy substitute name for a product. Companies, such as Donald F. Duncan, Inc., for example, failed to popularize “return top” as an alternative to the term “yo-yo.” This difficulty does not prevent genericide of the trademark and should not prevent its application in the context of publicity rights.

The final objection to publicity right genericide is that it gives celebrities the wrong incentives. Arguably, celebrities would feel compelled to litigate against generic uses constantly in order to avoid losing this right of publicity. The increased litigation would waste resources. Most of the genericizing process, however, would occur in the areas that the celebrity could not control—the informational and entertainment contexts—because the right of publicity only protects commercial use. Thus, the process of genericide might already be complete by the time the celebrity’s name or image was used in a commercial context. The celebrity would have little incentive to bring the lawsuit at that point because she would have little chance of winning.

226. For example, instead of Groucho Marx’s face, the image might show bushy eyebrows, a mustache, and glasses.
228. See supra text accompanying note 216.
229. Madow, supra note 1, at 207-15.
VI. CONCLUSION

Genericide would reground the right of publicity in its endorsement rationale and limit it with an established common law principle. Some limitation seems necessary because the right of publicity’s expansion in recent years has further untethered it from its already questionable justifications. At the very least, the endorsement rationale makes about as much sense for the right of publicity as it does for trademark. Genericide would limit the attenuation between the right of publicity and its endorsement function by requiring that the celebrity’s identity actually be the primary significance of the celebrity’s name or image to the public. At the same time, genericide would respect the celebrity’s dignity and personal autonomy. That is, genericide would limit publicity right protection to only those cases in which personal identity is really at issue. Uses of the celebrity’s persona that only evoke the celebrity, for example, to express a non-source-identifying meaning would fall under genericide. Moreover, genericide would occur in extreme situations where the remaining justifications for the right of publicity are already stretched thin. For example, the exclusive right to merchandise for a celebrity already so famous her name has become a byword is not a necessary incentive to encourage people to become famous. Most importantly, genericide would protect a considerable amount of free speech. Ideas that have become inexpressible without a celebrity’s name or image would return to the public domain. This is simply a recognition that famous people are an important part of our language and culture. Celebrities cannot claim exclusive commercial rights to everything their names and images have come to mean.