Texas Law Review

June, 1991

69 Tex. L. Rev. 1853

LENGTH: 17863 words

PAPER: Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue.

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SUMMARY:

... This, despite the fact that a lot of us cried when Bambi's mother died in that fire, that for many of us it's the closest thing we have to a shared cultural memory of childhood, and that we may well share a socialization in which our own mothers were grateful to be able to echo Thumper's words of wisdom. ... What we experience as social reality is a constellation of cultural structures that we ourselves construct and transform in ongoing practice. ... Any consideration of contemporary life must take into account both the production and the consumption of media-disseminated cultural forms. ... The type of practice I am concerned with is most readily apparent in trademark law, but examples may also be found in the publicity rights and copyright fields. ... I will momentarily leave aside the question of whether trademark rights give you "ownership" of a sign or symbol in any and all contexts ("authorities" say they don't, but then it is judges who authorize their use). ... With Pavel Medvedev and Valentin Voloshinov, Bakhtin developed a body of philosophy about the constitutive role of language in human life and the cultural life of democracy, which he saw as quintessentially dialogical. ... I will borrow Bakhtin's authority here because he transcends and rejects the dichotomy of subjectivity and objectivity by understanding culture as the ongoing activity of transformative meaning-making. ...

"[T]he self becomes itself only through a transaction of signs with other selves -- and does so, moreover, without succumbing to the mindless mechanism of the behaviorists."

-- Walker Percy n1

"[*C*]*onsciousness itself can arise and become a viable fact only in the material embodiment of signs. . . .* [U]nderstanding is a response to a sign with signs. . . .

. . . The individual consciousness is nurtured on signs; it derives its growth from them; it reflects their logic and laws."

-- Valentin Voloshinov n2

"[My] purpose . . . is to make explicit the systems of operational combination . . . which also compose a 'culture,' and to bring to light the models of action characteristic of users whose status as the dominated element in society . . . is concealed by the euphemistic term 'consumers.' Everyday life invents itself by *poaching* in countless ways on the property of others." n3

"Marginality today is no longer limited to minority groups, but is rather massive and pervasive; this cultural activity of the non-producers of culture, an activity that is unsigned . . . remains the only one possible for all those who nevertheless buy and pay for the showy products through which a productivist economy articulates itself. Marginality is becoming universal. A marginal group has now become a silent majority."

-- Michel de Certeau n4

"[T]he ruling class strives to impart a supraclass, eternal character to the ideological sign, to extinguish or drive inward the struggle between social value judgments which occurs in it, to make the sign u niaccentual."

-- Valentin Voloshinov n5

TEXT:

[*1854] I. Introduction

Who authorizes Thumper? I want to express the nature of my stunned disbelief when I noticed that, in a recent law review article, Pierre Schlag *cited authority* for the proverb, "If you can't say anything nice, don't say anything at all." n6 Perhaps he had his tongue in cheek. Or it may be that the editors made him do it. Either way, there are readers who no doubt feel that it is entirely appropriate to find authorization for taking the words out of Thumper's mouth. This, despite the fact that a lot of us cried when Bambi's mother died in that fire, that for many of us it's the closest thing we have to a shared cultural memory of childhood, n7 and that we may well share a socialization in which our own mothers were grateful to be able to echo Thumper's words of wisdom. In other words, notwithstanding his role in our collective cultural heritage, Thumper must be authorized. Who authorizes Thumper? Those who own the intellectual property rights in him, of course, and Schlag appropriately cites Walt Disney studios and the date of their copyright in *Bambi* as the relevant authority with which to credit Thumper's proverbial wisdom. It is the political dimension of this relationship between legal ownership and cultural authority that I wish to address, as I try to [*1855] develop what Schlag, in the same article, both implies and denies -- the possibility of a normative postmodern vision. n8

To make this argument, I must first reiterate philosophical arguments made elsewhere about the inadequacies of the understanding of subjectivity and objectivity as dichotomous that prevails in dominant perspectives on legal reasoning and the relation between law and social life. I will attempt to move beyond critique, however, and consider the relation between law, culture, and (the commodity) form. Moreover, I will put these arguments in their proper historical context and suggest that for a postmodern subject n9 occupying the cultural space of postmodernism n10 in contemporary consumer societies, political action must involve a critical engagement with commodified cultural forms. n11 I make this point by way of an elaboration of the concept of dialogism as it was developed by the late philosopher and literary theorist Mikhail Bakhtin, who argued that dialogic practice was constitutive of our humanity. n12 In the current climate, however, intellectual property laws stifle dialogic practices -- preventing us from using the most powerful, prevalent, and accessible cultural forms to express identity, community, and difference.

I want to make it clear at the outset that this Article will speak simultaneously from several dissonant cognitive frameworks n13 and that its polymorphous perversity n14 is intentional, to the extent that my historically-situated and culturally-mediated gender-, age-, and class-specific intent is at all relevant to the rationalist n15 within you. As the following discussion of subjectivity and objectivity will make apparent, I reject the [*1856] rationalist privileging of the autonomous self and its claims to know an objective social world. Like the modernist, I seek to de-center the subject and its claims to ontological and epistemological primacy, n16 but I reject the modernist insistence that a single underlying structure may be privileged as *the* objective reality underlying the cultural epiphenomena of everyday life and consciousness. n17 I am postmodernist in my refusal to believe that we can find solace in any of the totalizing visions that modernism offers us n18 and in my suggestion that the social world is constituted only in and through representational relations of difference that are constantly shifting in our all-too-human efforts to give meaning to its terms.

As a postmodernist, I believe that form has implications for the issues that we address n19 and that conventional forms of discourse limit and shape the realities we recognize. n20 Like Schlag, I believe that "the typical supposition within the legal community that intellectual endeavor can and must converge in 'points' or 'solutions' or 'ideas' -- or 'conclusions' -- has a real tendency to kill thought," n21 but I am not sufficiently rationalist to believe that it is possible to convey an "is" without imparting an "ought." This argument will be made by way of anecdote and appropriative dialogue, using irony, irreverence, and polemic -- fashions in form that mirror the modus operandi of the social practices with which I am concerned. I will also cease to cite endless references in incessant footnotes, n22 as if an abundance of small typeface enabled us to "speak in the name of the real." n23 First, however, I will permit Pierre Schlag to give [*1857] me authority to speak:

[T]he blunting of . . . postmodernism means that it is eighteenth century conceptions -- conceptions of responsibility, of agency, of harm, of language and meaning itself -- that continue to rule the decisions of a late twentieth century technological society. Such a state of affairs is at once an intellectual embarrassment and a form of violence. n24

II. Transcending the Subject-Object Dichotomy: The Cultural Construction of Self and World

The idea of an objective world that can be known with certainty by a subject whose capacity for knowledge is independent of that world has been repeatedly undermined in recent legal scholarship. n25 Arguing that [*1858] the objective world is the cultural construction of social subjects and that subjectivity itself is a product of language and cultural practice, this literature draws upon American

pragmatism, cognitive theory, cultural anthropology, and continental philosophy to support its claims. I have recently argued that the replacement of positivism and empiricism with interpretive or hermeneutic models of social life in the social sciences has profound implications for legal theory, specifically for the way it conceptualizes the world in which law has meaning, effect, and consequence. n26 Human beings may never speak in the name of the real, n27 or grasp the world objectively, because the realities we recognize are shaped by the cultural contexts that enable our very cognizance of the world itself. As Stanley Fish argues, what we see in the world is not a product of the world, but a product of our cultural categories, which provide the very possibilities for perception. n28 What we experience as social reality is a constellation of cultural structures that we ourselves construct and transform in ongoing practice. n29

Steven Winter uses the pragmatism of Richard Rorty and, to a lesser extent, cognitive linguistic anthropology to define and critique the objectivist assumptions that characterize traditional legal theory. n30 Objectivism, Winter notes, treats the world as

filled with determinate, mind-independent objects with inherent characteristics unrelated to human interactions[,] understands categorization either as about natural sets of objects in the world or, when it recognizes categorization as humanly constructed, as about objects with ascertainable properties or criteria that establish their commonality[, and] treats reasoning as about propositions and principles that are capable of "mirroring" those objects and accurately describing their properties and relations. n31

This set of assumptions is rejected by subjectivists and cultural relativists who argue that legal categories bear no accurate correspondence with a knowable reality n32 and that language, rather than describing an [*1859] objective state of things in the world, is constitutive of the world itself. n33 Winter agrees that there are no objective descriptions of reality separate from our conceptual schemes for apprehending it n34 and that the world is a product of our imaginative processes of interacting as embodied, social creatures. n35 Although I have grave doubts about Winter's belief in the constraints and direction given to meaning by virtue of the experience of human embodiment, n36 I think we share a belief in the constitutive role of culture -- socially established structures of meaning or relations among construable symbols or signs -- in constructing the realities we recognize and our sense of self, community, and possibility. n37 The imaginative making of meaning is the quintessential human act, and culture is both this practice and its product. n38

Drucilla Cornell evokes Hegelian philosophy to make a similar critique of objectivity and the conventional understanding of subjectivity with which it is associated. n39 Like myself and Winter, she seeks resources which will enable her to transcend liberalism's dichotomies. She attempts to reject the notion of a transcendental ego existing prior to its engagement in a social and historical context without either abandoning creative human agency or seeing the subject as imprisoned by determining structures. n40 Instead, the self is understood to be constituted through [*1860] communicative activity. Individuality and consciousness are embedded in and realized through language and shared cultural symbols. n41

[T]o understand ourselves as subjects constituted to be speaking subjects, is to understand ourselves as members of a dialogic community that is not a mere dead weight confronting the individual but rather is both the product and the medium of communicative relations. We transform speech even as we come to ourselves within it. n42

The de-centering of the subject does not spell its demise, but "renders subjectivity thoroughly

communicative." n43 Subjectivity, then, is fundamentally dialogic: "what is most characteristic of our humanity is that we are dialogical or conversational beings in whom language is a reality." n44 For Cornell, the concept of dialogue should serve as a powerful regulative ideal with which to orient our practical and political lives:

If the quintessence of what we are is to be dialogical -- and if this is not just the privilege of the few -- then whatever the limitations of this ideal, it nevertheless can and should give practical orientation to our lives. n45

Legal theory, however, tends to render its reconstitution of subjectivity and objectivity in utopian and optimistic gestures, as if legal tendencies to reify and dichotomize subjectivity and objectivity could be reversed with only a modicum of intellectual good faith and political good will. In the Dionysian social worlds Cornell and Winter describe, dialogue is always already our state of being and consciousness. If judges and decision makers were simply to recognize this state of affairs as the human condition, better laws and better decisions would further realize this immanent potential. Legal theorists generally evade consideration of the social processes at work in everyday life to fix meaning and stifle dialogue. They fail to examine the differential power that social agents have to make their meanings mean something and the material factors that constrain signification and its circulation in the late twentieth-century. Legal theory perhaps defines itself *as* theory by its loathing to address specific processes of hegemonic struggle or the political economies of communication in a late capitalist era.

It *is* important to celebrate the human capacity to engage in imaginative [*1861] meaning making, but it is now necessary to go beyond abstract assertions about the nature of subjectivity and objectivity to examine concrete practices of self and world creation. To do so, it is imperative that we acknowledge the politics of meaning making and the conflictual nature of struggles to fix and transform meanings in a world where access to the means and the mediums of communication is limited. It is necessary to consider, concretely, what the optimal "material and cultural conditions for participation" in dialogue might be. n46 As a modest contribution to an ethics and politics based on the dialogical principle, n47 I will indicate how intellectual property laws may function to deprive us of possibilities for dialogic interaction with the cultural reality or lifeworld known as postmodernism. n48

III. Making Meaning in Postmodernity

In postwar America, media images have dominated our visual language and landscape, infiltrating our conscious thoughts and unconscious desires. n49

In a century that has seen the intrusion of saturation advertising, glossy magazines, movie spectaculars, and television, our collective sense of reality owes as much to the media as it does to the direct observation of events and natural phenomena. n50

A friend tells me about a cross-country plane ride between Los Angeles and Chicago with her eighteen-month-old son, Jimmy. There is a little Korean girl two rows ahead of them. She's about four and speaks no English. She sees Jimmy and before she waves or smiles, she tries to determine what kind of creature she's dealing with. Bobbing up and down in her seat, she cries, "Ninja, Ninja, Ninja Turtles!" and waits, expectantly. My friend restricts her son's television viewing and tries to protect him from the influence of mass culture. Little Jimmy can't respond, and the girl turns away, disappointed (All dialogue guaranteed overheard n51).

The women of Smith College experienced a fair degree of internal social turmoil in the fall of 1990 as

the college dealt with demands for increased commitment to issues of multiculturalism and greater [*1862] sensitivity to minority experience. In a show of community and solidarity, a number of women made, wore, and sold T-shirts parodying the internationally known Bennetton logo. "United Colors of Smith" were proudly proclaimed. n52

The white kids had the counter-culture, rock stars and mysticism. The blacks had a slogan which said they were beautiful, and a party demanding power. Middle America had what it always had: Middle America. The hawks had Vietnam, and the doves the Peace Movement. The students had campus politics, and the New Left had Cuba and the Third World. And women had a voice. I had rejection from all of them. I also had Judy Garland. n53

Social theorists identify the term "postmodern" both with an historical era of capitalist development n54 and with the particular forms of cultural practice that are characteristic to that era. n55 To simplify things, I will refer to the historical period as the condition of postmodernity, to the era's cultural qualities as postmodernism, and to the practices situated in these contexts as postmodern or postmodernist. n56 Postmodernity is distinguished by a dramatic restructuring of capitalism in the postwar period, a reconstruction of labor and capital markets, the displacement of production relations to non-metropolitan regions, the consolidation of mass communications in corporate conglomerates, and the pervasive penetration of electronic media and information technologies. Such processes have coalesced in the Western World societies oriented toward consumption. Consumption is managed by the mass media's capacity to convey imagery and information across vast areas to ensure a production [*1863] of demand. Goods are increasingly sold by harnessing symbols, and the proliferation of mass media imagery means that we increasingly occupy a "cultural" world of signs and signifiers that have no traditional meanings within social communities or organic traditions. n57

A proliferation of signification without social meaning, n58 these signs seem to come at us as from nowhere -- across radio waves, fibers, unseen cables, and invisible microwaves and lasers. They spring up in our living rooms, flow from our telephones, bombard our paths, and fill our horizons wherever we walk. These images do, however, come from somewhere, and increasingly they come from fewer and fewer places. As the power of media widens, the power base is consolidating as corporations consolidate holdings in print and electronic media:

In 1981 twenty corporations controlled most of the business of the country's 11,000 magazines, but only five years later that number had shrunk to six corporations.

Today, despite 25,000 media outlets in the United States, twenty-nine corporations control most of the business in daily newspapers, magazines, television, books, and motion pictures.

. . . [B]y the year 2000 all United States media may be in the hands of six conglomerates. n59

Postmodernists suggest that we address the "textual *thickness* and the visual *density* of everyday life" n60 in societies saturated with commodified forms of cultural representation. Such images so pervasively permeate all dimensions of our quotidian lives that they are constitutive of the "cultures" in which most people in Western societies now live. Any consideration of contemporary life must take into account both the production and the consumption of media-disseminated cultural forms.

Elsewhere, I have argued that the consumption of commodified representational forms is productive activity in which people engage in meaning-making to adapt signs, texts, and images to their own agendas. n61 [*1864] These practices of appropriation or "recoding" n62 cultural forms are the

essence of popular culture n63 and are understood by theorists of postmodernism to be central to the political practices of those in subordinate social groups and those marginal to the centers of cultural production. n64 It is now evident that mass media imagery and commodified cultural texts provide the most important cultural resources for the articulation of identity and community in Western societies, as traditional ethnic, class, and cultural indicia fade, and minority groups must organize along alternative lines. n65

If, as human selves in human communities, we are constituted by and constitute ourselves with shared cultural symbols, then it is important that legal theorists consider the nature of the cultural symbols "we" "share" in consumer societies and the recognition the law affords them.

IV. Fixing the Signifier/Owning the Sign

[Within the science fiction fan community,] . . . there are distinct groups of fans that organize around the production, circulation, and consumption of fan magazines (fanzines). . . . [A]lmost exclusively female and predominantly heterosexual, [this movement] involves middle class women who . . . employ images, themes, and characters from a canonized set of mass culture texts [generally television series episodes] to . . . create new female communities [and] alternative gender identities. . . . In 'Slash' fiction, women write erotic stories and draw illustrations depicting a love relationship between [the male characters]. . . . [F]anzine writers ha[ve] depicted Luke Skywalker and Han Solo in an erotic relationship. . . . [F]andom has had an uneasy relationship with Lucasfilm. . . . n66

[*1865] Walking down the street in Toronto one day, pedestrians were surprised to see the following message flashing on an electronic billboard at the corner of Yonge and Wellesley: "Lesbians Fly Air Canada," it repeatedly flashed. The next day the message was gone. A gay rights group had broadcast the statement to remind people of the similarities between lesbians and all other Canadians by evoking the archetypal "normal" Canadian experience. The communication stopped when Air Canada threatened to apply for an injunction to stop the group from using its name. n67

From Harlem to Watts and nearly every urban enclave of black youths in between, black variations of the popular cartoon grade-schooler, Bart Simpson, have been the most enduring T-shirt images of the summer. . . . "There is a suppressed rage in the cartoon that black people are picking up on," [said Russell Adams, chairman of the Afro-American Studies Department at Howard University]. . . . Ultimately, the reasons for the popularity of the black Bart character may be as elusive as determining where the great masses of T-shirts come from. . . . [N]one of the Black Bart T-shirts are licensed by [20th Century] Fox. . . . n68

Only a few months ago, the T-shirt of choice in certain neighbourhoods was an image of Malcolm X next to the words, "It's a Black thing. You wouldn't understand." Now a chocolate-coloured Simpson has taken Malcolm's place, declaring, "I'm Black Bart. You wouldn't understand." n69

The only street phenomenon similar to this, in recent memory, was the bootleg, Afro-Americanized Mickey and Minnie Mouse T-Shirts of a few years ago. . . . But that was peanuts compared with the unmitigated appropriation of Bart Simpson. . . . "You have to have mixed feelings when you're getting ripped off," [artist Matt] Groening says. "I don't like these smokestack factories belching out bootleg Simpsons T-Shirts. It's a huge business. 20th Century Fox takes this matter extremely seriously. There have been busts all over the country." n70

A twelve year old boy was sued for producing Black Bart T-Shirts. n71

If both objective social worlds and subjective desires, identities, and understandings are constructed with cultural resources, then legal attitudes [*1866] toward cultural forms may have profound implications. Laws creating and enforcing intellectual property rights permit, maintain, and perpetuate the commodification of cultural texts and images by securing their market value. For example, trademark laws create proprietary rights in the signs manufacturers use to market their goods n72 and publicity rights enable celebrities (and often their estates) to control the reproduction and circulation of the star's name, image, and other publicly recognizable features. n73 Copyright laws restrict the social flow of texts, photographs, music, and most other symbolic works. All of these forms retain their cultural qualities, however, and in a world where mass media tends to monopolize the dissemination of signifying forms, the cultural resources available to us (and within us) are increasingly the properties of others.

The political implications of cultural commodification (and the legal regimes supporting it) are largely unexplored. When the ramifications for the political ideal of democratic dialogic practice are addressed, it is generally in terms of the *material* limitations of access to dialogue caused by concentrations of capital and mass media monopolies. n74 What I'm suggesting here is that intellectual property laws may deprive us of the optimal *cultural* conditions for dialogic practice. By objectifying and reifying cultural forms -- freezing the connotations of signs and symbols and fencing off fields of cultural meaning with "no trespassing" signs -- intellectual property laws may enable certain forms of political practice and constrain others.

Arguably, fewer and fewer defenses are available in intellectual property infringement actions; n75 free speech defenses are inconsistently [*1867] interpreted and often dismissed without due consideration. n76 More troubling, however, is the likelihood that freedom of expression arguments will not even be asserted. In most cases, the dispute will never be [*1868] tried on its merits. Faced with the threat of legal action, most local parodists, political activists, and satirical bootleggers will cease their activities. n77 They are also likely to be visited with ex parte injunctions and possibly even temporary restraining orders, in which their goods and records are seized without notice. n78 In any case, they are unlikely to have the resources and wherewithal to engage in protracted constitutional litigation. n79

Examples of cases which *are* litigated are not difficult to find, as the subject is an amusing one for both intellectual property and constitutional scholars. The type of practice I am concerned with is most readily apparent in trademark law, but examples may also be found in the publicity rights and copyright fields. Regardless, in an era when characters, phrases, logos, and even names and faces from movies, novels, and television are the subject of merchandising rights and tie-in contracts, the distinction becomes rather negligible. Humphrey Bogart's estate, for example, might hold publicity rights and use "Sam Spade" to market hats, while his film producers license "Casablanca" to bar and hotel chains while collecting royalties for commercial usages of copyrighted dialogue. n80 In any case, these figures and moments from our cultural history become private properties that we parody, proliferate, or politicize at our peril.

Let me give a few examples drawn from the trademark field. In 1977 an environmental rights group distributed materials critical of the practices of the electric utility industry. n81 These materials contained a caricature of the Reddy Kilowatt trademark, a stylized cartoon stick man. n82 Confronted with the possibility of an injunction, the Environmental Action Foundation argued that it was exercising its right of free [*1869] expression. n83 The defense was rejected by analogy to cases affirming the right of private property owners to exclude picketers. n84 In other words, you can't use someone

else's property to express yourself. I will momentarily leave aside the question of whether trademark rights give you "ownership" of a sign or symbol in any and all contexts ("authorities" say they don't, n85 but then it is judges who authorize their use). This question certainly didn't concern the Manitoba Court of Appeals when it allowed the Safeway grocery chain to enjoin picketing workers from using the stylized "S" from the company's name in its strike literature. n86 Deciding that the insignia was known to the public, the court determined it was an asset connected with the company's goodwill and that the company therefore had proprietary rights in it. The court stated: "[T]here is no right under the guise of free speech to take or use what does not belong to [you]." n87 It was, of course, precisely because the insignia was publicly associated with the company that the union wished to use it; the union sought to inform the public that the sign was associated with unfair labor practices, as well as the more cheerful associations the store management projected. They were attempting to invest the symbol with another, alternative set of meanings.

The ability to fix the signifier, because you "own" the sign, has expanded dramatically with the increasing adoption and judicial enforcement of state antidilution statutes. n88 Traditional trademark theory [*1870] protected rights in the sign only insofar as it was necessary to protect consumers from deception and confusion. n89 Increasingly, however, holders of trademark rights are enabled to prevent "misappropriation" even when there is no competition between the goods and the trademark use is unlikely to cause public confusion. The "dilution rationale" was first suggested by Frank Schechter in 1927 as additional justification for the protection of a mark used in association with noncompeting goods:

The real injury in all such cases . . . is the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods. The more distinctive or unique the mark, the deeper is its impress upon the public consciousness, and the greater its need for protection against vitiation or disassociation from the particular product in connection with which it has been used. n90

Justice Frankfurter put it this way:

The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. . . . The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same -- to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. . . . If another poaches upon the commercial magnetism [*1871] of the symbol he has created, the owner can obtain legal redress. n91

According to Schechter, the chief value of the trademark lies in its capacity to convey positive meanings. n92 The use of a similar mark vitiates the original's unique or distinctive ability to convey meaning, thus diluting its strength in the consumer imagination. n93 Although the doctrine was not incorporated into federal trademark legislation, many states have enacted "anti-dilution" statutes n94 that provide that "likelihood of injury to business reputation or of dilution of the distinctive quality of a mark . . . shall be a ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services." n95

Although these statutes initially encountered judicial recalcitrance, n96 courts increasingly accepted the dilution doctrine in the 1970s and 1980s. n97 The dimensions of dilution now extend to include protection against the "blurring" n98 of a positive image caused by "dissonant" n99 usage, against

"erosion" n100 of the "magic" n101 of the status of the mark, [*1872] against "tarnishing" n102 the luster of a trade name, to prevent use of the mark in an "unwholesome or unsavory" n103 context, and to prevent the creation of an "unsavory mental association" n104 with the original mark. n105

"Many of our culture's best known and most powerful symbols are trademarks." n106 Moreover, the "owners" of trademarks are the most powerful and wealthy members of North American society. Their production operations and management activities may be increasingly invisible to us, but their signifiers permeate our senses and surround us with sights, sounds, and smells. n107 Why should the most prominent indicia or symbols of corporate power be enabled to impart an exclusively favorable impression? Why should these symbolic forms be enabled to maintain a pristine innocence, abstracted from the history and the practices of the corporate bodies that produce them? Commodity fetishism, anyone?

The Coca-Cola Company, which polices its marks assiduously, is often (one could almost say routinely) successful in preventing unauthorized uses of its globally recognized bottles and logos. In 1972 it sued to enjoin entrepreneurs from marketing "ENJOY COCAINE" posters using the famous script employed by the multinational in its "ENJOY COCA-COLA" advertisements. n108 The court found that impermissible damage to Coca-Cola's reputation would be caused by this unwholesome association with an illegal drug. n109 The injunction was granted; n110 the judge commented that people seeing the posters might "refuse to deal with a company which would seek commercial advantage by treating a dangerous drug in such jocular fashion." n111 The court conveniently overlooked the company's historically established, more-than-symbolic [*1873] associations with the drug at issue. n112

Similarly, General Electric was granted an injunction against the use of GENITAL ELECTRIC on T-shirts and briefs, in a decision which manipulated the confusion rationale to deal with the threat of tarnishment to the company's image. n113 But what if one were to superimpose the company's advertising slogan, "GE, we bring good things to life," over a drawing of the missiles they produce or on a photograph of carnage in Iraq (presuming that it were established that GE played some role in manufacturing the thousands of bombs that inadvertently killed thousands of Iraqi civilians)? Would we be permitted to counter their media message with other mediations? Could we answer their assertion, even if we did have access to the same media channels and the same level of resources? Concepts as vague as tarnishment and loss of distinctiveness have the capacity to escalate into a general power to prohibit all reproductions of a mark and "grow into a powerful vehicle for the suppression of unwelcome speech." n114

The legal doctrine of dilution provides a potent means for corporate actors to manage their public personas. Perhaps the full implications of these laws have yet to be realized. n115 In jurisdictions that enforce dilution laws, it might not be safe to comment upon the sexual objectification of women in a mattress company's ads by way of a feminist film suggesting a rape on a mattress identified with its trademark. Nor could you be sure of your freedom to comment upon multinational capital if you depicted a Nestle billboard in the midst of Third World squalor and malnutrition. By controlling the sign, trademark holders are able to control its connotations and potentially curtail many forms of social commentary. The stronger or more famous the mark, the greater the legal protection that is afforded it against noncompeting and nonconfusing [*1874] uses. n116 This means that the more powerful the corporate actor in our commercial culture, the more successfully it may immunize itself against oppositional (or ironic or simply mocking) cultural strategies that "recode" n117 those signifiers that most evocatively embody its presence in postmodernity.

The most egregious and perhaps the most well-known recent example involved the prohibition of the

use of the word OLYMPIC by a gay rights advocacy group. In 1981, San Francisco Arts & Athletics, Inc. (SFAA), a nonprofit corporation, began to promote an international "Gay Olympic Games" to enhance the image of the gay community. n118 T-shirts, buttons, and bumper stickers were sold to finance the games. n119 The United States Olympic Committee attempted to prohibit any use of the term OLYMPIC in connection with these games. n120 Congress had granted the Committee exclusive rights to use the word under the Amateur Sports Act of 1978. n121

The district court granted a preliminary injunction prohibiting the SFAA's use of the term, and the Ninth Circuit affirmed. n122 Eventually, the district court awarded a permanent injunction and compelled the nonprofit organization to pay the Committee's attorneys' fees. n123 Finally, [*1875] in 1987 the Supreme Court upheld the Committee's exclusive rights to control the OLYMPIC signifier and determined, in effect, that the Committee had complete discretion to prohibit any use of the term that it found offensive. n124 The "property" rights of the Committee had priority over the expressive interests of an historically silenced minority. n125

The term OLYMPIC has a long history of positive associations with human excellence and achievement. It is, therefore, a "key symbol," n126 with which those in disadvantaged groups will associate to seek public recognition. n127 Indeed, the Committee had authorized youth groups and associations for the handicapped to hold OLYMPIC games. Homosexuals were not deemed worthy of the same privilege. As the judge writing the dissenting opinion for the Ninth Circuit remarked, "[I]t seems that the USOC is using its control over the term Olympic to promote the very image of homosexuals that the SFAA seeks to combat: handicapped, juniors, police, Explorers, even dogs are allowed to carry the Olympic [*1876] torch, but homosexuals are not." n128 In the dissent to the Supreme Court majority opinion, Justice Brennan (joined by Justice Marshall) noted that there were over 200 organizations listed in the Los Angeles and New York phone directories alone whose names began with the word OLYMPIC. n129 Indeed, the Committee's counsel (nominated by Ronald Reagan in 1987 for the position of district court judge) was a member of an exclusive all-male social club with a history of discrimination against minorities. n130 The name of this elite institution? You guessed it -- The Olympic Club. n131 No legal injunction was launched on that front.

The ability to restrict and control meaning because you "own" the sign may be most readily apparent in the trademark field, but it is more widespread. Other writers have suggested that copyright law has developed without due regard for the public interest, raising the specter of likely recovery for "copying" of any kind, without consideration of the social interests in promoting expressive activity or protecting the public domain. n132 Publicity rights arguably enable celebrities, their assignees, and their estates to control the meaning of the celebrity image in a fashion that deprives us of access to our collective cultural heritage and the ability to reflect upon the historical significance of the celebrity aura. n133 Further, celebrity images provide the cultural resources which those in marginalized groups use to construct alternative gender identities. For example, in the pre-Stonewall era gay men used the image of Judy Garland to identify themselves to each other and to comment upon the relation between nature and artifice in the presentation of the gendered [*1877] self. n134 Similarly, James Dean provides lesbians with an icon which may embody a challenge to dominant understandings of the causal connections between biology, anatomy, desire, and sexual practice. n135 Thousands of women use Star Trek characters to rewrite the masculine, re-imagine the male body, and engender utopian "alternative universes." n136 Again, those who attempt to give novel and alternative meanings to popular and powerful signifiers come up against the law and the politics of the commodity form. Gene Roddenberry may have conceived the philosophy of IDIC (Infinite Diversity in Infinite Combination), but there is no guarantee that Paramount Pictures will respect its principles. n137

V. Dialogism

The concept of dialogue, dialogism, and the dialogical principles of human life were central to the philosophical anthropology of Mikhail Bakhtin, who has been described as "the most important Soviet thinker in the human sciences and the greatest theoretician of literature in the twentieth century." n138 With Pavel Medvedev and Valentin Voloshinov, Bakhtin developed a body of philosophy about the constitutive role of language in human life and the cultural life of democracy, which he saw as quintessentially dialogical. n139

I will borrow Bakhtin's authority here because he transcends and rejects the dichotomy of subjectivity and objectivity by understanding culture as the ongoing activity of transformative meaning-making. n140 Further, he does so without denying either the materiality of signs or the political importance of struggles to fix their meanings. n141 Bakhtin made extensive attacks both on the transcendental ego and on objectivist understandings of self, language, and the world. For Bakhtin, the self was a [*1878] dialogic relation n142 with other selves that is never complete, but is always dominated by a "drive to meaning" in which meaning is understood as something always in the process of creation, never completed, for the world itself "is a vast congeries of contested meanings." n143

The self authors itself with and through the social signs with which meaning is made:

> Meaning comes about in both the individual psyche and in shared social experience through the medium of the sign, for in both spheres understanding comes about *as a response to a sign with signs*. . . . "And nowhere is there a break in the chain, nowhere does the chain plunge into inner being, nonmaterial in nature and unembodied in signs." n144

Bakhtin sees the relation between an individual and society not as a binary opposition, but as a continuum because the contents of the psyche and a culture are the same: signifying forms that simultaneously demand and elude closure as fixed signs with certain meanings. As one commentator has noted, "the nature of the linguistic sign is synergistic, a constant struggle and co-operation between the necessity to be static and repeatable, and the opposed but no less imperative necessity of the same material to be open to constantly new and changing circumstances. . . ." n145

As human beings we live an existence of sheer semioticity, "surrounded by forms that in themselves seek the condition of mere being-there, the sheer givenness of brute nature," n146 but at the same time we are compelled to invest these forms with new life and meaning so that we may understand them. Understanding is responding, answering. "Human being is the *production* of meaning. . . ." n147 We are fated to the condition of dialogue, "not only with other human beings, but also with the natural and cultural configurations we lump together as 'the world.' The world addresses us and we are alive and human to the degree that we are answerable, i.e. to the degree that we can respond to addressivity." n148

[*1879] If what is quintessentially human is the capacity to make meaning, n149 challenge meaning, and transform meaning, n150 then we strip ourselves of our humanity through over-zealous application and continuous expansion of intellectual property protections. Dialogue involves reciprocity in communication -- the ability to respond to a sign with signs. n151 What meaning does dialogue have when we are bombarded with messages to which we cannot respond, signs and images whose significations cannot be challenged, and connotations we cannot contest?

The sign, according to Bakhtin and Voloshinov, is always an arena of social struggle, because it embodies the dialectical history of two contending social tendencies -- the monologic and the dialogic. n152 Bakhtin often links monologic tendencies with the "official" in cultures, which must always contend with dialogic or "carnivalesque" tendencies. This is a sociopolitical opposition, with those in power attempting to give a brute facticity and singular meaning to the sign and to extinguish the "struggle between social value judgements which occurs in it, to make the sign uniaccentual." n153 Such centralizing forces must always contend with dialogism -- ubiquitous, centrifugal forces that find expression in practices like those of satire, parody, irony, quotation, collage, stylization, and polemic. n154 These are practices like those "recodings" of commodified signs explored earlier, n155 practices that involve a generation of new meanings through metaphor and generative recontextualizations of the sign.

The struggles that take place on the terrain of the sign to define its symbolic boundaries are historically specific contentions in which those [*1880] with divergent social interests strive to establish legitimate meanings for the sign or to delegitimate the meanings established by others. n156 The sign is dynamic; it maintains the capacity for development, vitality, and social life to the extent that it is open to reconfiguration. In postmodernism, I fear, we see fewer and fewer signs of life, but more and more monologic monuments -- commercial tombstones marking the demise of the carnivalesque in the condition of postmodernity.

Legal theorists who emphasize the cultural construction of self and world -- the central importance of shared cultural symbols in defining us and the realities we recognize -- need to consider the legal constitutions of symbols and the extent to which "we" can be said to "share" them. I fear that most legal theorists concerned with dialogue objectify, rarefy, and idealize "culture" -- abstracting "it" from the material and political practices in which meaning is made. n157 Culture is not embedded in abstract concepts that we internalize, but in the materiality of signs and texts over which we struggle and the imprint of those struggles in our consciousness. n158

This ongoing negotiation and struggle over meaning is the essence of dialogic practice. Many interpretations of intellectual property laws quash dialogue by affirming the power of corporate actors to monologically control meaning by evoking the concept of property. If both subjective and objective realities are constituted culturally -- through signifying forms to which we give meaning -- then we must critically consider the relationship between law, culture, and the politics of commodifying cultural forms.

FOOTNOTES:

n1 W. PERCY, *A Semiotic Primer of the Self,* in LOST IN THE COSMOS: THE LAST SELF-HELP BOOK 88 n.* (1984).

n2 V. N. VOLOSHINOV, MARXISM AND THE PHILSOSOPHY OF LANGUAGE 11-13 (L. Matejka & I. R. Titunik trans. 1973).

n3 M. DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE xi-xii (S. Rendall trans. 1984) (emphasis in original).

n4 *Id.* at xvii.

n5 V. N. VOLOSHINOV, *supra* note 2, at 23.

n6 Schlag, *Normative and Nowhere to Go,* 43 STAN. L. REV. 167, 175 & n.23 (1990).

n7 Well, of course there's Santa. Santa has long been with us as a European saint named Nicholas. What few people realize, however, is that until 1931, the old saint was a thin, dark man dressed in drab green or brown. His reincarnation as a plump, twinkling, jolly, white-bearded old chap in a red suit originated in a Coca-Cola advertising campaign (if pressed, I'll provide N. Cornell, *Collecting Christmas,* SKY, Dec. 1990, at 67, 72 as authority for this. I found this magazine in the seat pocket of an airplane). Fortunately for North American children and commercial culture, the Coca-Cola Company did not claim trademark rights in the figure. Had they done so, Santa, like Thumper, might also require authorization in this context.

n8 *See* Schlag, *supra* note 6, at 175 n.22.

n9 As Pierre Schlag puts it: "Postmodernism questions the integrity, the coherence, and the actual identity of the humanist individual self. . . . For postmodernism, this humanist individual subject is a construction of texts, discourses, and institutions." Schlag, *supra* note 6, at 173.

n10 I distinguish postmodernism as a cultural context from postmodernity -- the related historical condition of late capitalism. *See* R. Coombe, Publicity Rights and Political Aspirations: Mass Culture, Gender Identity and Democracy (1991) (unpublished manuscript on file at the *Texas Law Review*).

n11 I explore the cultural nature of postmodern politics more fully elsewhere. *See* R. Coombe, The Celebrity Image and Cultural Identity: Publicity Rights and the Subaltern Politics of Gender (1991) (unpublished manuscript on file at the *Texas Law Review*).

n12 *See infra* notes 138-148, 152-154.

n13 I have borrowed the term "dissonant cognitive framework" from Schlag who argues that although the dissonance among incomprehensible cognitive frameworks characterizes legal thought, legal argument, and legal texts, to characterize incommensurability as dissonance itself implies a rational belief in a unified ego. *See* Schlag, *Missing Pieces: A Cognitive Approach to Law,* 67 TEXAS L. REV. 1195, 1228-36 (1989).

n14 Schlag says that nearly all legal texts are polymorphously perverse. *Id.* at 1209.

n15 Schlag defines the rationalist world view as one that constantly asks for the redemption and justification of all descriptive and normative claims and that privileges the individual rationalist self and its ability to make normative recommendations about the law's ideal structure through ego-centered reason. *See id.* at 1208, 1210-12.

n16 *See id.* at 1214 ("Modernism thus demands a de-centering of ego-centered reason. It demands that individual ego renounce its claims to the status of the *fundamental* epistemological, ontological, or methodological unit." (emphasis in original)).

n17 *See id.* at 1213, 1216. For a longer discussion of the modern and the distinction between modern and postmodern forms of explanation, see Coombe, *Encountering the Postmodern: New Directions in Cultural Anthropology,* 28 CANADIAN REV. OF SOC. AND ANTHROPOLOGY 188 (1991).

n18 Schlag suggests that modernism at least offers solace with its totalities (*e.g.,* class relations, the

unconscious) that postmodernism rejects. *See* Schlag, *supra* note 13, at 1218.

n19 *Id.* at 1217-20. Postmodernists breach rules of discourse because they believe that form has implications and conventional forms of discourse may be inadequate to express alternative visions. The postmodernist voice is irreverent and typically bent on irony. *See, e.g.,* Schlag, *supra* note 6, at 167-77 (comparing normative legal thought to the Top 40 radio charts).

n20 Normative legal thought is in part a routine -- our routine. It is the highly repetitive, cognitively entrenched, institutionally sanctioned, and politically enforced routine of the legal academy -- a routine that silently produces our thoughts and keeps our work channelled within the same old cognitive and rhetorical matrices. *See id.* at 179.

n21 Schlag, *supra* note 13, at 1243.

n22 Well, at least I'll try.

n23 I have appropriated this phrase from Paul Stoller, who borrowed it from Ivan Brady, who appropriated it from Michel de Certeau, who discusses reading and writing as textual poaching in THE PRACTICE OF EVERYDAY LIFE. For the original sources of these borrowings, see (in turn) Stoller, *Speaking in the Name of the Real,* 29 CASHIERS D'ETUDES AFRICAINES 113 (1989); Brady, *Introduction to Speaking in the Name of the Real: Freeman and Mead in Samoa,* 85 AM. ANTHROPOLOGIST 908 (1983); and M. DE CERTEAU, *History: Ethics, Science and Fiction,* in SOCIAL SCIENCE AS MORAL INQUIRY (N. Haan, R. Bellah, P. Rabinow & W. Sullivan eds. 1983).

n24 Schlag, *supra* note 13, at 1248.

n25 *See, e.g.,* Brainerd, *The Groundless Assault: A Wittgensteinian Look at Language, Structuralism, and Critical Legal Theory,* 34 AM. U.L. REV. 1231, 1232 (1985) (stating that "[m]uch of critical legal theory has involved attempts to either reject or prove the possibility of an independent subject"); Coombe, *Context, Tradition, and Convention: The Politics of Constructing Legal Cultures,* 13 ASS'N FOR POL. AND LEGAL ANTHROPOLOGY NEWSL., Oct. 1990, at 15 (suggesting that the legal academy's objectification of legal culture results from a false belief in culture and consciousness as "singular, internally consistent system[s] of meanings"); Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies,* 14 LAW & SOC. INQUIRY 69, 70, 121 (1989) (arguing that critical legal theorists should stop characterizing structure and subjectivity as "two poles of an ineluctable dichotomy" as a critical first step towards freeing CLS from its relative "theoretical inadequacy") [hereinafter *Room for Manoeuver*]; Coombe, *"Same As It Ever Was": Rethinking the Politics of Legal Interpretation,* 34 MCGILL L.J. 603 (1989) (describing the theory of legal hermeneutics, its history, its relation to other social sciences, and its empirical and theoretical limitations) [hereinafter *"Same As It Ever Was"*]; D. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation,* 136 U. PA. L. REV. 1135 (1988) (critiquing the arguments of Dworkin, Hegel, and Pierce, and concluding that although there can be no final culmination of the interpretive process, the conversion principle of dialogue can justify a break with precedent); D. Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics,* 133 U. PA. L. REV. 291, 299 (1985) (arguing that "[t]he insistence on the intersubjective dynamic inherent in the construction of humanity -- our shared spirit -- permits us to expand the concept of rationality to encompass ethical questions and also to provide a vision of our prospects rooted in our actual life situation") [hereinafter *Reconstruction of Ethics*]; Peller, *The Metaphysics of American Law,* 73 CALIF. L. REV. 1151 (1985) (investigating law as a system of representation and the incorporation of legal realism into

mainstream legal discourse); Schlag, *supra* note 13, at 1198 (noting that "it has become a characteristic gesture of contemporary legal scholarship to scorn Cartesian rationalism"); Schlag, *supra* note 6 (criticizing normative legal thought as self-indulgent and obstructive of a real understanding of political and moral situations); Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self,* 76 GEO. L.J. 37 (1987) (exploring the rhetorical structure and appeal of Stanley Fish's arguments about interpretive communities) [hereinafter *Fish v. Zapp*]; Winter, Bull Durham *and the Uses of Theory,* 42 STAN. L. REV. 639 (1990) (proposing to reconceptualize the law in light of modern knowledge of the human mind with the goal of describing law in a cognitively meaningful manner) [hereinafter *Bull Durham*]; Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law,* 137 U. PA. L. REV. 1105 (1989) (arguing that philosophical analysts of the law frequently shift from one cognitive framework to another in more or less systematic ways) [hereinafter *Transcendental Nonsense*]. This is by no means an exhaustive list of legal theorists who have addressed these issues.

n26 Coombe, *"Same As It Ever Was," supra* note 25, at 605-10.

n27 Another way to explain this would be to say that reality cannot authorize us to speak in its name.

n28 *See* S. FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 82-85 (1989); S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 167-73 (1980).

n29 For a longer discussion of this process, see Coombe, *Room for Manoeuver, supra* note 25, at 88-99 (using cultural anthropology to develop and elaborate upon Robert Gordon's observations concerning the pervasiveness of social structures in Gordon, *New Developments in Legal Theory,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 286-89 (D. Kairys ed. 1982) [hereinafter POLITICS OF LAW]).

n30 *See* Winter, *Transcendental Nonsense, supra* note 25, at 1108.

n31 *Id.*

n32 *Id.* at 1110-11.

n33 *Id.* at 1119-20. *See generally* Coombe, *"Same As It Ever Was," supra* note 25, at 610-13.

n34 Winter, *Transcendental Nonsense, supra* note 25, at 1131; *see also* Winter, *Bull Durham, supra* note 25, at 683 (noting that an antifoundationalist insight teaches that one's view of the world always depends on one's conceptual scheme and is therefore not objective); Winter, *The Cognitive Dimension of the* Agon *Between Legal Power and Narrative Meaning,* 87 MICH. L. REV. 2225, 2228 (1989) (reiterating that meaning is located in the process of interaction between the world and the human) [hereinafter *The Cognitive Dimension*].

n35 Winter, *Transcendental Nonsense, supra* note 25, at 1132.

n36 *See id.* at 1130-34. Winter seems to believe that because reason is grounded in social and embodied experience it is not arbitrary, that our shared experience of embodiment provides us with a common basis for the cultural structures we differentially elaborate. (In this sense, he is a modernist.) I fear that Winter overstates this effect. Possibly, the legal meanings that afford the greatest

controversy are too abstracted from the body to be considered limited by it. Moreover, feminist, poststructuralist, and anthropological theorists suggest that the experience of embodiment is *not* a natural ground on which culture is built or a universal experience that is given cultural specificity through language, but rather a culturally and historically contingent experience. I have described the culturally sentient body elsewhere. *See* R. Coombe & P. Stoller, Consuming Power(s): Knowledge and Embodiment in West African Societies (1991) (unpublished manuscript); *see also* P. Stoller, The Sorcerer and his Body, Paper presented to the Department of Anthropology, University of Illinois-Champaign, Urbana (Apr. 11, 1991) (on file at the *Texas Law Review*).

n37 *See* Winter, *The Cognitive Dimension, supra* note 34, at 2245 ("[O]ur very ability to construct a world is already constrained by the cultural structures in which we are enmeshed.").

n38 Winter, *Foreword: On Building Houses,* 69 TEXAS L. REV. 1595, 1607 (1991). *See generally* Winter, *The Cognitive Dimension, supra* note 34, at 2230 (asserting that understanding narrative is essential to understanding the cognitive process).

n39 *See* D. Cornell, *Reconstruction of Ethics, supra* note 25, at 292-99.

n40 *See id.* at 297; *see also* Coombe, *Room for Manoeuver, supra* note 25, at 72-88 (drawing upon feminist and sociological literature to explore the possibilities for reconstructing subjectivity without denying agency).

n41 D. Cornell, *Reconstruction of Ethics, supra* note 25, at 297-98.

n42 *Id.* at 362 (footnote omitted); *see also* Coombe, *Room for Manoeuver, supra* note 25, at 88-99 (discussing the simultaneously constitutive and transformative, and constraining and enabling qualities of cultural structures).

n43 D. Cornell, *Reconstruction of Ethics, supra* note 25, at 364 n.361 (quoting M. TAYLOR, ERRING 142 (1984)).

n44 *Id.* at 365 (quoting R. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM 162 (1983)).

n45 *Id.*

n46 *Id.* at 368.

n47 *See id.*

n48 For a definition of postmodernism, see *infra* text accompanying notes 54-57. Readers interested in an extended discussion and bibliography should refer to R. Coombe, *supra* note 10; Coombe, *supra* note 17.

n49 M. HEIFERMAN & L. PHILIPS, IMAGE WORLD: ART AND MEDIA CULTURE 13 (1989).

n50 *Id.* at 57.

n51 This slogan sometimes accompanies STAN MACK'S REAL LIFE FUNNIES, a cartoon that appears in THE VILLAGE VOICE. It may well be copyrighted.

n52 I think this story is in the public domain.

n53 R. DYER, HEAVENLY BODIES: FILM STARS IN SOCIETY 141 (1986) (quoting Drag Queen, a character in the Grieg & Griffiths play, *As Time Goes By* (1981)).

n54 *See* D. HARVEY, THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE 107 (1989) (suggesting that postmodernism's insecurity derives from capitalism's destabilizing nature).

n55 *See* L. HUTCHEON, THE POLITICS OF POSTMODERNISM 1 (1989) (noting that "postmodernism here is not so much what Jameson sees as a systemic form of capitalism as the name given to cultural practices which acknowledge their inevitable implication in capitalism without relinquishing the power or will to intervene critically in it"); Ross, *Introduction,* in UNIVERSAL ABANDON?: THE POLITICS OF POSTMODERNISM viii (A. Ross ed. 1988) ("[P]ostmodernist Culture is a real medium in which we all live to some extent, no matter how unevenly its effects are lived and felt across the jagged spectrum of color, sex, class, religion, and nationality."). For a general discussion of postmodern cultural practices, see S. CONNOR, POSTMODERNIST CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY (1989).

Frederic Jameson notes the difficulty in trying "to systematize a usage or to impose any conventional coherent thumbnail meaning [on the term postmodernism], for the concept is not merely contested, it is also internally conflicted and contradictory. . . . [F]or good or ill, we cannot *not* use it." F. JAMESON, POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM xxii (1991). Jameson uses the term in both senses in dealing with "both levels in question, infrastructure and superstructures -- the economic system and the cultural 'structure of feeling.'" *Id.* at xx.

n56 For further elaboration of the distinction, see Featherstone, *In Pursuit of the Postmodern: An Introduction,* in 5 THEORY, CULTURE AND SOCIETY 195 (1988).

n57 Every day, according to the Association of American Advertising Agencies, the average person is exposed to 1,600 advertisements. M. HEIFERMAN & L. PHILIPS, *supra* note 49, at 18.

n58 See D. KELLNER, JEAN BAUDRILLARD: FROM MARXISM TO POSTMODERNISM AND BEYOND (1989) for an extended discussion of Baudrillard's musings on this topic.

n59 B. BAGDIKIAN, THE MEDIA MONOPOLY 4 (2d ed. 1987). *See generally* H. SCHILLER, CULTURE, INC.: THE CORPORATE TAKEOVER OF PUBLIC EXPRESSION (1989).

n60 McRobbie, *Postmodernism and Popular Culture,* in POSTMODERNISM: ICA DOCUMENTS 165 (L. Appignanesi ed. 1989) (emphasis in original).

n61 *See* R. Coombe, *supra* note 10; Coombe, *Postmodernity and the Rumor: Recoding the Commodity/Sign in Late Capitalism,* in CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY (R. Rouse, J. Ferguson, & A. Gupta eds. forthcoming 1992). An abbreviated version of the latter appears as *Postmodernity and the Rumor: Late Capitalism and the Fetishism of the Commodity/Sign,* in JEAN BAUDRILLARD: THE DISAPPEARANCE OF ART AND POLITICS (W. Chaloupka & W. Stearns eds. 1991).

n62 *See generally* H. FOSTER, RECODINGS: ART, SPECTACLE, CULTURAL POLITICS (1985); H. FOSTER, THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE (1983).

n63 *See generally* D. HEBDIGE, CUT'N'MIX: CULTURE, IDENTITY, AND CARIBBEAN MUSIC (1987); L. HUTCHEON, *supra* note 55, at 28; P. WILLIS, COMMON CULTURE (1990); McRobbie, *supra* note 60.

n64 *See* D. HEBDIGE, *supra* note 63, at 8 ("Naming can be in and of itself an act of invocation, conferring power and/or grace. . . . [T]he names carry power in themselves."); L. HUTCHEON, *supra* note 55, at 8 ("[T]he postmodern appears to coincide with a general cultural awareness of the existence and power of systems of representation which do not reflect society so much as grant meaning and value within a particular society."); McRobbie, *supra* note 60, at 8-9 (discussing Shiite terrorists' use of Western media as a political platform and observing that "the media continues, relentlessly, to hijack events and offer in their place a series of theatrical spectacles whose points or relevance are only tangentially on what is going on, and whose formal cues came from other, frequently televisual, forms of representation").

n65 Many inner city gangs mark their identities, communities, and turf with the logos of particular brands of athletic shoes. *See* Wilkerson, *Challenging Nike, Rights Group Takes a Risky Stand,* N.Y. Times, Aug. 25, 1990, § 1, at 10, col. 4.

n66 R. Coombe, *supra* note 10, at 62-69 (citations and footnotes omitted).

n67 Conversation with Professor Mariana Valverde, Professor of Sociology at York University, Toronto (May, 1989).

n68 Marriott, *I'm Bart, I'm Black and What About It?,* N.Y. Times, Sept. 19, 1990, at C8, col. 5.

n69 Klawans, *American Notes,* Times Lit. Supp., July 20, 1990, at 774, col. 1.

n70 Mills, *Bootleg Black Bart Simpson, the Hip-Hop T-Shirt Star,* Wash. Post, June 28, 1990, at D13, col. 1.

n71 This is only a rumor, but I think it is a telling one.

n72 E. VANDENBURGH, TRADEMARK LAW AND PROCEDURE 3 (1968).

n73 *See* Felcher & Rubin, *The Descendability of the Right of Publicity: Is There Commercial Life After Death?,* 89 YALE L.J. 1125 (1980).

n74 *See generally* L. TRIBE, CONSTITUTIONAL CHOICES 192-98 (1985); Fiss, *Why The State?,* 100 HARV. L. REV. 781, 787-90 (1987); Fiss, *Free Speech and Social Structure,* 71 IOWA L. REV. 1405, 1408-13 (1986); Kairys, *Freedom of Speech,* in POLITICS OF LAW, *supra* note 29, at 166; Moon, *Lifestyle Advertising and Classical Freedom of Speech Doctrine,* 36 MCGILL L.J. 76, 101 (1990); Moon, *The Scope of Freedom of Expression,* 23 OSGOODE HALL L.J. 331, 335-40 (1985).

n75 A growing body of legal literature points to this decline in available defenses, along with (1) the massive expansion of the cultural forms now considered to be private property, and (2) the use of intellectual property laws to impede the flow of imagery and information in the service of interested agendas. In a recent article, David Lange notes that copyright lends itself (recurringly) to efforts

aimed at the direct suppression of speech; it validates some speech at the expense of other speech, frequently imperils the creative process, and often conflicts with our commitments to freedom of expression. *See* D. Lange, At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium, Paper presented at the Society for Critical Exchange Conference, Intellectual Property and the Construction of Authorship, Case Western Reserve University (Apr. 19-21, 1991) (on file at the *Texas Law Review*).

This is especially true in Canada, where copyright has become a virtually absolute property right increasingly used as a means of private censorship. *See* Vaver, *Intellectual Property Today: Of Myths and Paradoxes,* 69 CAN. B. REV. 98, 110-11 (1990). The prevailing attitude toward the scope of copyright protection was summed up in a report issued by Canada's Sub-Committee on the Revision of Copyright, which included the remarkable statement that "ownership is ownership is ownership. The copyright owner owns the intellectual work in the same sense as a landowner owns land." REPORT OF THE SUB-COMMITTEE ON THE REVISION OF COPYRIGHT, STANDING COMMITTEE ON COMMUNICATIONS AND CULTURE, A CHARTER OF RIGHTS FOR CREATORS 9 (1985).

The increasing judicial restriction of the type of activities that might be considered fair use of copyright material in the United States indicates that the scope of copyright protection is expanding throughout North America. *See* L. PATTERSON & S. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USER'S RIGHTS (1991). Diane Conley has demonstrated that there is an increasing judicial presumption against fair use, a conclusory and dismissive attitude toward first amendment claims, a tendency to use copyright to protect the personal interests of the author (in a fashion that bears no tendency to use copyright to protect the personal interests of the author (in a fashion that bears no relation to the incentive structure the copyright is constitutionally designed to provide), and a general discounting of the public interest. *See* D. Conley, Author, User, Scholar, Thief: Fair Use and Unpublished Works, Paper presented at the Society for Critical Exchange Conference on Intellectual Property and the Construction of Authorship, Case Western Reserve University (Apr. 19-21, 1991) (on file at the *Texas Law Review*). For other critical discussions of the judicial tendency to limit and confine the application of fair use, see Leval, *Toward a Fair Use Standard,* 103 HARV. L. REV. 1105 (1990); Abrams, *First Amendment and Copyright: The Seventeenth Donald C. Brace Memorial Lecture,* 35 J. COPYRIGHT SOC'Y 1, 4-12 (1987); Leval, *Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture,* 36 J. COPYRIGHT SOC'Y 167-81 (1989); and, for an economic perspective, see Fisher, *Reconstructing the Fair Use Doctrine* 101 HARV. L. REV. 1659, 1698-1744 (1988). The unwillingness of the judiciary to consider the creative, productive, and culturally transformative nature in which copyrighted works may be used (and to insist upon a bright line distinction between "authors" and "users" that privileges and over-estimates the creativity of the former) is also discussed in Jaszi, *Theorizing Copyright Doctrine: Some Uses of "Authorship,"* 1991 DUKE L.J. (forthcoming), and Litman, *The Public Domain,* 39 EMORY L.J. 965 (1990). The increasing expansion of private copyright interests, the diminished arena of cultural forms that constitute the public domain, and the concomitant threat to the public interest in progress in the arts and sciences is explored in Yen, *Restoring the Natural Law: Copyright as Labor and Possession,* 51 OHIO ST. L.J. 517 (1990).

Jessica Litman argues that copyright law is inhospitable to actual processes of authorship precisely because it maintains untenable distinctions between (romantic) authors and (suspect) users and misunderstands the nature of creative authorship:

All authorship is fertilized by the work of prior authors, and the echoes of old work in new work extend beyond ideas and concepts to a wealth of expressive details. Indeed, authorship *is* the transformation and recombination of expression into new molds, the recasting and revision of details into different

shapes. What others have expressed, and the ways they have expressed it, are the essential building blocks of any creative medium.
J. Litman, Copyright as Myth, Paper presented at the Society for Critical Exchange Conference, Intellectual Property and the Construction of Authorship, Case Western Reserve University (Apr. 19-21, 1991) (on file at the *Texas Law Review*).

David Lange argues that both publicity rights and trademark protections are also expanding to the detriment of those engaged in creative authorship and at a significant cost to the public in *Recognizing the Public Domain,* in 44(4) LAW AND CONTEMPORARY PROBLEMS 147 (1981). A longer argument about the cultural losses occasioned by the expansion of publicity rights may be found in R. Coombe, *supra* note 10.

n76 *See, e.g.,* Walt Disney Productions v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978) (noting that the First Amendment claim of the defendants "can be dismissed without a lengthy discussion"), *cert. denied,* 439 U.S. 1132 (1979); McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F. Supp. 415, 422 (S.D.N.Y. 1971) (finding that the proffered First Amendment claims "fly in the face of established law"); *see also* Note, *Copyright, Free Speech and the Visual Arts,* 93 YALE L.J. 1565 (1989). But, for a more optimistic reading of judicial tendencies, see Note, *Trademark Parodies and Free Speech: An Expansion of Parodists' First Amendment Rights in* L.L. Bean, Inc. v. Drake Publishers, Inc., 73 IOWA L.REV. 961 (1988).

n77 *See* Dorsen, *Satiric Appropriation and the Law of Libel, Trademark and Copyright: Remedies Without Wrongs,* 65 B.U.L. REV. 1923, 1924-28 (1986) (noting that the risk of litigation can stifle creativity); Note, *The Parody Defense to Copyright Infringement: Productive Use After* Betamax, 97 HARV. L. REV. 1395, 1412 (1984) (finding that copyright law restricts parody).

n78 Matt Groening's allusion to Twentieth Century Fox's "busts," *supra* note 70, no doubt refers to officials carrying out the authority given them under an Anton Piller order. Such operations are often ominously Kafkaesque as armies of officials across wide regions simultaneously surround and enter premises, seizing merchandise and business records as evidence for a forthcoming trial -- a trial that is unlikely to take place once the alleged infringer has lost his inventory.

n79 *Cf.* Note, *Copyright, Free Speech and the Visual Arts, supra* note 76, at 1568 & n.18 (noting that when threatened with litigation over his use of an appropriated photograph, Andy Warhol easily squashed the suit with a settlement consisting of artwork).

n80 *See* Lugosi v. Universal Pictures, 603 P.2d 425, 160 Cal. Rptr. 323 (1979). Bela Lugosi's heirs sued a movie company for using Lugosi's likeness in promoting new Dracula movies. Although the company owned the copyright to the film, the court found that during his lifetime Lugosi could have created a "right of value" in his name or likeness. *Id.* at 428.

n81 Reddy Communications, Inc. v. Environmental Action Found, Inc., 199 U.S.P.Q (BNA) 630, 631-32 (D.D.C. 1977).

n82 *Id.* at 632.

n83 *Id.* A preliminary injunction was denied, *id.* at 636, and a permanent injunction was also denied. 477 F. Supp. 936, 948 (D.D.C. 1979).

n84 *Reddy Communications, Inc.,* 199 U.S.P.Q. (BNA) at 633-34 & n.11. The Court concluded that the plaintiff's "property" had not "assume[d] . . . the functional attributes of public property devoted to public use," *id.* at 633 (quoting Century Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972)), thus the enforcement of plaintiff's private rights was not considered state action. *See id.* at 633-34. In other words, because the private action was not inherently governmental, it was not subject to constitutional limitation. For a critique of this reasoning, see Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols,* 1982 WIS. L. REV. 158, 190-91 & n.146.

n85 *See* 2 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 24:1, at 160-63 (1984 & 1990 Supp.) (noting that trademark law limits use of the mark only where consumer confusion is likely).

n86 Canada Safeway Ltd. v. Manitoba Food and Chemical Workers, Local 832, 73 C.P.R. (2d) 234 (1983).

n87 *Id.* at 237.

n88 State antidilution statutes are a relatively recent phenomenon. Massachusetts adopted the first antidilution statute in 1947. Shire, *Dilution Versus Deception -- Are State Antidilution Laws an Appropriate Alternative to the Law of Infringement?,* 77 TRADEMARK REP. 273, 278 (1987). Today, at least 24 states have antidilution statutes. See *infra* note 94 for a list of state antidilution statutes. See Note, *Trademark Parody: A Fair Use and First Amendment Analysis,* 72 VA. L. REV. 1079, 1088-92 (1986), and 2 J. MCCARTHY, *supra* note 85, § 24:13 (D), at 159-60, for examinations of increasing judicial acceptance of dilution statutes.

Canada does not, as yet, have any judicially developed dilution doctrine and given judicial interpretations of the its Trademarks Act, CAN. REV. STAT. ch. T-10, § 22(1) (1985), is unlikely to develop antidilution protections unless there are statutory amendments. However, the tendency of those with distinctive trademarks to register them as copyrights augers in the same direction. Unlike the United States, Canada has no fair use defense for copyright infringement and only an anachronistic fair dealing defense to permit limited copying for the purposes of news reporting and scholarly review. *See* Copyright Act, CAN. REV. STAT. ch. C-30, § 27(2)(a) (1985).

n89 *See, e.g.,* Waterman Co. v. Gordon, 72 F.2d 272, 273 (2d Cir. 1934) (enjoining defendant from selling razor blades under the name "Waterman," because the blades "might naturally be supposed to come from" plaintiff, who owned the trademark "Waterman's" registered for use on fountain pens and other writing instruments); Yale Electric Corp. v. Robertson, 26 F.2d 972, 974 (2d Cir. 1928) (affirming dismissal of plaintiff's suit to compel registration of its trademark, the word "Yale" inside an ellipse and octagon, on the ground that consumers were likely to confuse it with products made by Yale & Towne Manufacturing Company and marked "Yale"); Aunt Jemima Mills Co. v. Rigney & Co., 247 F. 407, 410, 412 (2d Cir. 1917) (enjoining defendant from marketing syrup under the name "Aunt Jemima," because consumers would believe it to be manufactured by plaintiff, who sold flour under the same name). As Denicola described the traditional approach:

At a rhetorical level there is a certain convenience in speaking of a trademark "owner"; as the symbol of the goodwill enjoyed by an enterprise, the mark is indeed a valuable commercial asset capable of exploitation and assignment. Yet as a description of the legal consequences attaching to the adoption of a particular symbol as an indication of origin, the property conception is largely inadequate. Traditional trademark doctrine does not establish the general right to exclude others implied by the

property designation. Protection is normally limited to instances in which there is a threatened appropriation or injury to goodwill arising through customer confusion. The danger in utilizing a property conception of trademark [is that it has a tendency to preclude] rational consideration of competing social, economic, and occasionally, constitutional interests.
Denicola, *supra* note 84, at 165 (footnotes omitted).

n90 Schechter, *The Rational Basis of Trademark Protection,* 40 HARV. L. REV. 813, 825 (1927).

n91 Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942).

n92 *See* Schechter, *supra* note 90, at 818 ("The true functions of the trademark are, then, to identify the product as satisfactory and thereby to stimulate further purchases by the consuming public.").

n93 *See id.* at 830 (arguing that a trademark symbol "would soon lose its arresting uniqueness and hence its selling power if it could be used on pianos, shaving cream, and fountain pens").

n94 *See* ALA. CODE § 8-12-17 (Supp. 1984); ARK. STAT. ANN. § 4-71-113 (1987); CAL. BUS. & PROF. CODE § 14330 (West Supp. 1989); CONN. GEN. STAT. ANN. § 35-11i(c) (West 1987); DEL. CODE ANN. tit. 6, § 3313 (Supp. 1990); FLA. STAT. ANN. § 495.151 (West 1988); GA. CODE ANN. § 10-1-451(b) (1989); IDAHO CODE § 48-512 (1977); ILL. ANN. STAT. ch. 140, para. 22 (Smith-Hurd 1986); IOWA CODE ANN. § 548.11(2) (West 1987); LA. REV. STAT. ANN. § 55:223.1 (West 1987); MASS. GEN. LAWS ANN. ch. 110B, § 12 (West 1990); ME. REV. STAT. ANN. tit. 10, § 1530 (1980); MO. REV. STAT. § 417.061 (1986); MONT. CODE ANN. § 30-13-334 (1989); NEB. REV. STAT. § 87-112 (1987); N.H. REV. STAT. ANN. § 350-A:12 (1984); N.M. STAT. ANN. § 57-3-10 (1987); N.Y. GEN. BUS. LAW § 368-d (McKinney 1984); OR. REV. STAT § 647.107 (1989); 54 PA. CONS. STAT. ANN. § 1124 (Purdon Supp. 1990); R.I. GEN. LAWS § 6-2-12 (1985); TENN. CODE ANN. § 47-25-512 (1988); TEX. BUS. & COM. CODE ANN. § 16.29 (Vernon Supp. 1991).

n95 MODEL STATE TRADEMARK BILL § 12 (1964), *reprinted in* 2 J. MCCARTHY, *supra* note 85, § 22.4, at 26-27.

n96 *See* 2 J. MCCARTHY, *supra* note 85, § 24.13(B), at 156-59; Pattishall, *The Dilution Rationale for Trademark -- Trade Identity Protection, Its Progress and Prospects,* 71 NW. U.L. REV. 618, 621-24 (1976).

n97 *See* Note, *supra* note 88, at 1088-92; 2 J. MCCARTHY, *supra* note 85, § 24:13 (D), at 159-60.

n98 *See, e.g.,* Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026, 1030 (2d Cir. 1989) (defining "dilution as either the blurring of a mark's product identification or the tarnishment of the affirmative associations a mark has come to convey").

n99 *See, e.g.,* Exxon Corp. v. Exxene Corp., 696 F.2d 544, 550 (7th Cir. 1983) (explaining that similar names may cause dissonance in the minds of consumers: "It is the same kind of dissonance that would be produced by selling cat food under the name 'Romanoff,' or baby carriages under the name 'Aston Martin.'").

n100 *See, e.g.,* Jordache Enterprises, Inc. v. Hogg Wyld, Ltd., 625 F. Supp. 48, 52 (D.N.M. 1985) (stating that there is a risk of "erosion of the public's identification" of a trademark, diminishing its distinctiveness, uniqueness, effectiveness, and prestige (quoting Tiffany & Co. v. Boston Club, Inc.,

231 F. Supp. 836, 844 (D. Mass. 1964))).

n101 *See, e.g.,* Augusta National, Inc. v. Northwestern Mutual Life Ins. Co., 193 U.S.P.Q. (BNA) 210, 214 (S.D. Ga. 1976) ("[T]here is reasonable certainty that the value of [Augusta National's Masters] mark will be eroded; a little now, more later, until the 'magic' of the Masters will be mortally dissipated if not completely dispelled.").

n102 *See, e.g., Mead Data Central,* 875 F.2d at 1031 (stating that dilution has been defined as "the tarnishment of the affirmative associations a mark has come to convey").

n103 *See, e.g.,* Mutual of Omaha Ins. Co. v. Novak, 648 F. Supp. 905, 912, 231 U.S.P.Q. (BNA) 963, 967 (D. Neb. 1986) ("Trademark disparagement can be found where the defendant has used the same or a confusingly similar mark in a way that creates an undesirable, unwholesome or unsavory mental association with the plaintiff's mark.").

n104 *Id.*

n105 *See* 2 J. MCCARTHY, *supra* note 85, § 24:13, at 155-61.

n106 Note, *supra* note 88, at 1079 (footnote omitted). I couldn't have said it better myself.

n107 The United States Patent and Trademark Office determined on Sept. 19, 1990 that a distinctive smell could be registered as a trademark, thereby opening up a whole new realm of the senses to commodification. In re Clarke, 17 U.S.P.Q.2d (BNA) 1238, 1239-40 (1990) (holding fragrance added to applicant's yarn functions as a trademark for the yarn).

n108 Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183, 1193 (E.D.N.Y. 1972).

n109 *Id.* at 1191.

n110 *Id.* at 1193.

n111 *Id.* at 1191.

n112 *See* E. KAHN, THE BIG DRINK: AN UNOFFICIAL HISTORY OF COCA-COLA 54-55, 101-03 (1960) (describing the invention of Coca-Cola as a therapeutic syrup containing cola nuts, caffeine, and a derivative of coca leaves including, before 1906, trace amounts of cocaine); *see also* Schatzman, Sabbadini & Forti, *Coca and Cocaine: A Bibliography,* 8 J. PSYCHEDELIC DRUGS 95, 97 (1976) (noting that 19th-century advertisements of Coca-Cola proclaimed it a "remarkable therapeutic agent," a "sovereign remedy," and a cure for headaches, neuralgia, hysteria, melancholy, biliousness, spring fever, and insomnia).

n113 General Elec. Co. v. Alumpa Coal Co., 205 U.S.P.Q. (BNA) 1036, 1037 (D. Mass. 1979) (finding that confusion was likely without ever addressing the possible damage to GE's reputation). The "expansive confusion analysis" is discussed in Note, *supra* note 88, at 1094-96, and Denicola, *supra* note 84, at 186.

n114 Denicola, *supra* note 84, at 190.

n115 It is difficult to know. No one is keeping a record of threatening phone calls and letters received by local parodists, political groups, and other "consumers" of corporate symbols, which are subjectively experienced "realities" that are never documented by those who quantify objective "reality" for the official record. In other words, the political effects of the exercise of these legal rights may well be (and may remain) invisible to us.

n116 2 J. MCCARTHY, *supra* note 85, § 24:6(F), at 136-37.

N117 See the discussion of "recoding" as a cultural and political tactic, *supra* notes 61-65 and accompanying text.

n118 According to the SFAA's president, the Gay Olympic Games were intended

(1) To provide a healthy recreational alternative to a suppressed minority.

(2) To educate the public at large towards a more reasonable characterization of gay men and women.

(3) To attempt, through athletics, to bring about a positive and gradual assimilation of gay men and women, as well as gays and non-gays, and to diminish the ageist, sexist and racist divisiveness existing in all communities regardless of sexual orientation.
San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 535 n.13 (1987).

n119 *Id.* at 525.

n120 *Id.* at 525-28.

n121 In particular, section 110 of the Act, set forth in 36 U.S.C. § 380 (1988), provides:

(a) Without the consent of the [USOC], any person who uses for the purposes of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition --

(4) the words "Olympic", "Olympiad" . . . or any combination . . . thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity . . . shall be subject to suit in a civil action by the [USOC] for the remedies provided in [the Lanham Act]. . . .

(c) The [USOC] shall have exclusive right to use . . . the words "Olympic", "Olympiad" . . . subject to [lawful uses of these words established prior to 1950].
Amateur Sports Act of 1978, § 110, 36 U.S.C. § 380 (1988).

n122 International Olympic Comm. v. San Francisco Arts & Athletics, 219 U.S.P.Q. (BNA) 982, 987-88 (N.D. Cal. 1982), *aff'd,* 707 F.2d 517 (9th Cir. 1983) (mem.).

n123 *See* International Olympic Comm. v. San Francisco Arts & Athletics, 781 F.2d 733, 738 (9th Cir. 1986) (affirming permanent injunction but vacating and remanding for further proceedings on the award of the plaintiff's attorneys' fees), *reh'g denied and opinion amended,* 789 F.2d 1319, 1320 (9th Cir. 1986), *aff'd sub nom.* San Francisco Arts and Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 548 (1987).

n124 Moreover, it was determined that there were no defenses available to anyone who used the term without authorization. *San Francisco Arts & Athletics, Inc.,* 483 U.S. at 530-32. For longer discussions of the reasoning in the case, see Kravitz, *Trademarks, Speech, and the* Gay Olympics *Case,* 69 B.U.L. REV. 131, 160-84 (1989) (arguing that the Supreme Court's rationale in *San Francisco Arts & Athletics* distorted the analysis of what constitutes commercial speech to the detriment of SFAA's first amendment rights); Note, *A Sad Time for the Gay Olympics,* 56 U. CIN. L. REV. 1487 (1988).

n125 Similarly, a suit has been filed against The Pink Panther Patrol, a group formed to deter gay bashing in Manhattan's West Village. The company that owns the rights to the Pink Panther movies claims that the group's use of the name with an emblem consisting of a paw print inside a pink triangle "diminish[es] the identity and reputation" of their trademark. The group considers this is a necessarily homophobic argument. Hays, *Gay Patrol and MGM in a Battle over Name,* N.Y. Times, May 27, 1991, § 1, at 21, col. 2.

n126 For a discussion of the cultural significance of "key symbols," see Ortner, *On Key Symbols,* 75 AM. ANTHROPOLOGIST 1338, 1342-44 (1973) (suggesting that key symbols have both a summarizing function that catalyzes thought and action and an elaborating function that organizes conceptual experience or social action). Ortner updates her approach to key symbols in Ortner, *Theory in Anthropology Since the Sixties,* 26 COMP. STUD. SOC. & HIST. 126, 144-60 (1984) (suggesting that the trend in anthropology during the 1980s would be toward a more practice-oriented approach, focusing on either: (1) practice, praxis, action, and so on (*i.e.,* the things people do with cultural symbols, particularly with intentional or unintentional political implications); or (2) the agent, actor, self, subject, and so on (*i.e.,* the culturally constructed motivations of those who engage in such activities)).

n127 Elsewhere I have discussed minority interests in "official signifiers" (or marks held by public authorities) and the political implications of bestowing unlimited discretion to control signs upon bodies who are not accountable for its use. *See* R. Coombe, Official Signifers: The Control of Signs and the [De]Construction of Difference, Paper presented to the American Society of Criminology (Nov. 7, 1990) and to the American Anthropological Association (Nov. 28, 1990) (on file at the *Texas Law Review*).

n128 International Olympic Comm. v. San Francisco Arts & Athletics, 789 F.2d 1319, 1323 (9th Cir. 1986) (Kozinski, J., dissenting).

n129 *San Francisco Arts & Athletics, Inc.,* 483 U.S. at 568 n.32.

n130 *See* Shenon, *Battle Looming over a Nominee for U.S. Court,* N.Y. Times, Jan. 14, 1988, at A14, col. 6 (characterizing it as a "private club that bars membership to women and has been criticized for having no minority members in recent years"); *see also* McLaughlin, *The Walker Nomination: A Bork-style Battle in San Francisco,* The San Francisco Bay Guardian, January 20, 1988, at 7 (noting Walker's membership in the "elitist" club, "which openly discriminates against gays, women and minorities").

n131 *Id.*

n132 *See, e.g.,* Kulzick & Hogue, *Chilled Bird: Freedom of Expression in the Eighties,* 14 LOY. L.A.L. REV. 57, 77-78 (1980) (lamenting that "[i]n the long run . . . both the writer and the viewing public

will suffer from the inevitable chilling effect wrought by overbroad construction of the copyright monopoly"); Note, *Copyright Infringement and the First Amendment,* 79 COLUM. L. REV. 320, 320-21 (1979) (asserting that because "copyright protection results in a partial monopoly over expression, . . . it conflicts with the first amendment interest in free speech"); Vaver, *supra* note 75 (arguing that, upon examination, the social utilitarian justification of copyright law -- that it protects authors, encourages creativity, and encourages dissemination -- "dissolves into mythology"); *see also supra* note 75.

n133 See the discussion of Elvis Presley and Madonna in R. Coombe, *supra* note 10, at 14-21. David Lange makes a similar argument. *See* Lange, *supra* note 75, at 165 (noting that the First Amendment is an inadequate tool for controlling the development of intellectual property rights).

n134 R. Coombe, *supra* note 10, at 56-57.

n135 *Id.* at 59.

n136 *Id.* at 72-80.

n137 *Cf. id.* at 76-77 (suggesting that fanwriters may "respect the legal prohibition against selling their writings, videotapes and artworks for profit," but still not be deterred by the possibility that many of their activities might be enjoined on copyright, trademark, or publicity grounds).

n138 T. TODOROV, MIKHAIL BAKHTIN: THE DIALOGICAL PRINCIPLE ix (W. Godzich trans. 1984). Most of Bakhtin's work is still untranslated, and it is necessary to refer to secondary sources to get a sense of the full range of his thought.

n139 Hirschkop, *Introduction: Bakhtin and Cultural Theory,* in BAHKTIN AND CULTURAL THEORY 1-2 (K. Hirschkop & D. Shepherd eds. 1989).

n140 *See* M. HOLQUIST, DIALOGISM: BAKHTIN AND HIS WORLD 41 (1990) (describing Bakhtin's theory that "[e]xistence is . . . a vast web of interconnections each and all of which are linked as participants in an event whose totality is so immense that no single one of us can ever know it. That event manifests itself in the form of a constant, ceaseless creation and exchange of meaning.").

n141 *See id.* at 49 (noting that in dialogism "meaning comes about only through the medium of signs. . . . [And] a thing exists only in so far as it has meaning.").

n142 *Id.* at 19; *see also* M. BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS 311-12 (1984) (C. Emerson trans. 1984) (arguing that "I achieve self-consciousness, I become myself only by revealing myself to another, through another and with another's help. The most important acts, constitutive of self-consciousness, are determined by their relation to another consciousness. . . .").

n143 M. HOLQUIST, *supra* note 140, at 23-24; *see also* T. TODOROV, *supra* note 138, at 95.

n144 M. HOLQUIST, *supra* note 140, at 49 (quoting V. N. VOLOSHINOV, *supra* note 2, at 11) (emphasis in original); *see* T. TODOROV, *supra* note 138, at 30. There is a vociferous debate about whether the works allegedly authored by Voloshinov were in fact written by Bakhtin. *See* M. HOLQUIST, *supra* note 140, at 8. I think Bakhtin would be amused.

n145 M. HOLQUIST, *supra* note 140, at 175.

n146 *Id.* at 66.

n147 *Id.* at 158 (emphasis in original).

n148 *Id.* at 29-30.

n149 "To be human is to seek coherence, constantly to engage in an 'effort after meaning.'" Winter, *The Cognitive Dimension, supra* note 34, at 2230 (quoting Bruner, *Foreword* to D. SPENCE, THE FREUDIAN METAPHOR: TOWARD PARADIGM CHANGE IN PSYCHOANALYSIS at xii (1987)).

n150 We constantly use our imaginative capacities "to recast what we find and reconstruct our context by reconceptualization" and our "power of imagination to create new meanings not already shaped by what we believe." Winter, *Bull Durham, supra* note 25, at 674-76. "Freedom consists not in an unrestricted capacity to define meaning, but in an ability to modulate meanings." *Id.* at 684 (quoting K. WHITESIDE, MERLEAU-PONTY AND THE FOUNDATION OF AN EXISTENTIAL POLITICS 68-69 (1988)).

n151 *See* V. N. VOLOSHINOV, *supra* note 2, at 11.

n152 *See* Pechey, *On the Borders of Bakhtin: Dialogisation, Decolonisation,* in BAKHTIN AND CULTURAL THEORY, *supra* note 139, at 43-52.

n153 V. N. VOLOSHINOV, *supra* note 2, at 23.

n154 *See* M. BAKHTIN, *Discourse in the Novel,* in THE DIALOGIC IMAGINATION 259, 298-99 (M. Holquist ed. 1981) ("The prose writer does not purge words of intentions and tones that are alien to him, he does not destroy the seeds of social heteroglossia embedded in words. . . . [T]he writer of prose does not meld completely with any of these words, but rather accents each of them in a particular way -- humorously, ironically, parodically and so forth. . . .").

n155 *See supra* notes 61-65 and accompanying text. For specific examples of practices that recode commodified signs to produce alternative meanings, see text accompanying notes 51-53, 66-71, 81, 86.

n156 I should at this point make it clear that I believe that we are always in a world where some meanings are being fixed, while others are changing. A world of free-floating signifiers in which *no* meanings were fixed would be an impossible one in which to live, as would a world where signification had reached a state of closure. Social actors have many different kinds of power to fix and to challenge meaning; intellectual property law is only one kind of power in a larger field. We are all always engaged in meaning-making. What I am arguing for here is a democratization of access to this practice such that all peoples have equal capacities to engage in it and economically powerful actors are not given even further resources and capacities to dominate cultural arenas than they already possess.

n157 For example, Winter says that his conception of "culture" does not reify it into some monolithic, determinate "thing," but he never explores any social negotiations of meaning nor any conflictual practices or struggles to define meaning. Instead, he relegates the politics of meaning to a single

phrase in a single footnote when he tersely notes that "people in power get to impose their metaphors." Winter, *Transcendental Nonsense, supra* note 25, at 1135 n.101 (quoting G. LAKOFF & M. JOHNSON, METAPHORS WE LIVE BY 157 (1980)). For a longer discussion of the tendency of legal theorists to avoid issues of power when discussing "culture," see Coombe, *"Same As It Ever Was," supra* note 25, at 630-52.

n158 But if legal theorists concerned with "culture" have a tendency towards idealism, those concerned with free speech tend towards an undue materialism in their consideration of dialogism. I discuss the left critique of the public-private dichotomy in liberal freedom of speech doctrine in R. Coombe, *supra* note 10, where I argue that critics on the left fail to consider the cultural dimensions of postmodernity in their critiques of commercial expression.