

Cambridge Intellectual Property and Information Law

The Commercial Appropriation of Fame

A Cultural Analysis of the Right of Publicity
and Passing Off

David Tan



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Celebrities can sell anything from cars to clothing, and we are constantly fascinated by their influence over our lifestyle choices. This book makes an important contribution to legal scholarship about the laws governing the commercial appropriation of fame. Exploring the right of publicity in the US and the passing off action in the UK and Australia, David Tan demonstrates how an appreciation of the production, circulation and consumption of fame can be incorporated into a pragmatic framework to further the understanding of the laws protecting the commercial value of the celebrity personality. Using contemporary examples such as social media and appropriation art, Tan shows how present challenges for the law may be addressed using this cultural framework. This book will be of interest to intellectual property law academics, judges, practitioners and students in the US and common law jurisdictions, as well as those in the field of cultural studies.

David Tan is Vice Dean (Academic Affairs) and Associate Professor (Dean's Chair) at the Faculty of Law, National University of Singapore. He holds a PhD from Melbourne Law School and an LLM from Harvard Law School.

'David Tan expertly draws upon the cultural studies tradition to provide a wide-ranging, up-to-the-minute and even-handed critique ... Though theoretically sophisticated, Tan's critique is emphatically practical.'

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DAVID TAN is Vice Dean (Academic Affairs) and Associate Professor (Dean's Chair) at the Faculty of Law, National University of Singapore. He holds a PhD from Melbourne Law School and an LLM from Harvard Law School. He is also an accomplished fashion and fine art photographer, having held solo exhibitions presented by Cartier and Versace.

Cambridge Intellectual Property and Information Law

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Foreword by Professor Graeme Dinwoodie

Fame is a concept with deep cultural and commercial resonance. And, as the different spheres of our contemporary existence converge and overlap, fame has resonance in the political arena too. Maybe it always has, at least in some respects; political prominence has always brought with it a version of fame. But the interaction of the cultural, commercial and political dimension to fame has surely never been greater. The United States has elected a new President who could not have reached where he has without some exploitation of his pre-existing fame, whether as a recent television celebrity or as a more long-standing presence on the gossip pages of newspapers and magazines. Indeed, President Trump continues to exploit for political (and possibly commercial) gain the manifestations of fame developed before his political career – a persona that embodies an oversize ego, distinctively eccentric physical features, a clipped and crude form of communication, an obsession with self-promotion and aggrandisement, and an economical relationship with objective facts. For many in polite society, these features are not ones that one would choose to highlight in public; they do not appear to be indicia of achievement, intellect, greatness or humanity, or indeed any other characteristic that one would wish to celebrate. But as the political currency of fame increases in value, just as it has in the commercial arena, it has been a more consistent driver of the President's agenda than any coherent political philosophy or policy prescriptions. In this respect, the deployment of fame in the political arena arguably has mirrored the strategies used by some celebrities to secure commercial benefits: all publicity is good publicity.

David Tan's eloquent and insightful analysis of the concept of fame focuses on the means of its commercial appropriation. This appropriation occurs in large part (but not exclusively) through legal devices that inhabit more or less the realm of intellectual property law (though one can have a decent debate about whether that is an accurate label for all of them). In the common law jurisdictions that form the heart of Tan's analysis (the United Kingdom, Singapore, the United States and

Australia), there are causes of action for violation of publicity rights, breach of personality rights and passing off. Intellectual property law has for some time reflected in varying ways the principle described (critically) by Rochelle Dreyfuss as 'if value, then right'. It is thus perhaps not surprising that as fame has assumed greater commercial significance, claims would be advanced under the guise of intellectual property law.

But the 'if value, then right' principle has been subject to substantial critique on its own terms, which might not only undermine the legitimacy of such claims, but which also might cause us to question the social value of recognising them. Indeed, if the law recognises devices by which the commercial value of fame can be appropriated, this will likely have both expressive and dynamic effects. It says something about what we value as a society, and it will structure the behaviour of market actors who respond to economic incentives. Complicating the picture further, the uncertain conceptual identity of fame (or personality or persona) and the long-contested question of its valorisation by legal or social institutions resulted in the development of a variety of different legal causes of action. Insofar as those causes of action – such as passing off in the United Kingdom or Australia – seek to vindicate policy values that go beyond, but may be implicated by, fame, the prescriptive puzzle becomes even more tantalising.

But as the effects of such claims affect other valuable legal interests, such as the institutions of free speech or robust competition or political identity, the need for critical scholarly attention to the means of appropriating the commercial value of fame becomes ever more acute. As fame acquires greater value to celebrities, it also assumes greater importance to those third parties (whether fans or critics) who need to use that fame to assert their identity or simply to be active participants in cultural life.

Moreover, as the cultural, commercial and political spheres of our life become increasingly less distinct, scholarly analysis will be enriched by thinking about those questions with proper and informed regard for cultural effects. To be sure, the resulting analysis becomes ever more complex, but without it, the inquiry seems incomplete. This book grasps the complexity wonderfully, giving us a rigorous tour of the legal landscape in several jurisdictions, but framing legal analysis with insights from cultural studies.

By drawing on lessons from cultural studies, the book offers a more promising universal prescription than one can find heretofore in this corner of intellectual property law. Intellectual property law is increasingly internationalised, potentially imposing through that international system too homogeneous a template by which to regulate diverse social,

economic and cultural circumstances around the world. Yet, as regards the commercial appropriation of fame, the legal regimes remain largely unconstrained by international obligation, perhaps other than minimally through fundamental rights treaties; national legal regulations thus vary widely, imposing facially disparate solutions on a cultural phenomenon – fame – that may assume ever-more universal form. The analysis in this book is comparative, which allows the reader to see the possibilities of slow, incremental harmonisation through common legal moves even when performed within different formal rubrics. But the reference to cultural studies (and the cultural practices that are the focus of that field of inquiry) allows Tan to identify features of the production of fame that potentially might inform the wide array of legal actions across multiple jurisdictions.

Publicity rights – principally developed in the United States – are the most obvious place to apply the lessons presented by Tan. Such rights offer the broadest and most repressive scope of rights against misappropriation in the jurisdictions studied; as a result, they have also been the subject of the most sustained scholarly criticism. Publicity law is badly in need of a demanding, but measured, critique. But passing off cases in the United Kingdom would become far more transparent and granular if the courts were able to take account, in framing the types of actionable ‘misrepresentation’ and ‘harm’, of the distinctions that Tan develops to limit the range of actionable appropriation. Indeed, despite the author’s over-modest protestations that the lessons of the book pertain primarily to common law jurisdictions, it is not clear to me that they could not extend to the forms of action in civil law countries grounded more explicitly in notions of autonomy and human dignity. The line between the personal and the commercial is ripe for exploration in an era where commercial products have their own social media presence and personal search data feeds into advertising strategies. The concepts of ‘friends’ and ‘communities’ are semantically unstable.

The culturally informed analysis thus engages with the commercial appropriation of fame, and the legal doctrines by which that occurs, with far more nuance than one might find from duelling assertions of the wisdom or folly of the ‘if value, then right’ principle. Some scholars have previously drawn on cultural studies, largely to complain (fairly) that advocates of protecting celebrities against the commercial appropriation of fame have not advanced any persuasive reason to allocate excessive cultural control to particular individuals. But it is clear that as a society, we do attach value to fame. If that is the case, we should ask critically whether (and in what ways) the development and exploitation of fame is a

positive feature that we might wish to encourage, celebrate or bemoan. If we wish legal mechanisms that faithfully implement those prescriptive choices – insofar as intellectual property law is capable of dictating or at least influencing those cultural outcomes – then we will benefit from the full picture that this book provides.

GRAEME B. DINWOODIE

Preface

Why would top luxury brands like Louis Vuitton, Dolce & Gabbana and Versace pay Madonna to front their advertising campaigns? Why would Jura engage Roger Federer to be their global brand ambassador? Would fans of Cristiano Ronaldo and Beyoncé eat KFC or drink Pepsi because their idols are the spokespersons for these brands? Would I be rushing out to buy Emporio Armani underwear because David Beckham is on a billboard wearing a pair of white trunk briefs?

It is undeniable that celebrities can sell virtually anything. The contemporary celebrity does not have to be an individual of outstanding abilities in the fields of sports, music or movies. Fame in the twenty-first century is very different from traditional fame defined by one's distinguished achievements. What characterises 'fame' today is simply a heightened visibility in the public consciousness. Celebrities have access to numerous opportunities to commercially exploit their fame through myriad channels, such as advertising, endorsements and merchandising. In 2012, Beyoncé was reportedly paid US\$50 million to promote Pepsi products. In 2014, a retired David Beckham posted the highest earnings of his career with US\$75 million in endorsements that include Adidas, Breitling, Belstaff and Jaguar. At the same time, companies that are hoping for a free ride are devising innovative means of referencing the celebrity persona without having to pay a substantial licensing fee.

This book demonstrates how an appreciation of the production, circulation and consumption of fame as embodied by the celebrity can be incorporated into a pragmatic cultural framework for analysing the laws relating to the commercial appropriation of personality. It focuses on the right of publicity in the United States, and the related passing off action that celebrities resort to in Commonwealth common law jurisdictions like the United Kingdom and Australia. It argues that what we generally call 'celebrity' is really a cultural construction of a trinity comprising the celebrity individual, the audience and the cultural producers. Two exemplary insights from cultural studies are explored. The first insight on the definition of the contemporary celebrity based on well-knownness

provides the impetus for the legal protection of the commercial value of identity. The second insight about the celebrity's function as a semiotic sign representing majoritarian ideals has important implications for both contemporary consumption and identity politics. It will be shown how these insights support the concepts of *evocative identification*, *associative appropriation* and *political recoding*, all contributing to a more nuanced understanding of three key elements of a typical right of publicity claim. The book also demonstrates how treating ideological codings of the celebrity persona as political speech can influence the articulation of the First Amendment defence as well as trigger the application of Article 10 of the European Convention on Human Rights in European and English jurisprudence. In addition, these cultural insights have similar relevance to passing off laws, supporting a broad interpretation of goodwill and damage, and a standard of impressionistic association based on the notion of affective transfer as sufficient to constitute misleading conduct.

Perhaps in my other life as a fashion and celebrity portrait photographer, my interactions and friendship with numerous famous personalities have ignited that creative spark which got me started on this journey to write a book on fame. To Kit Chan, Allan Wu and Jason Godfrey from Singapore, the United States and Canada, thank you for the inspiration. To Professors Andrew Christie, Andrew Kenyon and Megan Richardson at Melbourne Law School, I very much appreciate your dedicated supervision during my doctoral candidature, and your invaluable criticisms and feedback on earlier drafts of this book. To Professor Graeme Dinwoodie at Oxford, I am humbled by your kind foreword. I am also grateful to my fabulous research assistants at the National University of Singapore over the years for an outstanding job in compiling and summarising cases and articles: Benjamin Foo, Yeo Wee Jin, Kenneth Wang Ye, Louis Lim, Matthew Dresden and Shawn Pelsinger. Last but not least, this book would not have been possible without the unstinting support of my family and friends.

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