

***451** CAN YOU QUOTE DONALD DUCK?: INTELLECTUAL PROPERTY IN CYBERCULTURE

[Peter Johnson](#) [FNa1]

Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law*. Durham: Duke University Press, 1998. Pp. xi, 462. \$19.95.

Resumen:

En su libro llamado "The cultural Life of Intellectual Properties", la profesora Rosemary J. Coombe examina la tensión existente entre los que protegen los símbolos corporativos y la sociedad.

En su juicio sobre Coombe, el profesor Peter Jonson encuentra que tensiones semejantes se presentan entre la propiedad intelectual de las corporaciones y la oferta sin restricciones que presenta Internet, donde nuevas modalidades de infracciones aparecen en forma de "cibersquatting, metatags y gripes".

El profesor Jonson, se abre a la posibilidad de que la Web pueda ser el aire fresco que la cultura postmoderna necesita para relajar el control centralizado -en exceso- de las imágenes populares.

Abstract:

In her book "The Cultural Life of Intellectual Properties", Professor Rosemary J. Coombe examines the tension between protectors of corporate "commodity / signs" and society. In his review of Prof. Coombe, prof. Peter Johnson finds similar tension arising between corporate intellectual property and the "carnival" of the Internet, where new forms of infringement arise in the form of cybersquatting, metatags and gripe sites. Prof. Johnson speculates that "the web might be just the fresh air that postmodern culture needs to loosen centralized control of popular images".

Introduction

Rosemary J. Coombe's *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* begins with the author, Associate Professor of Law at the University of Toronto, walking down Queen Street in Toronto, navigating a maze of intellectual property. She buys coffee at Starbucks®; sees billboards for Black Label® beer; T-shirts with *452 My Favorite Martian™ and Mattel's Hot Wheels®, bottles of Clearly Canadian® water and packages of Land-O-Lakes® margarine adorned with its trademark Indian princess; and passes a McDonald's®, which features a Disney Magic Kingdom® tie-in to a (copyrighted) movie called *The Indian in the Closet*. [FN1]

She also meets the counterculture of intellectual property, including a shoulder bag proclaiming its wearer "Armed and Hammered," posters for the Nancy Sinatras (a lesbian band), a jacket patch of Colonel Sanders overlaid with a skull-and-crossbones, and unlicensed T-shirts featuring

copyrighted Picasso paintings. On this walk, which reflects any short walk down any city street by any reasonably attentive observer, Coombe observes, "I have considered at least thirty-four legally protected cultural texts, run into about a dozen potential intellectual property infringements, and encountered a score of other intellectual properties I didn't reflect upon." [\[FN2\]](#)

In *The Cultural Life of Intellectual Properties*, Coombe expands upon her encounters on this Queen Street walk. Her central theme is the tension between "authors" and "alters." "Authors" are creators of privately-owned "commodity/signs," as she designates trademarks and other intellectual property tokens. [\[FN3\]](#) "Alters," on the other hand, are individuals and groups who turn the corporately-"authored" symbols to their own uses. The products of "authors" include "advertising, lyrics, brand names, corporate logos, slogans, indicia of government and celebrity images." [\[FN4\]](#) These "pictures, texts, motifs, labels, logos, trade names, designs, tunes, and even some colors and scents are governed, if not controlled, by regimes of intellectual property." [\[FN5\]](#) For instance, intellectual property law gives Church & Dwight Co. the rights to "Arm & Hammer" as the symbol's author, and Kentucky Fried Chicken "owns" the Colonel's image. The products of "alters" include such parodies as "Armed and Hammered" and the Colonel behind a skull-and-crossbones. According to intellectual property law, the alters' uses infringe or dilute the authored images if not saved by a defense such as fair use.

In Coombe's analysis, societies are composed of sub-societies and subcultures who communicate in ways the dominant culture cannot predict or control, and whose vocabulary consists partly of the symbols that the dominant culture has authored. These subcultures often apply to the symbols various meanings that the dominant culture does not intend, cannot control, and does not like. As Coombe observes, "[T]he social *453 deployment of texts always confounds the anticipations of their authors: the connotations of commodified form exceed those imagined in their inception." [\[FN6\]](#) In medieval times, this tension spawned a carnivalesque subculture of secular uses of sacred symbols that was largely accommodated by the Church. In today's postmodern culture, this tension often puts corporate symbols at odds with "the sounds in the kitchen, the noises in the home, and the signs and styles on the street" [\[FN7\]](#) and the unpredictable and parodic world of society's alters, with their "T-shirts and bumper stickers, billboards, newspaper debates, product labels, neon signs, label buttons, and cartoon figures." [\[FN8\]](#)

Such subcultural "alterity" emerges in fascinating forms. Some of Coombe's chapters describe subcultures that have adopted commodity/signs and given them cultural significance far removed from the corporate author's preferred connotation. Some examples:

- An international network of Star Trek fans, predominantly composed of heterosexual women, have produced and circulated a fanzine based on the Star Trek characters. "Star Trek episodes and characters are revised and reworked and new texts are authored," in which female themes are acted out and "issues of gender roles, sexuality, and the tension between family obligations and professional ambition are explored." [\[FN9\]](#) In other fanzine groups that feature "Slash" fiction, "women write erotic stories and draw illustrations depicting a love relationship between Kirk and Spock (erotic fiction is also written about the Starsky and Hutch, Blake's 7, The Man From U.N.C.L.E., Miami Vice, and The Professionals characters)." [\[FN10\]](#)

- For most of the 1980s, rumors linked the Procter & Gamble man-in-the-moon logo to Satanism. People claimed that it contained the satanic numerals "666" and that the chairman of the company had publicly linked its success to the devil. The company logged twelve to fifteen thousand calls each month asking about the rumor. Despite millions spent on investigations, Procter & Gamble was unable either to tie the rumor to a competitor or to eradicate it and eventually abandoned the 134-year-old symbol. [\[FN11\]](#)
- Rumor campaigns have linked numerous companies with the Ku Klux Klan, accusing them of tainting their products in order to kill or sterilize blacks. These include Church's Fried Chicken, Troop clothing, Reebok shoes, Kool cigarettes and the Brooklyn Bottling *454 Company. [\[FN12\]](#) It was said that if you tore open the Marlboro pack in a particular way, "there would be revealed the head of a hooded klansman, with two spots, in Black and gold, standing for eyeholes. . . . Marlboro . . . stopped using the two spots on their boxes." [\[FN13\]](#)
- The gay community has adopted the androgynous images of Bette Davis, Greta Garbo, Marlene Dietrich, Mae West and, particularly, Judy Garland. "[T]he Stonewall riots in New York (which inaugurated a new gay political praxis and a rejection of camp) took place on the evening of Garland's funeral" in 1969. [\[FN14\]](#) Less well documented is the lesbian community's adoption of Nancy Sinatra and Dolly Parton. [\[FN15\]](#)
- Despite the efforts of Elvis Presley's estate to control the exploitation of Presley's image, [\[FN16\]](#) "Elvis impersonators and fans [have] create[d] an ever-evolving Elvis folklore" that they consider far more echt than the mass-media version perpetuated by the authorized legatees. [\[FN17\]](#) They argue that his is a celebrity image "so deeply embedded in the North American psyche and cultural subconscious that [it] should not be subject to control by the parochial interests of the celebrity's estate and assigns." [\[FN18\]](#)

Coombe's strongest passages and chapters are those that detail these alternative uses in virtually anthropological terms, observing the phenomena of alterity without necessarily coming to any judgments about it. When she does make judgments, many of her pronouncements are dead-on. In the area of celebrity names, for instance, she is particularly astute, examining how the so-called "right of publicity" has expanded so that virtually every mention of a celebrity's name carries a threat of illegality.

There are, however, instances where Coombe's brush paints too broadly. While it is true that, in many instances, the hand of corporate America has slapped down alternative uses of commodity/signs and sought to ensure that the associations in the public mind with its signs are universally favorable, not all alternative uses of commodity/signs have met with corporate or legal disfavor. Many of the alternative uses that Coombe writes about have gone unhindered and even undisturbed. For example, the network of feminist Star Trek's rewriters and recoders seems *455 to have flourished happily without attracting anything but slightly bemused notice from Star Trek actors and other creators. [\[FN19\]](#) This benign neglect is in keeping with the way Star Trek has become a folklore phenomenon, spawning Trekkie clubs, conventions, and chatrooms without needing the approval--or risking the wrath--of Star Trek's authors. Similarly, the rumors that have sprung up around trademarks like Marlboro and Procter & Gamble have proved legally unattackable, largely

because no individual or group perpetrators can be found. The rumors arise seemingly from nowhere, spread via jungle telegraph, and disappear with equal mystery. [\[FN20\]](#)

The Star Trek and trademark rumor cases demonstrate a refinement in the flourishing of alterity that Coombe might have examined more closely. That is, the more genuinely folkloric these alternative uses are, the more likely they are to survive unmolested by corporate authors--either because they do not know about them or because they cannot do anything about them. They are genuinely the product of what Peter Jaszi calls "serial collaboration," [\[FN21\]](#) making it impossible for corporate interests to target any individual alter for punishment and ensuring the survival of the alternative use even though any individual alter may drop out. Such spontaneous brush fires are much harder to stamp out than the targeted acts of corporate arson that many alternative uses embody.

In contrast to these folkloric uses, some of the alternative uses that Coombe cites as victims of corporate bigfooting may deserve their fate. These proposed alternative uses more nearly approach straightforward commercialism than do the folkloric serial collaborations cited above. One example of selective enforcement that she examines is the refusal of the United States Olympic Committee to let the Gay Olympic Games use the word "Olympic." Congress has "granted the [United States Olympic] Committee exclusive rights to use the word Olympic under the Amateur Sports Act," [\[FN22\]](#) and it is certain that the Committee singled out the proposed Gay Olympic Games as an entity from which to withhold permission to use the name. However, although it is certainly true that it was specifically gay groups who were forbidden use of the name that has been allowed to straight groups, it is also true that the law allows such discrimination--a legally-held mark can be licensed or not to whomever the author chooses. Unlike the Star Trek and trademark rumor cases, in this situation the alters ^{*456} were traceable, their motives were arguably commercial, and there was nothing remotely carnivalesque or folkloric about them.

Coombe rightly points out the inconsistencies and confusions in the courts as to how a legally-owned mark can be put to alternative uses. While one court allows "SPA'AM" to be used for a benign muppet character, [\[FN23\]](#) others refuse permission for "Enjoy Cocaine" [\[FN24\]](#) and "Mutant of Omaha" [\[FN25\]](#) on T-shirts. Another court refuses to allow a parody ad for "Michelob Oily" meant as a protest to the anti-environmental policies of Anheuser-Busch. [\[FN26\]](#) To Coombe, this seems to portend a trend where the law protects benign alters and punishes critics. But, on closer examination, no such clear pattern emerges. These disparate holdings are the inevitable result of courts moving beyond traditional media and sorting through the new media of "T-shirts, bumper stickers, billboards," etc.

Coombe, however, is not proposing that notions of corporate authorship be extinguished entirely. Where some observers have seen a pervasive privatizing of the public domain through intellectual property law, Coombe's aim is to provoke rather than to protest. She intends her book neither as "a comprehensive treatise nor as a philosophical tome; it is, rather, a seriously irreverent intervention designed to provoke and stimulate what [she] . . . nominate[s] 'a critical cultural studies of law.'" [\[FN27\]](#)

In her travels through the byways of commodity/signs, Coombe never encounters the Internet and its most accessible interface, the World Wide Web. This is both unsurprising and astonishing. It is

unsurprising because the book is woven from a series of articles published mostly between 1991 and 1996 in various journals, [\[FN28\]](#) with only chapters six (Dialogic Democracy I: Authorship and Alterity in Public Spheres) and seven (Dialogic Democracy II: Alterity and Articulation in the Space of the Political) making their first appearances in this volume. It is astonishing because it shows how fast the Internet has rocketed to prominence--Coombe's major study of intellectual property and culture could take complete shape by 1996 and not even mention it. [\[FN29\]](#)

***457** The explosion of the Internet and the Web has meant an explosion in unauthorized use of commodity/signs in new and innovative ways by various Web-based alters and a concomitant retrenchment by corporate authors in the form of trademark-related litigation and legislation. The Web, in Coombe's terms, is another subculture that uses corporate symbols in its own unique ways. Corporate authors are challenging these uses in the same ways they challenge such uses in traditional media.

Although Coombe does not analyze this tension between authors and alters on the Internet, her book provides a framework in which to do so. In this Review, I have allowed Coombe to "provoke and stimulate" me into applying her "critical cultural studies of law" to the Internet. Her analysis raises two questions. First, how have corporate interests maintained their hold on commodity/signs in the World Wide Web carnival? Second, can the World Wide Web loosen corporate interests' continual hoarding of commodity/signs? The answers to these questions yield evidence that yet another postmodern culture is appropriating intellectual property and redefining it for its own uses in ways that corporate authors have difficulty controlling.

I divide this Book Review into four parts. Part I summarizes Coombe's survey of intellectual property in postmodern culture and the tensions that arise between the authors of commodity/signs and the subcultural alters that seek to make alternative uses of them. In Part II, I examine the work of the Russian philosopher Mikhail Bakhtin. Coombe draws upon Bakhtin's theory of a "dialogic" process that creates meaning in society and describes how the control of meaning by governmental or corporate authority can lead to social stultification and cultural paralysis. Using a Bakhtin work that Coombe does not cite, Rabelais and His World, [\[FN30\]](#) I trace the development of the carnivalesque spirit in the medieval world and carnivalesque uses of sacred symbols that were sanctioned by the Church. In Coombe's postmodern world, where commerce has replaced the Church as the primary source of both cultural symbols and authority, such carnival uses of corporate commodity/signs--which arise from the same impulses as carnival uses of Church symbols--are more likely to lead to lawsuits than laissez-faire.

This analysis of Bakhtin and the medieval carnival leads to Parts III and IV, which describe, respectively, the emergence of a new postmodern carnival of alters on the World Wide Web, and the backlash of corporate authors who seek to extend and strengthen their control of Internet intellectual property. The emerging carnival of the Web provides further evidence in support of Coombe's thesis. First, emerging cultures tend to ***458** use the commodity/signs of the mass culture in new ways that corporate culture cannot foresee. Second, confronted with a new carnival of alterity, corporate authors will seek to control it, both by bringing private lawsuits to apply existing laws to the new medium and, if such laws prove inadequate to the task, by passing new laws that specifically extend the rights of corporate authorship to the new medium. My Conclusion is less

conclusive than questioning: Will intellectual property on the World Wide Web prove as susceptible to corporate control as in traditional media, or will the diffuse nature of the Web (like the medieval marketplace) prove so uncontrollable that corporate culture (like the medieval Church) will find itself embracing the new carnival rather than fighting it?

I. Authors and Alters: Commodity/Signs in Postmodern Culture

The commodity/signs of Coombe's study are "signs" because, like other words, they are arbitrary linguistic symbols that denote things--in the case of a trademark, the source of a product or service. In addition to being a sign, however, the trademark, logo, or celebrity image is also a commodity because, unlike most non-privately-owned words, it is a valuable property in itself. [\[FN31\]](#) To illustrate, Coombe recounts the legend of the Coca-Cola executive who, waving his hand at a Coca-Cola sign, declared that the company could lose all its capital, plant, and other assets, but that the famous red-and-white script logo would still allow it "to walk into a bank and receive sufficient credit to replace the entire global infrastructure." [\[FN32\]](#)

A corporate commodity/sign, however, retains its value only insofar as the owner can maintain the connection between the sign and its unique referent--in other words, control both its denotation and its connotations. The boundary between denotation and connotation is an elementary linguistic concept that becomes hard-fought terrain in intellectual property law. A trademark owner would love it if his trademark absorbed enough connotation to attain "secondary meaning," i.e., association with the trademark owner alone, "a penumbra or fringe built up around the old, primary meaning of a symbol," [\[FN33\]](#) so that every appearance of the mark conjures up a single source in consumers' minds. Such is the case with Black & White and a pair of scotties for alcoholic beverages, [\[FN34\]](#) or "playboy" and "playmate" for adult entertainment. [\[FN35\]](#) However, the *459 trademark owner does not want his mark to wander so far from its original source-denotation and absorb so much uncontrolled connotation that it becomes "genericized," as is the case with the former trademarks aspirin [\[FN36\]](#) and cellophane. [\[FN37\]](#) A trademark owner, in other words, wants to give its mark enough rope to gain secondary meaning, but not enough to hang itself through genericide. A trademark, however, like any other word or symbol--whatever its source-- seeks to enter society's common vocabulary, where it is available to pick up connotations and associations and, in many cases, lose touch with its original denotation. When that happens to an ordinary word, it is simply the natural growth of language. Who, for instance, sees the "hashish" in "assassin" anymore, or the insect in a computer "bug" or the bootstraps a computer pulls itself up by in "booting up" ? Such natural growth is the death of trademark, however. Therefore, the trademark owner seeks, with the aid of intellectual property law, to "establish hegemony" [\[FN38\]](#) over the uses to which its trademarks are put.

This attempt at authorial hegemony is continually in tension with the "expressions of alterity" for which society needs and wants to use the same symbols. [\[FN39\]](#) Such alternative uses as the phrase "Armed and Hammered" and the image of Colonel Sanders with a skull-and-crossbones sometimes exist insofar as the corporate author chooses not to threaten them. Such alternative uses are, however, increasingly pervasive in modern consumer culture, as trademarks and brand-names become the currency of everyday speech. We speak of a Kodak moment, an Excedrin headache, a cup of Sanka, a Frigidaire, a Xerox copy, Miller time, a Marlboro man. When a social use of a commodity/sign oversteps the corporate author's invisible boundary,

intellectual property law comes to the rescue. In the arena that Coombe discusses, however, that law seldom finds expression in terms of "isolated decisions, statutes or treatises," [\[FN40\]](#) but usually arrives in the form of a cease-and-desist letter from a corporate law department. The most famous example is a letter from Disney lawyers demanding that children no longer display their own renditions of Disney characters on the walls of their privately-owned school. [\[FN41\]](#) Accused of trademark infringement or dilution, the accused surrenders. Thus, the mere brandishing of intellectual property laws is usually sufficient to stop offensive uses. As Coombe observes, "Hegemonic power is operative *460 when threats of legal action are made as well as when they are actually acted upon." [\[FN42\]](#)

To Coombe, the postmodern world calls into question "the continued viability of regimes of property and protection, freedom and speech, which privilege a conceptual apparatus appropriate to an eighteenth- and early nineteenth-century bourgeois public sphere." [\[FN43\]](#) This older world was populated by individual authors, whose work was commercially and publicly valuable, and who received intellectual property protection for "limited times" in order to keep them creating for the public good. [\[FN44\]](#) In the current world, by contrast, most "authors" are committees, [\[FN45\]](#) and most copyrights are held by corporations under the work-for-hire doctrine. [\[FN46\]](#) The purpose of corporate symbol-ownership is largely to sell goods. Coombe describes the postmodern world as one in which "[g]oods are increasingly sold by harnessing symbols," and where these symbols "come at us as if from nowhere--across radio waves, unseen cables, invisible microwaves, and laser beams, springing up in our living rooms and over our telephones, bombarding our paths and filling our horizons wherever we walk." [\[FN47\]](#) In this world, "[t]he product brand name or corporate trademark [is the] quintessential self-referential sign or postmodern cultural good." [\[FN48\]](#)

The commodification of culture has succeeded beyond any corporate dreams, bathed in the benign glow of intellectual property law. As Coombe explains:

Corporate trademarks are "friends from our childhood," "members of our extended modern family." We grow up with the jolly Green Giant®, Mr. Clean®, the Lucky Charms® leprechaun, and the Pillsbury Doughboy. Brand names have become so ubiquitous that they provide an idiom of expression and resources for metaphor. With phrases like the Coca-Cola-ization of the Third World, the Cadillac® (or the Edsel) of stereo systems, meeting with the Birkenstock® contingent (or the Geritol® generation), we convey messages easily and economically. [\[FN49\]](#) The same is true of celebrity names. A life jacket is a Mae West, a free *461 ticket an Annie Oakley, a fastball a Linda Ronstadt (because it "blew by you")--and everyone knows what a Lewinsky is.

As Coombe observes, the right of publicity--which protects commercial uses of celebrity names--is the equal of trademark law in its power to confer authorship qualities and protections onto celebrity names. Earlier cases located the right in a performer's possession of a unique act or talent, theft of which would diminish its value and his livelihood. [\[FN50\]](#) This rationale is similar to the Constitutional justification for copyright and patent protection--"to promote the progress of science and useful acts"--with the goal of serving the public the primary one and that of rewarding the author only secondary. [\[FN51\]](#) Other early cases followed the same rationale, compensating singer Bette Midler for using a knockoff sound-alike to imitate her singing Do You Want To Dance? for a car commercial after the singer herself had refused to do it. [\[FN52\]](#) A similar case awarded singer Tom

Waits \$2.6 million for using a sound-alike, when the singer himself was well known for refusing to do commercials. [\[FN53\]](#)

As Coombe points out, celebrity law, like trademark law, is not limited in time by the Constitution and so can potentially last forever. By analogy to property law, courts have found that a celebrity's right of publicity survives her and vests in her survivors. "Having categorized the right as property, some courts seem to think that they have little or no choice but to recognize its surviveability." [\[FN54\]](#) It also vests in celebrities regardless of whether they have any unique talent or not.

Take the case of Vanna White, whose only "performance of interest to the public" is filling in the blanks with big letters on the Wheel of Fortune TV show. Her celebrity arose as something of a postmodernist joke among adolescent boys in the mid-1980s, which made her a commodity of some commercial value. Therefore, when Samsung advertised its VCR as a machine that would last into the future--and showed a blond robot changing letters on a Wheel of Fortune- type show in "2012 A.D."--White sued for violation of her right of publicity and won. When the Ninth ^{*462} Circuit denied rehearing, Judge Alex Kozinski, in dissent, put his finger on the problem with the expansion of right-of- publicity law, noting that "intellectual property law is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us." [\[FN55\]](#) For instance, patents and copyrights expire; facts and ideas are uncopyrightable; copyrights and trademarks are subject to fair use; compulsory licenses limit producers' hold on TV and music. "All of these diminish an intellectual property owner's rights. All let the public use something created by someone else." [\[FN56\]](#) Right of publicity law, however, allows "no fair use exception; no right to parody; no idea- expression dichotomy." [\[FN57\]](#) Instead, "advertisers [must] cope with vague claims of 'appropriation of identity,' claims often made by people with a wholly exaggerated sense of their own fame and significance." [\[FN58\]](#)

Despite dissenting voices like Judge Kozinski's, the right of publicity has expanded to such an extent that the mere mention or calling-to-mind of a celebrity image--like a trademark--can elicit a letter from the celebrity's lawyer. In one case, Dustin Hoffman initially won a huge judgment (later reversed) against Los Angeles Magazine for its use of a computer-generated update of his Tootsie character wearing a "butter-colored silk gown by Richard Tyler and Ralph Lauren heels." [\[FN59\]](#) In a recent case, actors George Wendt and John Ratzenberger--who played the barflies Norm and Cliff on the TV show Cheers--sued the owners of an airport bar modeled on the Cheers bar for using a fat and a thin robot as part of the set, even though the robots bore only a passing resemblance to the actors, and the owners of the theme bar had obtained copyright permission to use the characters. [\[FN60\]](#)

When rehearing in this case was denied, Judge Kozinski again dissented. Echoing Coombe and many authorities that she cites, he noted that "the gang at Cheers became like family to many fans." [\[FN61\]](#) Here, then, are examples of national myths being created out of TV and film characters, in a sort of joint venture between the actors and the audience, with the actor being the only one able to control the dissemination of the ^{*463} characters from the myth. Like the corporate trademark, the celebrity image enters the national consciousness.

It should come as no surprise, then, that individuals and groups latch onto these free-floating symbols and use them in ways that the corporate or celebrity author often does not want. In the postmodern world, cultural symbols and all the detritus of previous and contemporary cultures--whether corporately owned or not--are woven into the social fabric and up for grabs, for recombining, for "creative bricolage, pastiche and parody identified as a postmodern aesthetic."

[\[FN62\]](#)

More disturbing to corporate authors than mere appropriation of commodity/signs are uses that actually transform the meaning of the signs from their public denotations into private connotations for particular subcultures, "reappropriations" in which the alters "inscribe their own authorship" onto corporate authors' symbols. [\[FN63\]](#) As Camille Paglia observes, "great art is always flanked by her twin sisters, blasphemy and pornography." [\[FN64\]](#) The same is true of the lesser art of corporate symbols. Despite their creators' best efforts, they enter the general culture where--like other signifiers--they are at the mercy of alternative and often dissident uses. "The most vibrant, compelling, and ubiquitous of cultural signifiers--those around which marginal groups tend to mobilize--are often the properties of corporate others." [\[FN65\]](#)

The recoding of commodity/signs, however, is not just the activity of minority or dissident groups, or makers of knockoff goods, "but is pervasive, in the sense that most of us are nonproducers of the commodified culture within which we live." [\[FN66\]](#) In addition to highlighting dissident uses of commodity/signs, Coombe points to a more ubiquitous recoding by society in general and a concomitant general cultural danger that results from the privatizing of corporate symbols. Ascribing shared meanings to symbols is the heart of culture. Therefore, allowing a corporate author to monopolize the connotative power of generally-available trademarks stifles something vital about culture itself. Intellectual property law--even the brandishing of it-- "freeze[s] the play of signification by legitimating authorship" and makes the corporately-authored symbol mean whatever the corporate author wants it to mean. [\[FN67\]](#)

Coombe extends this theme by arguing that investing corporate authors ***464** with complete power over their trademarks ignores "the contributions or interests of those others in whose lives [the trademark] figures." [\[FN68\]](#) The creation of commodity/signs and their subsequent incorporation into the social fabric is not a top-down process, but instead involves dialogue between the corporate author and the consumer alters. An image becomes successful when society adopts it and uses it to "talk back" to the owner--the dialogic process. There are two phases to this dialogue. The first phase is the initial creation of the commodity/sign. Despite the claims of marketers that focus groups and salesmanship create a trademark's fame, it is a fantasy to believe that corporate authority can predict with certainty what images society will consume and then manufacture images to fit the market research. More often than not, images are created and launched upon the public, to sink or swim willy-nilly. As department store tycoon John Wanamaker is reported to have said, half of advertising money is wasted--but advertisers do not know which half.

It is equally true that, just as all the corporate planning in the world cannot guarantee a successful trademark, all the calculation in the world cannot create a celebrity. Actors become successful largely through talent, skill, and hard work; they become famous largely through popular taste and whim. As Coombe points out, "any number of individuals have attempted to achieve celebrity with diligent effort, great investment, and the utmost originality and still failed to achieve any public

recognition or social distinction." [\[FN69\]](#) Celebrity, Coombe points out, does not exist in a vacuum. Rather it is something that the public confers on an individual. It seems only right, then, that the public should have some rights in the celebrity persona whose value it has helped to create. "The audience makes the celebrity image the unique phenomenon that it is." [\[FN70\]](#) The public ^{*465} must adopt the trademark or the celebrity in order to give it any value at all, with the shared experience of the author and the public filling the empty trademark or celebrity with meaning. [\[FN71\]](#)

The second phase of the trademark dialogue is transformative. Just as commodity/signs are created through dialogue, their meanings shift through dialogue as the commodity/sign makes its way through social time and space. In this second phase of the dialogue, the alters find corporate symbols planted or discarded throughout the culture, like Xixo, the Kalihari bushman in the film *The Gods Must Be Crazy*, who finds a Coke bottle fallen from the sky into the desert and sets off to return it to the gods. Other corporate trademarks leap national borders, as if equally fallen from the sky, to become the only links between "peoples formerly separated by language, class, ethnicity, religion, geography, and generation." [\[FN72\]](#)

[P]ink Duracell bunnies and Flintstone® characters appear in Spanish Fiesta parades, cakes are baked in the image of Snoopy in Mexico, Ninja Turtles appear in the place of traditional religious chalk markings in Cairo just as religious icons are mass-produced in the fashion of Ninja Turtles, and West African youth use Hindi film characters and dialogue as a form of lingua franca. [\[FN73\]](#)

This worldwide scattering of American brands, however, does not ^{*466} necessarily mean that the world is becoming homogenized. Coombe doubts the "Coke bottle in the Kalihari syndrome"--the notion that, when Western culture intrudes onto other cultures, the native culture "ups and leaves." [\[FN74\]](#) "Too often the Adidas® T-shirt on the native was figured as the sign of tragic cultural decline." [\[FN75\]](#) This is not necessarily so, she explains:

[T]he significance of this flow of cultural imagery is still far from clear. From a superficial perspective, the proliferation of Coca-Cola®, Exxon®, Barbie® dolls and the Big Mac® around the globe appears as a universalization and homogenization of culture. It is not inevitably the case, however, that these phenomena assume the same meanings in other cultures that they do in our own. It is surely a form of imperialist hubris (and a marketing fantasy) to believe that they do. [\[FN76\]](#)

It is worth recalling that, in *The Gods Must be Crazy*, the Coke bottle becomes the tribe's apple of discord before the bushman sets out to return it. To the bushman, the Coke bottle has nothing to do with Coca-Cola but has assumed its own tribal meaning. In a sense, we, the consuming public, are all tribal bushmen, bombarded daily with commodity/signs that fall from the sky, detached from any meaning or content, available for us to attach any meanings to them that our various tribes find necessary.

II. Authors and Alters in the Commodity/Sign Carnival

In describing this "dialogic" process of symbol creation and transformation, Coombe draws upon the work of Soviet philosopher Mikhail Bakhtin (1895-1975), who "developed a body of philosophical ethics about the constitutive role of language in human life and the cultural life of democracy that he saw as quintessentially dialogical." [\[FN77\]](#) Bakhtin sees the development of meaning not as

descending from authority to society but as a continuing dialogue; people become acculturated and fully self-realized only through interaction with society, including interaction with the social signs that society produces. The linguistic sign is synergistic, caught in a constant struggle between the practical necessity of language to be static and repeatable--so that constant meanings attach to words--and its ability to change with ***467** changing circumstances. According to Coombe, Bakhtin's conceptual framework "more adequately accounts for the complexities of the signifying lives of commodified texts protected by intellectual property laws in conditions of post-modernity [than] a juridical account of language that sees it as a system of rules." [\[FN78\]](#)

Bakhtin deals with how people actually use words and symbols rather than imposing a normative or legalistic framework on how they should do so. We do not choose what language we speak or what vocabulary we use. We do choose, however, the connotations that attach to our words. Therefore, given a corporate culture that dispenses pre-packaged symbols, subcultures will make what use they can of them, rather than invent symbols of their own. According to Bakhtin's dynamic theory, the different meanings that the same sign has for different peoples at different times reflect "the different social positionings, interests, values, and attitudes of those who engage the sign in everyday life." [\[FN79\]](#) Trademarks, in this analysis, are no different from other words and symbols. "So long as the sign is part of a living language, it is continually caught up in generative processes of struggle." [\[FN80\]](#) The only places where words or signs can escape this dynamic of recodification is in dictionaries, which one Bakhtin scholar calls "the graveyards of language." [\[FN81\]](#)

Intellectual property law seeks to remove commodity/signs from this "struggle for meaning" and to declare the author the victor. This creates societal frustration over people's inability to use corporate commodity/signs with the same freedom they use other signs and symbols. Such rigid application of intellectual property protection, according to Coombe, can strip us of our humanity by frustrating the dialogue that creates meaning. "Dialogue involves reciprocity in communication: the ability to respond to sign with sign. 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?" [\[FN82\]](#)

In Bakhtin's dialectic, the struggle for meaning usually pits cultural officialdom against the "carnavalesque" impulses of non-officialdom. Authorities seek to "arrest the inherent semantic flux of discourse and . . . ***468** impose a rigid code of equivalences between language and reality." [\[FN83\]](#) The marketplace, on the other hand, is full of unpredictable and centrifugal forces that find expression in satire, parody, irony, quotation, collage, stylization, and polemic. These are parodic antibodies that seek to rupture from within the "grey monotonous seriousness" of official meanings. [\[FN84\]](#) One of the hallmarks of this carnival world is irony, as expressed in children's songs, satire magazines, fanzine writing, graffiti on billboards, bootleg T-shirts of cartoon characters smoking dope or having sex, or parody ads that make serious social commentary on corporate sins.

Coombe's invocation of Bakhtin's "carnavalesque" is provocative, as is her later reference to "a Rabelaisian consumer carnivalesque" that she contrasts to "a univocal world of signs controlled by an abstract force demonized simply as Capital." [\[FN85\]](#) Both references conjure up another Bakhtin work that Coombe does not cite but might have. In *Rabelais and His World*, [\[FN86\]](#) Bakhtin gives a

fuller exegesis of the carnival humor of the Middle Ages and early Renaissance. It is an explanation to make trademark owners tremble.

In the Middle Ages, an entire world of "humorous forms and manifestations" grew up in the shadow of, and was sanctioned by, the "official" ecclesiastical and feudal culture. Celebrations of a carnival type occupied a great deal of medieval life. Every official feast had its carnival opposite, the most famous of which survives in Mardi Gras. Its epitome was the "Feast of the Fools," where kings and clergy were ritually deposed and replaced by jugglers and jesters. In the same manner, all official rituals were mimicked, "such as the tribute rendered to the victors at tournaments, the transfer of feudal rights, or the initiation of a knight." [FN87] The "Cyprian's supper," for instance, offered "a carnivalesque travesty of the entire Scriptures." [FN88] There were also great numbers of "parodical liturgies (The Liturgy of the Drunkards, The Liturgy of the Gamblers), parodies of Gospel readings, of the most sacred prayers (the Lord's Prayer, the Ave Maria), of litanies, hymns, psalms, and even Gospel sayings. There were parodies of wills (The Pig's Will, The Will of the Ass), parodies of epigraphs, council decrees, etc." [FN89]

Bakhtin calculates that many medieval cities devoted three months a *469 year or more to these carnival festivities, the people's "second life, organized on the basis of laughter." [FN90] Carnival was the underbelly of the official ecclesiastical feasts, which sanctioned the existing pattern of things and reinforced "the existing hierarchy, the existing religious, political, and moral values, norms, and prohibitions." [FN91] Carnival represented a liberation from the prevailing truth; the suspension of all hierarchies of rank, privilege, norms and prohibitions; an opposition to "all that was ready-made and completed, to all pretense at immutability." [FN92] As Bakhtin observes, carnival has "a characteristic logic, the peculiar logic of the 'inside out (a l'envers),' of the 'turnabout,' of a continual shifting from top to bottom, from front to rear, of numerous parodies and travesties, humiliations, profanations, comic crownings and uncrownings." [FN93]

Of particular significance for Coombe is the way the medieval carnival spirit was permitted to penetrate to the very highest, most orthodox of texts and symbols. No text or symbol remained completely sacred. "The entire official ideology and ritual are here [in Latin parodies] shown in their comic aspect. Laughter penetrates the highest forms of religious cult and thought." [FN94] It was a bawdy, belly-laughing, gross-out humor that contrasts sharply with the orthodox "classic" literary tradition, the "aesthetic concept of the following age," where wit and form are supreme, and the rough edges of grotesque realism are rubbed smooth. [FN95]

In the modern era, however, commerce has replaced the Church as the center of the human universe, and corporate logos and brand-names have replaced ecclesiastical icons as society's pervasive imagery. To quote Adlai Stevenson, "the supermarket is our temple and the singing commercial is our litany." [FN96] In contrast with medieval carnival practices that were "consecrated by tradition and, to a certain extent, tolerated by the Church," [FN97] modern corporations cannot afford to be laissez-faire about carnivalesque uses of their sacred symbols. The Church allowed carnival as a healthy steam-valve, a temporary escape from orthodoxy, while remaining secure in the knowledge that the faithful would return with their faith intact and renewed. Such uses could be tolerated by the Church, because of the dominance of orthodoxy, the strength of the symbols and texts themselves, and the knowledge that accommodating parodic uses aboveboard was preferable

to letting blasphemy fester underground. *470 Furthermore, carnival uses of sacred symbols were as ritualized as Church rituals themselves. There were also, undoubtedly, built-in limits to how far carnival parodies could go. Heaven and hell were real places to medieval men and women. When parody crossed over to blasphemy, the punishment was damnation--a hell of a price for trademark infringement.

Corporate intellectual property, however, is more fragile than ecclesiastical images, in part because its owners lack--as yet--the power of damnation and redemption over consumers. Corporate symbols can less afford to yield to the carnival spirit. As shown above, a trademark left unmoored in the marketplace can commit genericide. [FN98] A brand that tolerates rumor and parody becomes the source of jokes and loses its "unique selling power," through dilution. [FN99] Therefore, apart from such grudging exceptions as fair use, newsworthiness, and non-commerciality, the keepers of corporate symbols resist the carnival tolerance of their medieval forebears. Instead, they must guard their trademarks more religiously than religion itself.

The comparison of trademarks to sacred symbols is not far-fetched. [FN100] Just as the Church was and is able to sanctify secular objects by anointing them with holy water or applying church symbols to them, so trademark owners are able, through licensing and branding, to control the spread of their marks far and wide, stamping them on goods that have nothing to do with the goods and services that the trademarks originally and nominally identify. It was not always thus. A trademark is a symbol, like a brand name, a distinctive container, a logo, a style of packaging, or even a sound like the NBC chimes, that identifies the source of goods or services. [FN101] Originally, a trademark protected the public from mistake, confusion or deception about the source and quality of products. Of course, a trademark was never an assurance of quality, but it was supposed to give the producer an incentive to maintain quality in order to protect the value of the brand. [FN102]

In the twentieth century, the original function of trademark laws was progressively inverted, moving away from protecting the consumer from confusion toward attributing "authorship" qualities to trademark creation. The legal result is to "protect from 'dilution' or 'misappropriation' the *471 integrity of a set of positive meanings which have been 'created' by the trademark owner's investment." [FN103] Courts agree: "Whereas traditional trademark law sought primarily to protect consumers, dilution laws place more emphasis on protecting the investment of the trademark owners." [FN104] Now the trademark itself qualifies for protection, quite apart from any product it helps to identify. [FN105] Licensing a trademark creates "proprietary rights in the signs manufacturers use to market their goods." [FN106] Those rights persist when the signs are no longer attached to the goods. When a trademark is licensed, the only assurance the buyer has is that the trademark owner has approved somebody else's use of the mark. The result is the proliferation of goods adorned with trademarks that have nothing to do with the goods or services the trademark originally denoted. As Coombe observes, Our children sleep in Barney® sheets, eat off Aladdin placemats, drink liquids they know only by brand name from plastic cups encircled by Disney characters (protected by copyright laws and character merchandising agreements). . . . A child in the Philippines eats Batman cereal launched by Ralston Purina. Logos like Cabbage Patch Kids, Hot Wheels, and Ghostbusters mark American products as more desirable than local ones in a diversity of markets. [FN107]

As early as 1975, courts recognized a potential problem in extending trademark protection to the trademark itself, but went ahead anyway. In *Boston Professional Hockey Association v. Dallas Cap & Emblem Manufacturing, Inc.*, [\[FN108\]](#) the defendant emblem company was accused of copying Boston Bruins emblems for people to sew on their own jackets. The court initially worried that "[t]he difficulty with this case stems from the fact that a reproduction of the trademark itself is being sold, unattached to any goods or services," [\[FN109\]](#) and that protecting, via trademark, "designs that were not copyrighted" meant they would remain forever the property of the trademark owner and not "eventually pass into the public domain . . . by the mere passage of time." [\[FN110\]](#)

***472** The Court ultimately found that the "goods" offered for sale were, in effect, the trademark itself, and that defendant had applied the NHL trademarks to emblems, which it then offered for sale. This is tantamount to saying that, if defendant were selling an unauthorized Mickey Mouse doll, what it would have been guilty of is applying 100% of the Mickey Mouse characteristics to a blank doll. The court also neatly summarized the dichotomy between copyright and trademark law regarding contributions to the public domain. In copyright, an individual creates a unique design, enjoys a temporary monopoly over it, but at the end of the copyright term, "his creation becomes part of the public domain." In trademark, however, an individual plucks a word or design from the public domain. To the extent that word or design comes to symbolize his product or business in the public mind, it goes "out of the public domain [and] into the protective ambits of trademark law." [\[FN111\]](#)

The court acknowledged that "our decision here may slightly tilt the trademark laws from the purpose of protecting the public to the protection of the business interests of plaintiffs." [\[FN112\]](#) In subsequent cases, this "tilt" has become a landslide, as commodity/signs have assumed a legally-protectable life of their own as free-floating signifiers that can alight wherever the trademark owner (and only the trademark owner) decides. [\[FN113\]](#)

That such symbols are literally free-floating is proved annually by the gigantic balloons that float down Broadway at treetop level in Manhattan every Thanksgiving Day. Many balloons in the Macy's Parade are corporate trademarks, whose appearances have been bought by the sponsor for upwards of \$200,000 (in addition to the cost of constructing the giant trademark in the first place). [\[FN114\]](#) The 1999 balloons included Met Life's Snoopy, the Honey Nut Cheerios Bee, Blue (from Nickelodeon's "Blue's Clues"), the Pets.com sock-puppet, [\[FN115\]](#) the Nesquick Bunny, and a Maurice Sendak Wild Thing sponsored by Bell Atlantic. In return for its investment, the trademark owner gets two hours of television coverage, during which its balloon may appear any number of times. This is a bargain compared to the cost of a commercial minute during television coverage of the same event. Of course the "coverage" of the "event" is not ***473** coverage at all, but part of the show that the trademark owner buys--in addition to buying the participation of its balloon, the trademark owner also writes the script that celebrity "reporters" who cover the parade read as the trademark floats by. Thus a cherished national event can be seen, in Coombe's terms, as a parade of free-floating commodity/signs detached from their moorings in identifiable goods and services, floating down city streets and into television sets around the world as celebrities, who are paid because of their ability to appear spontaneous, read the nice things that the corporate owners have paid them to say about their intellectual property. [\[FN116\]](#) The only unplanned part of the event is when one of the trademarks literally leaves its moorings and bashes a spectator, one of the few times in memory where a trademark has infringed a person instead of vice versa. [\[FN117\]](#)

Corporate brand-managers have become so obsessed with controlling the landscape in which their brands appear that some have even sought to co-opt and sponsor negative uses of their brand-names. In May 1999, when Nike was in the midst of sweatshop-labor scandals, its advertising agency offered consumer-advocate and corporate-basher Ralph Nader \$25,000 to appear in a commercial in which he would hold up a Nike sneaker and proclaim, "Another shameless attempt by Nike to sell shoes." [\[FN118\]](#) Nader declined. [\[FN119\]](#) If the commercial "church" has co-opted the public carnival, as is evident in the Macy's Thanksgiving Day Parade, where is today's counter-culture carnival spirit? Bakhtin traces it in literature from its apotheosis in Rabelais to the twentieth century, to which it traveled in an underground ^{*474} stream, surfacing now and then in the works of Cervantes, Moliere, Swift, Sterne, Jarry, and Brecht. Had Bakhtin written later (his Rabelais was written in 1940), he might have found the carnival spirit re-emerging as the dominant popular literary form of the later twentieth century, in Mad magazine, Monty Python, the early Saturday Night Live, the works of Mel Brooks, public access cable TV, Beavis and Butt-Head, and most rock concerts. He certainly would have found it on the Internet.

III. A New Carnival of Alters: The World Wide

Web

The World Wide Web brings carnival into the twenty-first century. The Web inverts everything, blowing creative destruction through established hierarchies. On the Web "any person with a phone line can become a town crier, with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders and news groups, the same individual can become a pamphleteer." [\[FN120\]](#) Such ease of access makes Web culture individualistic, informal, decentralized, and extremely resistant to authority and control. According to one source, "This makes it the preferred medium of dissident groups in countries around the world 'The Internet is profoundly disrespectful of tradition, established order and hierarchy.'" [\[FN121\]](#) In this it bears a remarkable resemblance to Bakhtin's marketplace:

[A]ll were considered equal during carnival. Here, in the town square, a special form of free and familiar contact reigned among people who were usually divided by barriers of caste, property, profession and age. . . . This temporary suspension, both ideal and real, of hierarchical rank created during carnival time a special type of communication impossible in everyday life. This led to the creation of special forms of marketplace speech and gesture, frank and free, permitting no distance between those who came in contact with each other and liberating from norms of etiquette and decency imposed at other times. A special carnivalesque marketplace style of expression was formed. [\[FN122\]](#)

Substitute a few words and the marketplace carnival sounds like the Web, where even Bill Gates will answer your e-mail.

The Web is the perfect post-modern medium--fragmentary, non-linear, encouraging Coombe's collage, bricolage, and pastiche. Web searches are non-linear, composed of a piece of this and a piece of that. A Web surfer does not read a Web page from top to bottom or a website from beginning ^{*475} to end, but rather jumps from link to link. [\[FN123\]](#) This has created some interesting

problems in trying to apply print-oriented law to Web content. For instance, in a traditional media ad, an overbroad or potentially false advertising claim can always be qualified by a printed disclaimer at the bottom of the page or screen, or by spoken text at the end of a TV or radio commercial. But where is the bottom of a Web page or screen? Because, unlike a TV commercial, a Web page has no top or bottom in the traditional sense, or any beginning or end, the Federal Trade Commission has recommended that any disclaimer or qualification that appears in Internet advertising contain scrolling and/or hyperlinking instructions to the disclaimer that are at least as "clear and conspicuous" as the comparable placement of such disclaimers in non-Internet advertising. [\[FN124\]](#)

Other examples of the non-linear Web encountering linear law are two lawsuits brought by Ticketmaster, first against Microsoft [\[FN125\]](#) and then against tickets.com. [\[FN126\]](#) Both the Microsoft sidewalks.com site and the tickets.com site advertised musical and other cultural events and offered deep links to the Ticketmaster page where the tickets could be ordered. This bypassed the Ticketmaster home page, where numerous advertisers had bought space on Ticketmaster's promise that every site visitor hit the home page first. [\[FN127\]](#) The whole concept of forcing Web searchers to enter a site only through the home page imports a forced linearity into the web-shaped Web, like insisting that every customer enter a shopping mall by the front entrance, which would turn any space by the door into prime real estate. [\[FN128\]](#) Instead, a Web journey is like Proust's memory of his childhood home, a lighted staircase which leads up and up, only to his room at the top, leaving the rest of the house dark.

The Internet is also anarchic, ironic, and juvenile, all of the characteristics that Coombe ascribes to the postmodern ethos. Even the Supreme Court has declared, "the strength of the Internet is chaos [and] the strength of our liberty depends upon the chaos and cacophony of the unfettered speech" of the Internet. [\[FN129\]](#) Although its structure grew from the *476 government's Arpanet, [\[FN130\]](#) the Internet's vocabulary is that of its earliest public users--teenage technogeeks raised on Star Trek and Monty Python. The "victory of the nerds" on the Internet [\[FN131\]](#) now has an entire generation of grown-ups saying "spam" and "Yahoo!" without cracking a smile. They undoubtedly do it without hearing the Swiftian carnival echo in the word Yahoo!, the name of the lumpen humans, who are ruled by Apollo-like horses called Houyhnhnms, in the Fourth Book of Jonathan Swift's Gulliver's Travels. The Web froths with adolescent humor writ large. Spam, the cybername for unsolicited indiscriminate e-mail, has nothing to do with pressed meat, but derives instead from a Monty Python sketch where a waiter announces it as a side dish with every meal. [\[FN132\]](#) Entertainment on the Web is the mainstream inverted. Interactive Web cartoons feature "a foul-mouthed frog in a blender" who "taunts the viewer into grinding him up" or "animated fish talking in a bar." Even mainstream entertainment companies, when tempted to go online, opt for "the sophomoric, if not downright demented." Warner Brothers, for instance, has contemplated launching "The God & Devil Show" where the Lord and Satan will interview dead celebrities like John Wayne and viewers will vote whether to send them to heaven or hell." [\[FN133\]](#) This is carnival humor. According to Coombe's analysis, then, the Web should become the locus for all sorts of recoding of commodity/signs. Because it lacks corporate control, the Web should reveal both the top-down proliferation of commodity/signs as well as the bubbling-up from below of alternative uses and recodifications. [\[FN134\]](#) In fact, a brief look at the Web bears out this claim to some degree and shows that the Internet, too, has become a playground for newer and jollier forms of commodity/sign re-invention.

Cybersquatting

Among the first carnival players--the dissident alter recodifiers of Coombe's book--were the cybersquatters. Cybersquatting came about as ***477** a result of the laissez-faire policies of Network Solutions, Inc. ("NSI"), the company that was originally the sole registering agency for Internet domain names ending in .com, .net and .org. NSI's early policy allowed individuals to register as many names as they wanted, regardless of whether the name was a trademark, company name, or brand-name, and thus regardless of whether the registrant had any rights to it. Initially, this led to a few pioneers registering famous names, calling the trademark owner, and offering to sell the domain name. When such retailing proved costly, wholesalers registered hundreds, sometimes thousands, of combinations of famous trademarks. When the trademark owner tried to register the name and found it taken, the cybersquatter demanded ransom.

Dennis Toeppen of Illinois, an early cybersquatter, registered domain names based on the trademarks of, among others, Air Canada, Eddie Bauer, Delta Airlines, and Panavision. Panavision, the movie camera company, demanded its name back, and, when Toeppen demanded \$13,000, sued. [\[FN135\]](#) Toeppen at first claimed he was a video artist using the Web as his medium. To prove this, he pointed out that his panavision.com site was not a ruse, but had actual content--aerial views of Pana, Illinois. [\[FN136\]](#) This argument, however, had less force when it became evident that most of Toeppen's sites had no such ironic content--the court found that Toeppen was, in fact, in the "business" of selling Internet domain names and found him liable for dilution of the famous Panavision trademark.

Typosquatting

Along with the cybersquatting craze arose "typosquatting"--the practice of registering a domain name that is one letter away from a famous trademark, or that adds a letter or a digit, in the hope that fumble-fingered typists will land there. Typosquatting has a slightly different purpose from cybersquatting. Whereas the cybersquatter usually wants only to sell the name and to make a profit, many typosquatters actually own websites and use the typo sites as bridges to point to their home sites. Their design is to produce large numbers of accidental hits on their sites, which they can then show to potential advertisers as evidence of the number of eyeballs their sites attract. Thus, the typosquatters can profit in one of two ways: they can either sell the typosites back to the trademark owners or keep the typosites and use them to drive eyeballs to their own ***478** sites. [\[FN137\]](#)

Gripe Sites

One of the most popular alternative uses of famous trademarks on the Internet is the "gripe site." A gripe site is the diametric carnival opposite of an authorized site established by the trademark owner. Typically, the gripe site is named "[trademark] sucks.com." For example, Bally Total Fitness has health clubs worldwide that it promotes on a website named Bally.com. Andrew Faber, a web site designer unaffiliated with Bally, created a web site called "Bally sucks," which presented the viewer with "Bally's mark with the word 'sucks' printed across it. Immediately under this, the web site states, 'Bally Total Fitness Complaints! Un-authorized.'" [\[FN138\]](#) Any Internet user entering "Bally" as a search term would be directed to the "Bally sucks" site as well as the official Bally site. Bally complained that Internet users directed to the "Bally sucks" site may stop their searches there and "may fail to continue to search for [Bally's] own home page, due to anger, frustration or the belief

that [Bally's] home page does not exist." [\[FN139\]](#) The court rejected this argument, noting that a user who "may want to access the official Internet site to see how Bally sells itself . . . may also want to be apprised of the opinions of the others about Bally," which are unlikely to be available elsewhere than the official Bally site. [\[FN140\]](#) The court thus sanctioned the carnival usage and proved more nimble than other courts at finding the line between commercial use and commentary. [\[FN141\]](#) Accordingly, gripe sites have flourished. A recent search counted over 13,000 active websites worldwide with "sucks" in the title, many of them taking the form of "[trademark] sucks.com." [\[FN142\]](#)

***479** Metatags

Metatags represent an even more sophisticated use of trademarks. Unlike visible domain names, metatags are hidden in a website's HTML code, invisible to users, but visible to search engines, which find the tagged site if the word or description is entered as a search term. [\[FN143\]](#) In *Playboy Enterprises, Inc. v. AsiaFocus International, Inc.*, [\[FN144\]](#) the owners of a site called Asian-playmates encoded the tags "playboy" and "playmate" in its site description, to hijack users looking for Playboy magazine's playboy.com site. The court held that "[t]hrough the defendants' willful deception, consumers have been misled into believing the Asian-playmates web site is connected, or somehow sponsored by, PEI." [\[FN145\]](#) It enjoined the conduct and awarded the plaintiff \$3,000,000.

Corporate owners, however, have not succeeded in expunging all metatag uses. Just as the "Bally sucks" court found that traditional defenses to infringement and dilution survive the transition to cyberspace, other courts have ruled that similar defenses apply to metatags. In *Playboy Enterprises v. Welles*, [\[FN146\]](#) Playboy sued Terri Welles, the magazine's 1981 "Playmate of the Year," for embedding "playmate" and "playboy" as metatags in her web page. Terri Welles, however, was telling no more than the truth--she had, in fact, been named a "playmate" of the year, which the court found was not just a Playboy trademark but also a "title bestowed upon particular models who appear in [Playboy] magazine." [\[FN147\]](#) Additionally, the site included a disclaimer of any affiliation with Playboy, indicating that, unlike the AsiaFocus defendant, Welles "has not attempted to trick consumers into believing that they are viewing a Playboy-endorsed website." [\[FN148\]](#)

Celebrities

Trademark owners are not alone in seeking to prevent infringing metatags. Coombe's other group of commodity/sign authors--celebrities--are doing the same. For instance, celebrity skater Nancy Kerrigan reportedly filed suit against a website that repeated her name several dozen times in a metatag. The website, of course, had nothing to do with Nancy Kerrigan or skating, but sold pornographic photos. [\[FN149\]](#)

***480** Furthermore, just as the Web has increased the ease of and opportunities for trademark infringement, it has also increased the likelihood that actors'--and other people's--images can be digitized and used in ways the actors do not approve. One such use is "virtual kidnapping," in which people's images are digitized and shown on the Internet "performing lewd or violent acts." [\[FN150\]](#) A more familiar use of digitization is the creation of virtual actors, or "synthespians," which allows dead celebrities like John Wayne to appear in beer commercials and Groucho Marx to dance with a

live actor in a soft drink commercial. Bruce Willis has reportedly given permission for Sony to feature a digitized version of himself, in which he will "run, jump or fire a flame-thrower at your command," as their "digitized star" of a video game. [\[FN151\]](#)

By lumping together cybersquatting, typosquatting, and metatagging, I do not mean to suggest that all these alters are innocent. In many of the cases, the alters used trademarks in a straightforwardly commercial way in order to divert traffic meant for the trademark owner's website. This is classic "passing off" or "palming off" and is as actionable online as off. [\[FN152\]](#) As one court held, raising "the Internet" as a defense "is not the equivalent to a cry of 'sanctuary' upon a criminal's entry into a medieval church." [\[FN153\]](#)

It is equally clear, however, that trademarks and celebrity images have become part of the common coinage of Web discourse just as they have in the off-line world. And, just as they do in the offline world, trademark owners are using lawsuits, or the threat of lawsuits, to "establish hegemony" [\[FN154\]](#) over their commodity/signs. As the Bally and Welles cases indicate, trademark owners are fully prepared to go to court and spend enormous sums to press causes of action that seem unwinnable. There are two reasons for this. First, because courts are new to cyberspace, a roll of the legal dice may just as likely turn up a court that is favorable to the trademark owner's claims as one that recognizes that alternative uses are subject to traditional defenses. Second, a well-publicized lawsuit--even a losing one--can easily deter potential alternative users from using the trademark at all rather than go through the trouble of defending a lawsuit. This is the well-known "chilling effect." [\[FN155\]](#) Not all alters have the tenacity **481* of Bally defendant Faber or former Playmate Terri Welles. As one commentator noted, "an Internet page creator who wants to link to the Walt Disney Company's official pages or fan pages and who creates a Mickey Mouse icon for the hyperlink, may well receive a cease-and-desist letter from Disney's lawyers," and that may be enough. [\[FN156\]](#)

The reported cases, where one or two famous trademarks were embedded in code, are child's play compared to the exuberant, Rabelaisian metatags concocted by more imaginative Netizens. It is not surprising that the first metatag pioneers on the Web were pornographers, society's basic alters, who initiated much of the initial Web skirmishing over trademark and other intellectual property law. [\[FN157\]](#) By now it has become commonplace to acknowledge that pornographic sites are at the cutting edge of most Internet innovations, including graphics, payment systems and profit-making. [\[FN158\]](#) Porn sites, too, were among the first to bring metatags to their apotheosis. In the summer of 1998, a metatag called "The Pussy List" began appearing on scores of pornographic websites: The Pussy List. . . The Sprite Pussy: Image is nothing. . . Taste is everything; The Snickers Pussy: It satisfies you; The Alkaseltzer Pussy: Pop, pop, fizz, fizz. . . Oh, what a relief it is. . .; The Magnavox Pussy: Smart. Very Smart; The American Express Pussy: Don't leave home without it; The Pringles Pussy: Once you pop, you can't stop; The M&M Pussy: Melts in your mouth, not in your hand; The Frosted Flakes Pussy: They're GGRRRRRRREEEEAAAATTT!; The Lucky Charms Pussy: They're magically delicious; The Energizer Pussy: It keeps going and going; The Right Guard Pussy: Anything less is uncivilized; The Jolly Green **Giant** Pussy: self- explanatory; The Campbells Soup Pussy: mmm mmm good; The purple pickle Pussy: heh heh; The Kix Pussy: Kid tested, mother approved; The Tombstone Pussy: What would you like on your Pussy?; The Ragu Pussy: Comes out chunkier than the rest; The Chips Ahoy Pussy: Betcha bite a chip; The

Purdue Pussy: More meat, less bone; The All State Pussy: You're in good hands . . . [\[FN159\]](#) And so on, through eighty-one variants, most of which were plays on famous trademarks. There are several remarkable things about "The Pussy List." First, all ***482** the advertising slogans are extremely familiar: This metatag rambles through a list of close to a hundred of them, each as familiar to the average American TV viewer as quotations from Psalms or Proverbs would have been in the Middle Ages. [\[FN160\]](#) Second, the length and repetition of the list are unnecessary. For a metatag to succeed in driving traffic to the tagged site, only single words need be listed, such as "Equal, Sprite, Snickers, Alka- seltzer, Magnavox . . ." Instead, the author or authors of "The Pussy List" used puns and free-verse. This is the sort of unbusiness-like playfulness the Web inspires. Most significantly, many of the alters who used "The Pussy List" had no idea that they were doing anything wrong--they thought that they were simply pushing the edges of the medium, using the popular slogans of the day. According to one site owner who used the metatag, "The Pussy List" was an enjoyable way of tallying how much traffic different words would bring to his site. He could then maximize traffic by repeating the most popular "pussies." When told that his use of trademarks was probably unlawful, he was genuinely surprised. "Everyone knows these slogans," he said. "They're part of pop culture." [\[FN161\]](#) This comment supports Coombe's point: We do not think of commodity/signs as the property of "corporate others," but rather as part of the general culture. Because we have popularized these phrases, we believe that we own them, at least in part. Perhaps the most interesting thing about "The Pussy List" is its homage to the carnival spirit found in Rabelais. Gargantua and Pantagruel is full of lists embodying a run-on durational humor based on exaggeration, sheer length, and a "grotesque realism [that] from immemorial times was linked with the bodily lower stratum." [\[FN162\]](#) In this, "The Pussy List" is a Web recasting of the famous couillon dialogue of Panurge and Friar John in Book III. Eager to marry but besieged by contradictory advice, Panurge turns to Friar John, the vinous monk, and begins his plea for advice with a litany of praise to the monk's sex organ, or couillon (often translated as "cod," or "ball-bag"):

Listen, my dainty ballock ball-bag, stumpy ball-bag, lumpy ball-bag, dumpy ball-bag, plaited ball-bag, leaded ball-bag, milky ball-bag, silky ball-bag, caulked ball-bag, veined ball-bag, mastered ball-bag, plastered ball-bag, grotesque ball-bag, Arabesque ball-bag, reinforced ball-bag, hare-on-the-spit-like ball-bag, ancient ball-bag, confident ***483** ball-bag, provident ball-bag . . . [\[FN163\]](#)

And so on, through 153 epithets, which, in Bakhtin's analysis, "are extremely varied. They are grouped, without strict order, either for their alliteration, rhyme, or even assonance, or according to the various fields from which these expressions are taken." [\[FN164\]](#) What they do have in common is praise for the monk's couillon. When Friar John, in turn, responds with his own litany, his 150 epithets for Panurge's couillon are quite different, as befits Panurge in the throes of matrimonial indecision:

Tell me that, you faded ball-bag, jaded ball-bag, musty ball-bag, mouldy ball-bag, mildewed ball-bag, dangly ball-bag, chilled ball-bag, swallowed ball-bag, cowardly ball-bag, cowed ball-bag, broken-down ball-bag, broken- backed ball-bag, incongruous ball-bag, defective ball-bag . . . [\[FN165\]](#)

This couillon list has no deep meaning. It is simply a list, built up through free-association, that ransacks the language. Its only point is that you can apply any adjective in the language to couillon,

giving it numerous flavors and connotations. The same is true of "The Pussy List." It dares the reader to apply "pussy" to any slogan any advertiser has created. [\[FN166\]](#) The similarities between the couillon litany and "The Pussy List," however, should not be pushed too far. The former, after all, is used for literary exuberance and comic excess. The latter uses literary exuberance and comic excess to commit trademark infringement and lure traffic to pornographic websites. Still, the literary tradition of carnival, with its roots in Rabelais, seems to have found a home on the Web, praising the infinite variety of the female sex organ much as Rabelais praised the male.

***484** IV. The Authors Retrench: Law and the Cybercarnival

One of Coombe's themes is that, as trademarks and brands proliferate, and as their uses become more and more detached from their original signifying function, law also expands to protect the new uses. This Part updates and extends Coombe's analysis by asking: How is intellectual property law reacting to the Web commodity/sign carnival? On the one hand, thousands of Web-based pasticheurs, bricolageurs, collageurs, and other alters are recombining the icons and symbols of popular culture into different forms for fun and profit. On the other hand, the corporate and celebrity authors of the commodity/signs fear that the diffuse Web will loosen their hegemony over their chosen symbols. Failure to enforce their rights can release the signs into the public domain. Yet strict enforcement can cost as much in time, legal fees, and reputation as it saves in intellectual property, as is shown by the evolution of Disney from a fun-loving purveyor of cartoons into a bigfoot enforcer of corporate conformity and copyright. [\[FN167\]](#)

In the middle, of course, stands law. In theory, many social uses of commodity/signs are protected through exceptions to intellectual property protection. These include permission to dilute a trademark when the use is not "commercial" [\[FN168\]](#) or to depict a celebrity when the use is "newsworthy," as well as permission to use trademarks and copyrighted works when the use is "fair," analysis of which also often turns on whether the use is "commercial" or not. In practice, however, the potential alter is often left scratching his head, because, as Coombe points out, courts provide contradictory guidance. One court found it non-diluting to name a Muppet character "Spa'am" and to exploit the character on commercial television because the use would not be harmful to Hormel, the corporate owner of the Spam trademark. [\[FN169\]](#) Another court, in contrast, enjoined the use of "Mutant of Omaha . . . Nuclear Holocaust Insurance" on T-shirts, sweatshirts, caps, buttons, and coffee mugs because of a damaging association with Mutual of Omaha Insurance Co. [\[FN170\]](#) The court found the use of Mutant of Omaha on these "commercial" products infringing, while noting, however, that "an editorial parody in a book, magazine or film" would not be. [\[FN171\]](#) This is a court with willful blindness toward contemporary culture, where, as Coombe observes, political ***485** opinions are more likely to be expressed on mugs and T-shirts than in corporately-owned TV shows and other mainstream media.

Similar contradictions attend the "newsworthiness" exception. One court ruled that Ann-Margret could not prevent a magazine from publishing a nude picture of her because it was newsworthy, while another court upheld a similar claim by another nude subject against the same magazine because "she was not shown participating in a newsworthy event." [\[FN172\]](#) Yet a third court refused to enjoin the inclusion of a couple's nude photo in a commercial guide to nude beaches because "the photographs were not being used for commercial purposes." [\[FN173\]](#) Such legal line-drawing between commercial and non-commercial, and between newsworthy and

non-newsworthy, is fast becoming obsolete in the real world. As Judge Kozinski pointed out, "[i]n our pop culture, where salesmanship must be entertaining and entertainment must sell, the line between the commercial and noncommercial has not merely blurred; it has disappeared." Drawing too narrow a line between fair and infringing uses harms "the vibrancy of our culture" by restricting "[t]he right to draw ideas from a rich and varied public domain, and the right to mock, for profit as well as fun, the cultural icons of our time." [\[FN174\]](#)

Some of the most powerful weapons in controlling trademark connotation are dilution laws, which exist in over half the states as well as the federal level. [\[FN175\]](#) Dilution law protects "famous" trademarks from uses that, while not confusing to the public, nonetheless diminish the unique selling power of the mark by "blurring" or "tarnishing" it. One example that Coombe examines is a poster consisting of a reproduction of Coca-Cola's ENJOY COCA- COLA advertisement, rewritten as ENJOY COCAINE. [\[FN176\]](#) She notes that Coca- Cola's objection was particularly ironic, considering that Coca-Cola's early success was partly based--as its name suggests--on the rumor that it contained cocaine. [\[FN177\]](#) Now Coca-Cola tries to hide that association in the attic like an aging flapper aunt.

The passage of the Federal Trademark Dilution Act in January 1996 coincided with the rise of the Internet, [\[FN178\]](#) and much of the case law that has arisen under the Act has involved the Web. As noted, the Act has been used to prevent cybersquatters from holding famous names hostage from *486 trademark owners who want to use them on websites and to prevent alters from using famous marks in metatags, which one court called "the essence of dilution." [\[FN179\]](#) The Act has also been used to combat spam [\[FN180\]](#) and typosquatting. [\[FN181\]](#)

The application of dilution law to the Web is no accident. As Senator Patrick Leahy stated, "[I]t is my hope that this anti-dilution statute can help stem the use of deceptive Internet addresses taken by those who are choosing marks that are associated with the products and reputations of others." [\[FN182\]](#)

It is ironic, of course, that the Federal dilution law has found its happiest hunting ground on the Web, whose most imaginative content, like other carnivals throughout history, consists of "blurring" and "tarnishing"--blurring the distinctions between information and rumor and between public and private, and tarnishing every trademark with the reductive "[trademark]sucks.com." [\[FN183\]](#)

A threshold requirement for a finding of dilution, however, is that the mark in question be "famous," within the meaning of the federal act [\[FN184\]](#) or state law. Therefore, trademark owners whose marks are insufficiently famous have no recourse under dilution law to prevent alternative Web uses of their names. [\[FN185\]](#)

The Anticybersquatting Consumer Protection Act, [\[FN186\]](#) passed in November 1999, filled this gap. This Act bans the bad faith registration or trafficking in domain names that are identical or confusingly similar to a "distinctive" trademark. This obviates the "fame" requirement and ties protection instead to the well-known trademark requirement of distinctiveness. [\[FN187\]](#) Thus the legal bar is lowered when trademark protection *487 demands it. Intellectual property law has learned to abhor a vacuum. [\[FN188\]](#)

The expansion of intellectual property law has not escaped the notice of marketable celebrities--Coombe's second group of authors. The Anti- Cybersquatting Consumer Protection Act is, in fact, the only federal law that specifically protects celebrity names [\[FN189\]](#)--the result of a compromise between the movie studios and actors' organizations. The studios, such as Walt Disney Co. and Warner Brothers, originally opposed a cybersquatting bill that protected everything except trademarks, fearing that extending protection to celebrities could thwart studios' Internet-related publicity for celebrity- named movies such as Nixon and The Doors and open the door to a federal right- of-publicity statute that could further limit studios' rights to exploit celebrity names. [\[FN190\]](#) Celebrities countered with straight faces that "individuals" should "get the same protection as a big company," meaning, of course, only those individuals that are as famous as a big company. [\[FN191\]](#) The Act therefore protects not only trademarks, but "famous personal names" from exploitation by "unfair" domain name registrations, such as proposing to sell it to a celebrity or falsely suggesting celebrity endorsement of the site. [\[FN192\]](#)

While expanding its coverage of trademark and celebrity rights, federal ***488** law also has expanded the "limited times" that authors are entitled to copyright protection. This time has expanded from the original fourteen years to twenty-eight years to fifty-six years, to fifty years after the author's death. [\[FN193\]](#) In 1998 Congress passed the (celebrity-named) Sonny Bono Copyright Term Extension Act, which extends the term of copyright to life of the author plus seventy years, or--for works made for hire or whose authorship cannot be determined--ninety-five years after publication or 120 years after creation, whichever is shorter. [\[FN194\]](#)

The operative provision from the standpoint of Coombe's work is the 95 years after publication for works made for hire. This provision includes all corporately-authored works, including motion pictures. It is no accident that this Act was passed in 1998 and that the prime movers behind it were the Walt Disney Company and Turner Broadcasting. The previous copyright term for works for hire was seventy-five years, which meant that copyright would soon start expiring on the first Mickey Mouse movies--made in 1929--and on the films of the 1930s. Turner had just acquired the Metro Goldwyn Mayer archive of these classic films. The upshot of the Copyright Term Extension Act is to keep Mickey Mouse and all the classic films of the 1930s and 1940s out of the public domain for another twenty years. [\[FN195\]](#) A challenge to the Sonny Bono law was dismissed, the court holding that the "extension of limited times is within the discretion of Congress." [\[FN196\]](#) This decision has led some to suggest that a copyright term of "eternity minus a day" would be constitutional, because ***489** it would be "limited" within Congressional discretion. [\[FN197\]](#)

As with copyright term extension, the interests being protected in the first spate of Internet-related laws are the same corporate intellectual property interests that Coombe finds protected offline. Although it is commonly thought that the government has taken a hands-off approach to the Internet, a number of laws affecting intellectual property have the effect of privatizing a great deal of what is available on the Internet and criminalizing any encroachment on the corporate interests protected there. In addition to the Anticybersquatting Consumer Protection Act, the Copyright Term Extension Act and the Digital Millennium Copyright Act, there are laws that criminalize the making of code that might circumvent copy protection. [\[FN198\]](#)

As Stanford Law School Professor Lawrence Lessig points out, the cordoning off of the Internet and other potentially public property may soon lead to a time when one can "quote Donald Duck" only with corporate permission. [\[FN199\]](#)

The Web, then, appears to be retrenching from a wide-open society to another locus of corporately-protected intellectual property, where, as Coombe has mapped in the non-Web world, expressions of alterity are squelched by existing law as they emerge or are declared illegal by new laws if no old law yet forbids them.

Conclusion

The commodity/sign carnival on the World Wide Web, and the legal and corporate reactions to it, appear to have proceeded along the same broad patterns that Coombe has observed in the non-Web world. First, commodity/signs proliferate in the new medium as they did in the old. Second, alters take hold of the sign--in the form of cybersquatting, typosquatting, metatagging and the like--and threaten to wrest the commodity/sign from the author's hegemony. Next, reaction sets in, as corporate authors use traditional intellectual property law to reassert their rights in the new medium. When old law fails, new laws are passed to patch up the leak in the law that the new medium has revealed.

It appears, however, that courts are becoming facile in applying traditional law to Web-based activities. As far as trademarks on the Web go, for instance, courts have, as in the offline world, been able to distinguish infringing from non-infringing alters largely by drawing the *490 traditional line between commercial and noncommercial trademark uses. Pioneer cybersquatter Dennis Toeppen, for instance, was brought to heel for his commercial attempts to market such names as panavision.com, and not for his noncommercial (and postmodern and carnivalesque) use of panavision.com to display pictures of Pana, Illinois. [\[FN200\]](#) The same has been true in the metatag cases involving "Playboy" and other trademarks. [\[FN201\]](#) The commercial use of "Playboy" as a metatag in the Asian-playmates site was enjoined as the "essence of dilution" under a straightforward and traditional trademark analysis. [\[FN202\]](#) However, Playmate-of-the-Year Terri Welles can use the terms "Playmate" and "Playboy" on her Website to describe her status and be protected from the wrath of Playboy by the fair use doctrine. [\[FN203\]](#) Similarly, gripe sites incorporating [trademark] sucks.com get a free pass from courts because there is no likelihood that consumers will think the targeted corporation sponsored its own gripe site--no confusion, no infringement. [\[FN204\]](#)

It will be worth watching how parody--another traditional defense to copyright or trademark infringement--fares on the Web. As Coombe repeatedly observes, parody is one of the hallmarks of postmodern recodifications--using the culture's own commodity/signs to mock the culture that produced them. Recently, in the non-Web world, the parody defense has not fared as well as the non-commerciality defense. Perhaps one of the difficulties with the parody defense is that the Copyright Act, for instance, allows no separate defense for parody. Instead, whether an imitation of a copyrighted work is parody or not depends on an analysis of the fair use factors under § 107 of the Copyright Act. Thus, whether a work is a non-infringing parody requires analyzing whether its purpose is "criticism" or "comment," whether its use is commercial, and "the amount and substantiality" of the copyrighted work that the parody "copies." The parody defense has proved

most successful when the medium involved is song lyrics--perhaps because the tradition of writing satiric lyrics to popular songs goes back so far that it is imprinted on the judiciary's subconscious. [\[FN205\]](#) Thus courts have allowed parodies of popular songs even ***491** when such parodies involve commercial sales. Such legal parodies include a rewrite of Roy Orbison's Oh Pretty Woman (as "big hairy woman," "bald-headed woman,," and "two-timin' woman"), [\[FN206\]](#) of When Sunny Gets Blue (as "When Sunny Sniffs Glue"), [\[FN207\]](#) Blue Skies (as "Blue Cross"), and fifty-seven parodies of song lyrics in Mad Magazine. [\[FN208\]](#)

The parody defense has been less successful in other media. This includes print ads such as "Michelob Oily" and T-shirts such as "Mutant of Omaha." It also includes popular poetry. A rewrite of the Dr. Seuss poem The Cat in the Hat that satirized the O.J. Simpson murder saga was enjoined, in part because the target of the parody was more O.J. Simpson than Dr. Seuss. [\[FN209\]](#) Thus, there was no apparent "criticism" of Dr. Seuss that would qualify the parody as fair use under § 107 of the Copyright Act. Using similar thinking, another court issued an injunction (which was quickly lifted on appeal) against a parody of Gone with the Wind, entitled, The Wind Done Gone. The Court found that the parody "seeks not only to criticize the older but work also . . . to criticize the South for its miscegenation, whippings and selling apart familiar." [\[FN210\]](#) These courts seem to want parody to exist in a literary vacuum, detached from any criticism of society.

This is a troubling trend, if followed widely, and seems to direct the law toward a strict literary-criticism definition of parody. In literature, "parody" in its strictest sense is reserved for works that imitate the form of another work while altering the substance, with the aim of debunking the author of the original. A classic example is Lewis Carroll's The White Knight's Tale in Through the Looking Glass--a literary skewering of Wordsworth's Resolution and Independence. In law, however, parody has always meant something more than literary mockery and has embraced the use of popular forms to engage in social commentary as well. The Oh Pretty Woman parody, after all, is less a commentary on Roy Orbison's original than a social commentary on how times, popular tastes and imagination--and popular visions of women--have changed since the original Oh Pretty Woman in 1964. To say that parody is only parody if its primary object is literary rather than social is a severe restriction on the parody defense.

Another troubling restriction on the parody defense is the insistence that the "amount and substantiality" of the work that is copied be sufficient only to "conjure up" the original work in the reader's or viewer's mind. [\[FN211\]](#) ***492** This has led to some questionable decisions. Jack Benny, for instance, once did a parody of the movie Gaslight by using the exact words, settings and costumes of the original movie, but changing the stage directions entirely. That the court found the work infringing is a troubling indication of courts' literal and word-oriented bent--focusing mostly on the "copied" words of the film and ignoring that the stage directions and other visuals (which were probably part of the copyrighted work) were changed entirely. [\[FN212\]](#) Another overly literal decision involved a parody comic book that placed Mickey Mouse in compromising and pornographic situations. The court found that the exact copying of the Mickey Mouse cartoon character was more than sufficient to "conjure up" Mickey Mouse. [\[FN213\]](#) This raises the unanswerable question of how to parody (or caricature) Mickey Mouse--himself a caricature of a real mouse--without drawing a picture of him.

The rule that the copying must only "conjure up" the original is particularly stifling in postmodern works, which often depend on exact, detailed copying of popular images as a central element in social commentary. In *Rogers v. Koons*, [\[FN214\]](#) for instance, sculptor Jeff Koons parodied a copyrighted photograph entitled *Puppies*, which showed a smiling man and wife holding eight German shepherd puppies in their laps. Koons' parody sculpture froze the couple's expressions into glazed dumb-struckness and the puppies as eight identical, robotic critters with identical bulbous noses. The Koons sculpture, entitled *String of Puppies*, was exhibited in 1988 in the Sonnabend Gallery in New York City as part of what Koons called the *Banalities Show*, intended, as its title suggests, to comment on the blandness of contemporary American culture. When the photographer, however, sued for copyright infringement, the court analyzed the "amount and substantiality" of the copying, found the sculpture virtually identical to the photograph, failed to see any "comment or criticism" that Koons was making about the saccharine original, and rejected the parody defense. [\[FN215\]](#) Taking Koons at his word that his work was intended "to comment critically both on the incorporated object and *493 the political and economic system that created it," the court ignored that Koons was satirizing--among other things--the social atmospherics of the original *Puppies* photograph, instead holding that there was no right simply to use "another's copyrighted work to make a statement on some aspect of society at large." [\[FN216\]](#)

This analysis of postmodernist parodies could have a telling effect, ignoring as it does that the appropriation and recodification of mass media imagery are central to postmodernism. "[W]hen an artist places a familiar image in a new context, the maneuver forces the viewer to reconsider how different contexts affect meaning and to understand that all meaning is socially constructed." [\[FN217\]](#) According to the reasoning of *Rogers v. Koons*, such creative recordings are, in law, "essentially theft or piracy." [\[FN218\]](#)

I have sought to answer the first question I posed at the outset of this Review: How have corporate interests maintained their hold on commodity/signs in the World Wide Web carnival? My second question--Can the World Wide Web loosen corporate interests' continued hoarding of commodity/signs?--remains unanswered. Does the Web allow the opportunity for such wholesale reappropriation of cultural icons that the corporate grip must necessarily slip? Or, will corporate interests retain their hold on popular symbols by eventually controlling the Web--as they have controlled all other media, no matter how populist and democratic those media may have been in their formative years?

It may be, in fact, that, as in traditional media, visibility and traceability are fatal to alternative uses on the Web. The more folkloric such alternative uses become, the more likely they will flourish. Take "The Pussy List," for example. [\[FN219\]](#) It probably began as a work of individual authorship, was added to by successive editors and was distributed seriatim among a small group of porn sitemasters. Eventually, however, it began to be distributed anonymously and undetectably, copied into the invisible metatags of freely downloadable software. Some of the users of "The Pussy List," for instance, had no idea it was on their sites--it had simply been copied in along with some other downloaded free software. If it had not been squelched early, it is entirely possible that "The Pussy List" would have spread as anonymously and untraceably as the *Star Trek* rewrites and trademark rumors that Coombe describes. [\[FN220\]](#) It would have *494 become imprinted in the DNA of the Web, a recessive gene that emerged willy-nilly on various websites without the webmasters' even

being aware of it. This would have been a folkloric, carnivalesque spread of pornographic parodies of corporate trademarks that would have proved impossible to eradicate. [\[FN221\]](#)

At first blush, it seems that the Web might be just the fresh air that postmodern culture needs in order to loosen centralized control of popular images. There is some actual basis for this hope in the Web's early reactions to governmental and corporate bigfooting. In the summer of 1995, for instance-- the dark ages of the Web--a study out of Carnegie-Mellon University purported to show that an astonishingly high percentage of Internet usage involved pornography. [\[FN222\]](#) The study generated much heat, much law journal commentary, a front page story in Time magazine, and an invitation for the author of the study to appear before Congress. The study also provided fuel for the portion of the Communications Decency Act--later passed as part of the 1996 Telecommunications Act and struck down as unconstitutional by the Supreme Court--that criminalized the transmission of "indecent" content on the Internet on the grounds that children might have access to it.

The study's attack on the Web, and the Web's response to it, show how rapidly this new communications medium reacts. As soon as it became public, the study was hit with a firestorm of Web criticism--exposing both the study itself and its purported author as shams. The rapid response was made possible by the nature of the Web, a many-to-many communication that refuses to let a Big Lie like the Carnegie-Mellon study rest unopposed for long. [\[FN223\]](#) Debunked by the many on the Web, the Carnegie-Mellon author was exposed, his study discounted, his Congressional invitation withdrawn, and a good portion of the quasi-factual rug was pulled out from under the "indecent" portions of the Communications Decency Act. It remains to be seen whether the Web can react in similar fashion to loosen corporate control of corporate imagery. To some, the Web is an ideal of perfect democratic communications, where virtual communities ^{*495} emerge, police themselves, and serve as a populist antidote to centralized alarmism, whether corporate or governmental. [\[FN224\]](#) This vision of the Web is something like the W.A.S.T.E. system in Thomas Pynchon's *The Crying of Lot 49*. [\[FN225\]](#) There, protagonist Oedipa Maas is astonished to uncover a secret mail system, operational since the Middle Ages, whereby millions of people have been secretly communicating with each other, in silent defiance of the officially-controlled PTTs of Europe, the U.S. Mail, and even corporately- controlled private postal systems like Wells Fargo and American Express.

For here were God knew how many citizens, deliberately choosing not to communicate by U.S. Mail. It was not an act of treason, nor possibly even of defiance. But it was a calculated withdrawal from the life of the Republic from its machinery. Whatever else was being denied them out of hate, indifference to the power of their vote, loopholes, simple ignorance, this withdrawal was their own, unpublicized, private. Since they could not have withdrawn into a vacuum (could they?), there had to exist the separate, silent unsuspected world. [\[FN226\]](#)

In the World Wide Web, Pynchon's imagined W.A.S.T.E. system may have emerged from the underground to become the dominant means of communication--unfettered by government and too slippery to be controlled by corporate interests.

Whether the Web can loosen the corporate grip on commodity/signs remains to be seen. One trend appears to be emerging, however. Formerly, a corporation, confronted with an alter that was using

its sign in an unwelcome manner, would write a threatening letter to the offender and, after a few squeaks of outrage, the alter would yield and that would be the end of it. In this manner, corporate intellectual property lawyers could pick off their alters piecemeal without any of them becoming aware of each other.

Now, however, such demand letters are not swallowed in silence, but posted on the Web for all to see. Such was the case with the verizonreallysucks.com demand letter. [\[FN227\]](#) No sooner had Bell Atlantic told the verizonreallysucks alter to cease and desist than the letter was posted on the Web, zapped from chat group to chat group, and Bell Atlantic's bullying exposed. Did it make Bell Atlantic back off? Nobody knows. But clearly the best hope for loosening the corporate grip on commodity/signs is that the Web carnival will prove too exuberant and overwhelming to put ***496** down, and that corporations--like the Medieval Church--will see the value of embracing the carnival once they find themselves powerless to control it. [\[FN228\]](#)

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[\[FN1\]](#). Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* 4(1998).

[\[FN2\]](#). *Id.* at 5.

[\[FN3\]](#). *Id.* at 15.

[\[FN4\]](#). *Id.* at 31.

[\[FN5\]](#). *Id.* at 6.

[\[FN6\]](#). *Id.* at 133-34.

[\[FN7\]](#). *Id.* at 27.

[\[FN8\]](#). *Id.*

[\[FN9\]](#). *Id.* at 119.

[\[FN10\]](#). *Id.*

[\[FN11\]](#). *Id.* at 146.

[\[FN12\]](#). *Id.* at 152-59.

[\[FN13\]](#). *Id.* at 159 (quoting Patricia Turner, *I Heard it Through the Grapevine: Rumor in African-American Culture* 100 (1993)).

[FN14]. Coombe, supra note 1, at 112.

[FN15]. Id. at 113-14.

[FN16]. [Elvis Presley Enter. v. Elvisly Yours, 817 F.2d 104 \(6th Cir. 1987\).](#)

[FN17]. Coombe, supra note 1, at 99.

[FN18]. Id. at 98.

[FN19]. Id. at 127-28. Robin Curtis, who played Saavik in the Star Trek movies, explained, "I really had no idea that this all existed.... really, the care and the time which people devote to something.... It is really quite an honor to be the receiver of that kind of appreciation." Id. According to Coombe, "Shatner and Nimoy have commented appreciatively on fanzines generally and found the homoerotic texts surprising but not inconceivable given what they now see as the "campiness" of some of the old episodes." Id.

[FN20]. Id. at 146ff.

[FN21]. Peter Jaszi, The Author Effect II, in *The Construction of Authorship: Textual Appropriation in Law and Literature* 40 (Martha Woodmansee & Peter Jaszi eds., 1994).

[FN22]. Coombe, supra note 1, at 137.

[FN23]. [Hormel Foods Corp. v. Jim Henson Prod., Inc., 73 F.3d 497 \(2d Cir. 1996\).](#)

[FN24]. [Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183 \(E.D.N.Y. 1972\).](#)

[FN25]. [Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397 \(8th Cir. 1987\)](#), cert. denied, [488 U.S. 933 \(1988\)](#).

[FN26]. [Anheuser-Busch v. Balducci Publications, 28 F.3d 769 \(8th Cir. 1994\).](#)

[FN27]. Coombe, supra note 1, at 9.

[FN28]. Rosemary J. Coombe, [Critical Cultural Legal Studies, 10 Yale J.L. & Human. 463 \(1998\).](#)

[FN29]. Coombe does, however, note in passing that the author-alter tension extends to the digital era, where "every reading of a digital text on the information highway is deemed a theft of authorial property." Coombe, supra note 1, at 285. See also Mark A. Lemley, Book Review, [Romantic Authorship and the Rhetoric of Property, 75 Tex. L. Rev. 873, 896 \(1997\)](#) (lamenting the trend of characterizing trademark and copyright infringement as "theft" and explaining that "'infringement' may be a morally neutral term, but 'theft' is clearly wrong, and courts are more likely to be inclined to punish the latter"). Professor Coombe has lately applied her analysis of commodity/signs to include "Digital environments such as the World Wide Web [which] enable practices that promise to transform the nature of corporate/consumer relations by undermining the traditional capacities of

companies to manage their images and control their imagery." Rosemary Coombe & Andrew Herman, [Trademarks, Property, and Propriety: The Moral Economy of Consumer Politics and Corporate Accountability on the World Wide Web](#), 50 DePaul L. Rev. 597 (2000).

[FN30]. Mikhail Bakhtin, *Rabelais and his world* (Helene Iswolsky trans., The MIT Press 1968) (1940).

[FN31]. So are celebrity names and images. See, e.g., Patrick McGeehan, *Salton Pays \$137.5 Million For George Foreman's Name*, N.Y. Times, Dec. 10, 1999, at C2.

[FN32]. Coombe, *supra* note 1, at 56.

[FN33]. 2 McCarthy, Trademarks and Unfair Competition § 15:8.

[FN34]. [Fleischmann Distilling Corp. v. Maier Brewing Co.](#), 314 F.2d 149 (9th Cir.), cert. denied, 374 U.S. 830 (1963).

[FN35]. [Playboy Enters. Inc. v. Netscape Comm. Corp.](#), 55 F. Supp.2d 1070, 1077 (C.D. Cal.) (explaining that trademarks Playboy® and Playmate® "have become inherently distinctive and have acquired secondary meaning"), *aff'd*, 202 F.3d 278 (9th Cir. 1999).

[FN36]. [Bayer Co. v. United Drug Co.](#), 272 F. 505 (D.N.Y. 1921).

[FN37]. [Dupont Cellophane Co. v. Waxed Prods. Co.](#), 85 F.2d 75 (2d Cir.), cert. denied, 299 U.S. 601 (1936).

[FN38]. Coombe, *supra* note 1, at 9.

[FN39]. *Id.* at 15.

[FN40]. *Id.* at 31.

[FN41]. *Id.* at 53 (citing G.D. Cox, *Don't Mess With The Mouse: Disney's Legal Army Protects A Revered Image*, Nat'l. L.J., Jul. 1, 1989 at 1).

[FN42]. Coombe, *supra* note 1, at 9.

[FN43]. *Id.* at 39.

[FN44]. U.S. Const. art. I, § 8.

[FN45]. Jaszi, *supra* note 21, at 32-33 (noting that "firms and individuals with capital investments," rather than individual private authors, are the most likely plaintiffs in a copyright suit).

[FN46]. Lemley, *supra* note 29, at 883 (noting that "in 1955, forty percent of all copyright registrations were for works made for hire" and that such percentage has likely increased since

then, given the growth in corporate authorship and the software industry).

[FN47]. [Coombe, supra note 1, at 52.](#)

[FN48]. [Id. at 55.](#)

[FN49]. [Id. at 57.](#) When President Ford in 1974 introduced himself to the nation as "A Ford, not a Lincoln," everyone knew what he meant.

[FN50]. In [Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 \(1977\)](#), for instance, the Supreme Court found that a television news broadcast of the plaintiff's complete "human cannonball" act unfairly robbed Zacchini of something that was uniquely his.

[FN51]. This analogy has been criticized as a "fixation on act rather than identity [that] has had a profound, and negative, effect on publicity rights doctrine." Alice Haemmerli, [Whose Who? The Case for a Kantian Right of Publicity, 49 Duke L.J. 383, 402 \(1999\)](#).

[FN52]. [Midler v. Ford Motor Co., 849 F.2d 460 \(9th Cir. 1988\)](#), cert. denied, [503 U.S. 951 \(1992\)](#).

[FN53]. [Waits v. Frito-Lay Inc., 978 F.2d 1093 \(9th Cir. 1992\)](#), cert. denied, [506 U.S. 1080 \(1993\)](#).

[FN54]. [Coombe, supra note 1, at 88](#) (citing Michael Madow, [Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal. L. Rev. 127, 173 n.229 \(1993\)](#)). In some states, the survivability of the right of publicity has been legislated by statute. In 1999, at the urging of Fred Astaire's widow, California extended the post-mortem right to 70 years. [Cal. Civil Code § 3344.1 \(2000\)](#). The law is entitled the Astaire Celebrity Image Protection Act, which guarantees Fred Astaire's survival in law, if not in fact, and shows that legislatures are free to exploit a celebrity's right of publicity. See also [infra note 194](#), for a discussion of the Sonny Bono Copyright Term Extension Act.

[FN55]. [White v. Samsung Electronics Am., Inc., 989 F.2d 1512, 1516 \(9th Cir. 1993\)](#) (Kozinski, J., dissenting), cert. denied, [508 U.S. 951 \(1993\)](#).

[FN56]. [Id.](#)

[FN57]. [Id.](#)

[FN58]. [Id.](#)

[FN59]. [Hoffman v. Capital Cities/ABC, Inc., 33 F. Supp. 2d 867 \(C.D. Cal. 1999\)](#), rev'd, [2001 WL 754769 \(9th Cir. July 6, 2001\)](#) (finding the use of Hoffman's image not to be "commercial speech").

[FN60]. [Wendt v. Host Int'l, Inc., 125 F.3d 806 \(9th Cir. 1997\)](#), rehearing denied, [197 F.3d 1284 \(9th Cir. 1999\)](#), cert. denied, [121 S. Ct. 33 \(2000\)](#). Apparently, the robots are not particularly funny and have not added to the bars' popularity. "'They break all the time,' one person involved in the case said, 'And Host found that the bars did just as well without them. Now when they stop talking they

just throw them away." Jeffrey Toobin, *The Bench: The Case of the "Cheers" Replicants*, *New Yorker*, Mar.27, 2000, at 34. On June 18, 2001, the two actors reached a confidential settlement with Host International. *Entertainment Weekly, News & Notes*, July 13, 2001, at 14.

[FN61]. [Wendt, 197 F.3d at 1285](#).

[FN62]. Coombe, *supra* note 1, at 49. "Bricolage," a somewhat derogatory term in French, means "odds and ends." (Cf. "bric-a-brac"). In the postmodernist sense that Coombe uses the term, it means using materials at hand to create something new--"materials that have traditional or given meanings may be appropriated and given multiple and contradictory signification." Haemmerli, *supra* note 51, at 432 n.201.

[FN63]. Coombe, *supra* note 1, at 23.

[FN64]. Camille Paglia, *Sexual Personae* 24-25 (1990).

[FN65]. Coombe, *supra* note 1, at 31.

[FN66]. *Id.* at 58.

[FN67]. *Id.* at 26.

[FN68]. *Id.* at 8.

[FN69]. *Id.* at 96. See also Madow, *supra* note 54, at 181-82 (1993) ("[T] here is a good deal more to the generation of a commercially marketable public image than the 'labor' of the star herself."). Furthermore, once celebrities achieve distinction, they often are rewarded with intellectual property protection over uses of their image that they expended no labor in creating. For instance, Johnny Carson was able to prevent the use of "Here's Johnny" for portable toilets ("The World's Foremost Comedian"), although it was his sidekick Ed McMahon who popularized the slogan. See [Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 \(6th Cir. 1983\)](#). Bela Lugosi was given a partial monopoly over "his facial characteristics and the individual manner of his likeness and appearance as Count Dracula," [Lugosi v. Universal Pictures, 25 Cal. 3d 813 \(1979\)](#), which had as much to do with the makeup department as with Lugosi. See also James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* 103 (1996) ("[I]n each case, the plaintiffs did not expend great labor, emotion, or even much originality in creating the protectable 'mark.'").

[FN70]. Coombe, *supra* note 1, at 94. Coombe's view of celebrity as a collaboration between the actor and the public has been attacked, most recently and thoroughly by Alice Haemmerli. See Haemmerli, *supra* note 51. According to Professor Haemmerli, right of publicity law has traditionally been based on John Locke's labor theory of value (i.e., that a celebrity has a right to the fruits of his own labor). *Id.* at 411-12. She rejects this view in favor of a "Kantian" view that "the rational human being has absolute worth as an end in himself," *id.* at 413, arguing that a celebrity "persona" deserves protection regardless of its economic value. Appropriation of celebrity images, according to Haemmerli, deprives actors of their rights to control their "personhood," including the "objectified

images" that personhood creates. *Id.* at 421. "Thus, a strong argument can be advanced that uses of an individual's persona strike at the heart of one's personhood even more than appropriation of an individual's expression," as is the case with copyright infringement. *Id.* at 422 n.169. Here, there is neither space nor excuse for a critique of Professor Haemmerli's thorough and provocative work. Any such critique, however, would begin by noting that the people whose personas are being protected are, by and large, actors, whose craft, almost by definition, requires recognition and participation by the public. As an English court once said, in refusing to extend right of publicity law, "[S]ome men and women voluntarily enter professions which by their nature invite publicity, and public approval or disapproval. It is not unreasonable in their case that they should submit without complaint to their names and occupations and reputations being treated... almost as public property." *Tolley v. Fry* (1930) 1 K.B. 467, 477, *rev'd on other grounds* (1931) AC 333.

[FN71]. In confining her discussion to corporately-authored commodity/signs and commercially-viable celebrity images, Coombe avoids much of the "full-court author bashing" of which postmodern criticism has been accused. See Boyle, *supra* note 69, at 103 ("Poststructuralist philosophy has produced a fair amount of author bashing [but] I do not believe that authorship is a patriarchal, phallogentric plot."). Others have described the postmodernist critique of "romantic authorship" in equally assaultive terms. See, e.g., Haemmerli, *supra* note 51, at 411-12 & n.117 (describing the postmodernist critiques of right-of- publicity law as an "onslaught" of critics, "often parroting" each other, an image that conjures up Hitchcock's *The Birds*). Despite such counter-punches, "author-bashing" has a point. As Peter Jaszi points out, the "romantic" notion of an individual "author" of a work, ignores that many "works" are a result of "serial collaborations--works resulting from successive elaborations of an idea or text by a series of creative workers, occurring perhaps over years or decades.... [W]here the law formerly envisioned the possibility of improving existing works by redaction or expansion, modern copyright is more myopic, focusing exclusively on the potential for harm to the interests of the original author." Jaszi, *supra* note 21, at 40. Such "serial collaborations" between author and the public are what fills trademarks and celebrities with meaning, as is less the case with the more elaborated "writings of an author" that are the subject-matter of copyright.

[FN72]. Coombe, *supra* note 1, at 31.

[FN73]. *Id.* at 21-22.

[FN74]. *Id.* at 19.

[FN75]. *Id.* at 70.

[FN76]. *Id.* at 21-22.

[FN77]. *Id.* at 82-85. Specifically, Coombe cites the following works: M.M.Bakhtin, *The Dialogic Imagination: Four Essays* by M.M. Bakhtin (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., Univ. of Tex. Press 1981) (1975); M.Bakhtin, *Problems of Dostoevsky's Poetics* (Caryl Emerson trans., Univ. of Minn. Press 1984) (1972); *Bakhtin and Cultural Theory* (Ken Hirschkop & David Shepherd eds., 1989); Simon Dentith, *Bakhtinian Thought: An Introductory Reader* (1995);

Michael Gardiner, *The Dialogics of Critique: M.M. Bakhtin and the Theory of Ideology* (1986); and Michael Holquist, *Dilogism: Bakhtin and His World* (1990).

[\[FN78\]](#). Coombe, *supra* note 1, at 83-84.

[\[FN79\]](#). *Id.* at 84.

[\[FN80\]](#). *Id.*

[\[FN81\]](#). *Id.* (citing Dentith, *supra* note 77, at 24).

[\[FN82\]](#). *Id.* at 84-85. The effect of and battles against this "one-way dialogue" have recently been documented in Naomi Klein, *NO Logo: Taking Aim at the Brand Bullies* (2000). Klein cites a litany of corporate enforcement and protective actions, including the owners of Barney's refusal to let shops rent out purple dinosaur costumes, the previously cited removal of Disney characters from a playground mural, and Mattel's suit against the rock band Aqua for its hit song Barbie Girl. "Culture," according to Klein, has become "something that happens to you. You buy it at the Virgin Megastore or Toys 'R' Us.... It is not something in which you participate, or to which you have a right to respond." *Id.* at 178.

[\[FN83\]](#). Coombe, *supra* note 1, at 85 (citing Gardiner, *supra* note 77, at 177).

[\[FN84\]](#). *Id.*

[\[FN85\]](#). *Id.* at 134.

[\[FN86\]](#). Bakhtin, *supra* note 30.

[\[FN87\]](#). *Id.* at 5.

[\[FN88\]](#). *Id.* at 13.

[\[FN89\]](#). *Id.* at 14. See also Stephen Nissenbaum, *The Battle for Christmas 8-13* (1996), which traces the Christmas celebration back to medieval times, as a season of ritualized topsy-turvy, when servants mocked masters with impunity. The carnival origins of Christmas celebrations--and their threat to the established order--had much to do with the suppression of Christmas celebrations in the New England colonies. According to Nissenbaum, the revival of Christmas in the early nineteenth century as a season of gift-giving may owe as much to merchandising as to anything else.

[\[FN90\]](#). Bakhtin, *supra* note 30, at 8.

[\[FN91\]](#). *Id.* at 9.

[\[FN92\]](#). *Id.* at 11.

[FN93]. Id. at 8-11.

[FN94]. Id. at 12.

[FN95]. Id. at 18.

[FN96]. Adlai Stevenson Quotations, available at <http://www.intelligentsianetwork.com/adlai/adlai.htm> (last visited January 8, 2001).

[FN97]. Bakhtin, *supra* note 30, at 135-37.

[FN98]. See *supra* text accompanying notes 33-37.

[FN99]. Federal Trademark Dilution Act of 1995, [15 U.S.C. § 1125\(c\) \(1997\)](#).

[FN100]. There is arguably an even closer nexus between celebrities and sacred symbols. As Jonathan Bate explains:

In the Eastern Churches, an icon is a painting, mosaic, or other representation of a sacred person which is itself regarded as sacred.... To speak of a movie or rock star as an icon is to give a secular infliction to this belief. The worshipper attributes divinity to the performer on stage or screen. The connection with the sacred origin of the idea is deliberately exploited by Madonna in her choice of a name for herself.

Jonathan Bate, *The Genius of Shakespeare* 253 (1998).

[FN101]. Coombe, *supra* note 1, at 60; see also Trademark Act of 1946, [15 U.S.C. § 1127 \(1997\)](#).

[FN102]. Coombe, *supra* note 1, at 60.

[FN103]. Id. at 61 (citing K. Aoki, *Authors, Inventors, and Trademark Owners: Private Intellectual Property and the Public Domain*, Part I, 18(1) *Colum.-VLA J.L. & Arts* 1, 4 (1993)).

[FN104]. [Panavision v. Toeppen, 945 F. Supp. 1296, 1301 \(C.D. Cal. 1996\)](#), *aff'd*, [141 F.3d 1316 \(9th Cir. 1998\)](#).

[FN105]. [Panavision, 141 F.3d at 1325 n.5](#). See also Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 *Yale L.J.* 1687, 1706 (1999) ("Rather than identifying the good with a particular manufacturer, and thereby guaranteeing its quality, the identifier is itself the product.").

[FN106]. Coombe, *supra* note 1, at 55.

[FN107]. Id. at 53 (citing R. Barnet and J. Cavanagh, *Global Dreams: Imperial Corporations and the New World Order* 66 (1994)).

[FN108]. [510 F.2d 1004 \(5th Cir.\)](#), cert. denied, [423 U.S. 868 \(1975\)](#).

[FN109]. [Id. at 1010](#).

[FN110]. [Id. at 1010-11](#).

[FN111]. [Id. at 1014](#).

[FN112]. [Id. at 1011](#).

[FN113]. The wholesale licensing of trademark has the inevitable effect of shrinking the public domain by "dividing the commons into private property." Further, "the power the intellectual property owner has over those rights is increasing," as fair use diminishes, "particularly if the licensor can show that some money could have been squeezed out of the user. Trademark owners can prevent uses of their marks as obvious parodies or for entirely noncommercial purposes, and are well on their way to owning the exclusive right to pun." Lemley, *supra* note 29, at 900.

[FN114]. Leslie Eaton, *And Now, a Balloon From Our Sponsor*, N.Y. Times, Nov. 24, 1999, at A1.

[FN115]. Even a high-flying balloon could not keep *pets.com* aloft. The company closed down in November 2000, "after failing to find a financial backer or buyer." *Pets.com Put To Sleep*, CBS News, Nov. 7, 2000, [http:// www.cbsnews.com.htm](http://www.cbsnews.com.htm). To reinforce Coombe's thesis that commodity/signs become more important than the company's products, see Ali Asadullah, *Did Pets.com wrongfully kill Sock Puppet?* *Upside Magazine*, Nov. 13, 2000, <http://www.upsidenews.com.On-Trial.htm>.

[FN116]. The parade can also be seen as a carnival performed by the marketplace establishment rather than against it. For genuine carnival uses of commodity/signs it is necessary to go to New York's Greenwich Village for the Halloween parade, or to Europe, where carnival parades still survive, and parodies of corporate trademarks and current celebrities have replaced the inverted ecclesiastical parodies of other times. Lucy Ferriss, for example, describes how, in the Carnival of the Giants in Aalst, Belgium: Nothing is sacred. The floats are monstrous in every sense of the word. Preceding them are teams of devil line-dancing, sailors mimicking "The Full Monty," rats fleeing the sinking Titanic labeled "Belgica," schoolmarms dancing to "Stop in the Name of Love." The Carnival Prince is a blend of Elvis, Liberace and a Musketeer in a black cape. *Belgium Revels in 'Carnival' Traditions*, *Int'l Herald Trib.*, Jan. 21, 2000, at 10.

[FN117]. In fact, the infringing balloon was *The Cat in the Hat*, which is more likely to be subject to copyright than trademark, but the point is the same. Douglas Martin, *Chilly, Wet Parade Rolls As Crowds Try to See It*, N.Y. Times, Nov. 26, 1999, at B5.

[FN118]. Klein, *supra* note 82, at 302.

[FN119]. In the 2000 Presidential campaign, MasterCard accused Nader himself of trademark and copyright infringement for parodying its advertising: "Grilled tenderloin for fund-raiser: \$1,000 a plate. Campaign ads filled with half- truths: \$10 million. Promises to special interest groups: over \$10 billion. Finding out the truth: priceless. There are some things money can't buy. Without Ralph Nader in the presidential debates, the truth will come in last." Nader's Parody Ad Draws Lawsuit From MasterCard, N.Y. Times, Aug. 17, 2000, at A24. A federal judge rejected MasterCard's attempt to monopolize its grammatical construction and found Nader's ad to be protected political speech under the First Amendment. Mark Hamblett, Judge Backs Nader's Parody of MasterCard Ad, N.Y. L.J., Sept. 13, 2000, at 1.

[FN120]. [Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 \(1997\)](#).

[FN121]. Steve Lohr, Welcome to the Internet, the First Global Colony, N.Y. Times, Jan. 9, 2000, [§ 4](#) at 1 (quoting Fareed Zakaria, managing editor of Foreign Affairs).

[FN122]. Bakhtin, *supra* note 30, at 10.

[FN123]. "Surf" is therefore a good term for the Web. One skims along the surface of it.

[FN124]. F.T.C. Working Paper, Dot Com Disclosures (May 3, 2000), available at <http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.html>.

[FN125]. Ticketmaster Corp. v. Microsoft Corp., No. 97-3055 (C.D. Cal. filed Apr. 28, 1997).

[FN126]. Ticketmaster Corp. v. Tickets.com, Inc., No. 99-07654WDK (C.D. Cal. filed July 23, 1999). See Bob Tedeschi, Ticketmaster Sues Again Over Links, N.Y. Times, Aug. 10, 1999. <http://www.nytimes.com/library/tech/99/08/cyber/articles/10tickets.html>.

[FN127]. Ticketmaster Corp. v. Tickets.com, Inc., Complaint P 17.

[FN128]. On March 27, 2000, most claims against tickets.com were dismissed with the court ruling that deep-linking does not constitute misappropriation or trespass. As the court wrote, "it is hard to see how entering a publicly available web site could be called trespass, since all are invited to enter," thereby dismissing the notion that the only permitted entry can be through the home page. Ticketmaster Corp. v. Tickets.com, Inc., Order on Defendant's Motion to Dismiss the First Amended Complaint (March 27, 2000) at 6.

[FN129]. [ACLU v. Reno, 929 F. Supp. 824, 883 \(E.D. Pa. 1996\)](#), *aff'd*, [521 U.S. 844 \(1997\)](#).

[FN130]. The Internet originated in 1969 as a "net" of linked computers set up by the Advanced Research Project Agency (ARPA), hence ARPANET. It eventually expanded beyond defense-related computer networks to encompass universities, corporations, and individuals around the world, its name evolving through "DARPA Internet" to plain "Internet." [Reno, 521 U.S. at 850](#).

[FN131]. Gretchen Morgenson, For Time Warner Shareholders, A More Volatile Future Beckons; AOL's Gamble. "The Nerds Have Won," Int'l Herald Trib., Jan. 12, 2000, at 4.

[FN132]. [Hormel Foods Corp. v. Jim Henson Prods., Inc.](#), 73 F.3d 497 (2d Cir. 1996) (describing the Monty Python skit in some detail); see also [Hotmail Corp. v. Van\\$ Money Pie Inc.](#), 47 U.S.P.Q. 2d 1020, 1021 (N.D. Cal. 1998) (defining "spam" as unsolicited commercial bulk e-mail, with no reference to spam's origin in cans or Monty Python, thereby demonstrating how "spam," like "bug" and "boot" have entered Web-speak and lost their original denotation entirely).

[FN133]. Andrew Pollack, Show Business Embraces Web, But Cautiously, N.Y. Times, Nov.8, 1999, at 1.

[FN134]. In her later work, Coombe has in fact noted this very characteristic of the Web. Coombe & Herman, supra note 29, at 600 ("The Web provides unprecedented opportunities for new and dynamic dialogues between producers of products and imagery, and those who consume them.").

[FN135]. [Panavision Int'l L.P. v. Toeppen](#), 945 F. Supp. 1296 (C.D. Cal. 1996), aff'd 141 F.3d1316 (9th Cir. 1998); see Jeremy D. Mishkin, [Master of Your Domain--An Overview of the Anticybersquatting Consumer Protection Act](#), 18 Comm. Law. 3 (2000) ("if ever there were a poster child for the cybersquatter, it would be Dennis Toeppen"); see also [Intermatic Inc. v. Toeppen](#), 947 F. Supp. 1227 (N.D. Ill. 1996) (finding Toeppen liable for trademark dilution of Intermatic's trademark by registering intermatic.com as a domain name and attempting to sell it toIntermatic).

[FN136]. [Panavision](#), 945 F. Supp. at 1300.

[FN137]. Examples are available at <http://www.flairmail.com> (last visited Jan. 8, 2000), which sells variants of famous trademarks as vanity e-mail addresses, including names such as nyrangers1.com and redsox1.com.

[FN138]. [Bally Total Fitness Holding Corp. v. Faber](#), 29 F. Supp. 2d 1161, 1162 (C.D. Cal. 1998).

[FN139]. [Id.](#) at 1165.

[FN140]. [Id.](#)

[FN141]. See infra text accompanying notes 201-219.

[FN142]. Search of Saegis Worldwide Domain Names, (Jan. 24, 2000) (using the search criterion "Domain Name: *sucks.*"). Cybersquatting on gripe sites is a recent Web phenomenon. Web pornographer Dan Parisi has registered the domain names of over 500 of the world's largest companies with the suffix "sucks.com," including TWAsucks.com, MerrillLynchsucks.com and GMSucks.com. Greg Farrell, From Sour Grapes to Online Whine Firm Dread Creation of Griper's Portal, USA Today, Apr. 7, 2000, at 1B. Parisi's new Website, sucks.com, advertises itself as "the Website Corporate America wants to shut down" and features the "Corporate America Sucks 500 List." <http://www.flairmail.com.htm> (last visited Jan. 9, 2001). The Anticybersquatting Consumer Protection Act may have given trademark owners a new weapon against gripe sites. See infra text

accompanying notes 186-192. Another weapon that trademark owners have used is simply to register every possible variant of their company name, including ".sucks" variants. The discount travel e-firm, Priceline, registered, "Pricelinesucks.com," Chase Manhattan owns "Ihatechase.com," "Chasestinks.com," "Chasesucks.com," and even "Chaseblows.com." The question remains, how many variants can one corporation cover, and at what cost? Coombe & Herman, *supra* note 29, at 609.

[FN143]. "The machine readable code is the hidden part of the Internet upon which search engines rely to find sites that contain content which the individual user wishes to locate. The basic mechanics is that the web page designer places certain keywords in an unreadable portion of the web page that tells the search engine what is on a particular page." [Bally, 29 F. Supp. 2d at 1165 n.3.](#)

[FN144]. No.97-734-A, 1998 U.S. Dist. LEXIS 10359 (E.D. Va. Feb.2, 1998); see also [Playboy Enters. Inc. v. Calvin Designer Label, 985 F. Supp. 1220 \(N.D. Cal. 1997\).](#)

[FN145]. Playboy, 1998 U.S. Dist. LEXIS 10359 at *8.

[FN146]. [7 F.Supp. 2d 1098 \(S.D. Cal\)](#), *aff'd*, [162 F.3d 1169 \(9th Cir. 1998\).](#)

[FN147]. [Id. at 1103-04.](#)

[FN148]. *Id.*

[FN149]. See <http://www.infobeat.com/stories/cgi/story.cgi?id+2560305071-8b5>.

[FN150]. Susan Kuchinskas, Image is Everything, Wired News, June 18, 1998, available at <http://wired.com/news/news/email/other/culture/story/13075.html>, cited in Haemmerli, *supra* note 51, at 389 n.21. According to Professor Haemmerli, "The concern that an individual might be made to appear in fictitious acts is a real one.... One can readily imagine a public figure 'appearing' in a fake infomercial on the Internet, or a secretly homophobic actor being made to host a gay men's health telethon. Despite the potentially informative or charitable nature of such uses, they would still amount to 'virtual kidnapping.'" *Id.*

[FN151]. People, Dec. 21, 1998, at 18, cited in Haemmerli, *supra* note 51, at 394 n.33.

[FN152]. Mark Sableman, Link Law: The Emerging Law of Internet Hyperlinks, 4Comm. L. & Pol'y 557, 563 (1999).

[FN153]. [People v. Lipsitz, 663 N.Y.S. 2d 468, 475 \(Sup. Ct. N.Y. Cty. 1997\).](#)

[FN154]. Coombe, *supra* note 1, at 9.

[FN155]. Frederic Schauer, Fear, Risk And The First Amendment: Unraveling The "Chilling Effect," 58 B.U. L. Rev. 685 (1978).

[FN156]. Sableman, *supra* note 152, at 585.

[FN157]. Peter Johnson, Pornography Drives Technology, Fed. Comm. L.J. 217 (1996); see also Porn Site Soon to Solicit Consumer Gripes, Daily Rec., Apr. 7, 2000, (describing the evolution of Web pornography sites into gripe-site cybersquatting).

[FN158]. James Collins, Wall Street Follies: Where are all the paper billionaires in the on-line porn business?, New Yorker, Aug. 16, 1999, at 23.

[FN159]. "The Pussy List," formerly available at, inter alia, <http://www.pussy.pleasure.com/ppfirst.htm> (last visited May 29, 1998).

[FN160]. Coombe, *supra* note 1, at 39 ("Corporate trademarks are 'friends from our childhood'....").

[FN161]. Telephone Interview with Peter Johnson (June 1, 1998). Demand letters from the trademark-holders' attorneys soon put a stop to the "Pussy List" metatag. By way of full disclosure, the author of this Review sent such demand letters on behalf of a client whose trademark appeared in "The Pussy List."

[FN162]. Bakhtin, *supra* note 30, at 20.

[FN163]. Francois Rabelais, Gargantua and Pantagruel 360 (bk. 3, ch. 26) (J.M. Cohen trans., Penguin Books 1955) (1546).

[FN164]. Bakhtin, *supra* note 30, at 417.

[FN165]. Rabelais, *supra* note 163, at 366 (bk. 3, ch. 28).

[FN166]. The reductionist technique of "The Pussy List" is like the adolescent game in which the phrase "between the sheets" is added to any song title, producing I Saw Mama Kissing Santa Clause (Between the Sheets) and I Love Paris (Between the Sheets). This game is popular among scholars as well. See Marjorie Garber, Symptoms of Culture 199 (1998) ("During a meal at a Chinese restaurant, critic Terry Castle once taught me an invaluable lesson about what might be called situational grammar. Any fortune-cookie fortune could be immeasurably altered, and enriched, she pointed out, by simply adding to it the phrase 'in bed.' (Try this yourself and you will see.)"). Another example, on the Web, is The Birth of a Candy Bar, which uses graphic scanned-in images of trademarked wrappers of famous candy bars to tell the following story:

One PAYDAY, MR. GOODBAR wanted a BIT O'HONEY so he took Miss HERSHEY's behind the POWERHOUSE on the corner of CLARK and 5TH AVENUE. He began to feel her MOUNDS with his BUTTERFINGER. That was pure ALMOND JOY. It made her TOOTSIE ROLL and he let out a SNICKERS, as she screamed OH HENRY! while squeezing his PETER PAUL. Miss HERSHEY's said: you are even better than the 3 MUSKETEERS. Soon she was a bit CHUNKY and nine months later had a BABY RUTH.

at <http://member.empowering.com/tjmed.candy>.

[FN167]. See Frank Rich, We All Pass Go. They Collect \$200, N.Y. Times, June 3, 2000, at A13 ("Disney [is] described by The Wall Street Journal as 'one of America's most aggressive corporate bullies.'").

[FN168]. Federal Trademark Dilution Act, [15 U.S.C. § 1125\(c\)\(4\)\(C\) \(1997\)](#).

[FN169]. [Hormel Foods Corp. v. Jim Henson Prods., Inc., 73 F.3d 497 \(2d Cir. 1996\)](#).

[FN170]. [Mutual of Omaha Insurance Co. v. Novak, 836 F.2d 397 \(8th Cir. 1987\)](#), cert. denied, 48 U.S. 933 (1988).

[FN171]. [Id. at 402](#).

[FN172]. Coombe, *supra* note 1, at 262.

[FN173]. *Id.*

[FN174]. [White v. Samsung Elec., 989 F.2d 1512, 1520-21 \(9th Cir.\)](#) (Kozinski, J., dissenting), cert. denied, [508 U.S. 951 \(1993\)](#).

[FN175]. Federal Trademark Dilution Act, [15 U.S.C. § 1125\(c\)](#) 1997.

[FN176]. [Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183 \(E.D.N.Y. 1972\)](#).

[FN177]. Coombe, *supra* note 1, at 72 (citing E. Kahn, The Big Drink: the Story of Coca-Cola 54-55, 101-103 (1960), and M. Schatzman et al., Coca and Cocaine: A Bibliography, 8 J. Psychedelic Drugs 95, 97 (1976)).

[FN178]. [15 U.S.C. § 1125\(c\)\(1\)](#). The Act gives the "owner of a famous mark" protection "against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark."

[FN179]. *Playboy Enters., Inc. v. Asia Focus Int'l, Inc.*, No. 97-734-A, 1998 U.S. Dist. Lexis 10359 at *30 (E.D. Va., Feb. 2, 1998).

[FN180]. See *supra* text accompanying note 23; see also *Hotmail v. Van\$ Money Pie, Inc.*, 47 S.P.Q.2d 1021, 1024 (N.D. Cal. 1998) ("[T]he use of identical marks by defendants who are sending e-mails to thousands of e-mail users across the country and the world through identical trade channels threatens to dilute the distinctiveness of plaintiff's trademark and threatens to harm plaintiff's business reputation.").

[FN181]. [Electronics Boutique Holdings Corp. v. Zuccarini, No. Civ. A. 00-4055, 2001 WL 83388 \(E.D. Pa. Jan. 25, 2001\)](#) (Anticybersquatting Act invoked to enjoin bad faith registration of www.electronicboutique.com and www.electronicbotique.com).

[FN182]. 141 Cong. Rec. 19312-01 (daily ed. Dec. 29, 1995) (statement of Sen. Leahy) (emphasis added).

[FN183]. See supra text accompanying notes 138-142.

[FN184]. [15 U.S.C. § 1125\(c\)\(1\) \(1997\)](#).

[FN185]. See, e.g., [Avery Dennison Corp. v. Sumpton, 999 F. Supp. 1337 \(C.D. Cal. 1998\)](#), rev'd, [189 F.3d 868 \(9th Cir. 1999\)](#) (explaining that although Avery and Dennison might be distinctive, they do not rise to the level of "famous" marks deserving dilution protection).

[FN186]. 5 U.S.C. § 1125(d).

[FN187]. [Abercrombie & Fitch, Co. v. Hunting World, Inc., 537 F.2d 4, 11 \(2d Cir. 1976\)](#). Ever-vigilant and ever-imaginative in finding new uses for both new and old laws, corporate authors have now tried to use the Anticybersquatting Act as a weapon against gripe sites, which have heretofore enjoyed a safe harbor because they are not considered "commercial." See supra text accompanying notes 137-41. The gripe site verizonreallysucks.com, named for Verizon, then a new wireless communications service engineered by Bell Atlantic, received a demand letter from Bell Atlantic's Chief Intellectual Property Counsel. Although, as the letter points out, "On behalf of Bell Atlantic, its agents have registered hundreds of domain names incorporating 'Verizon' and variations thereof," the agents apparently missed verizonreallysucks.com. Asserting that, in its short life, Verizon has become a "famous" trademark, the letter accuses verizonreallysucks.com of "trademark infringement, unfair competition and dilution"--the standard litany of corporate complaints against dissident domains. "Moreover," the letter adds, registration of the name "violates the new Anticybersquatting Consumer Protection Act, [which] expressly prohibits the registration of a domain name confusingly similar to or dilutive of a mark [and] makes illegal the bad faith misappropriation of trademarks as domain names." Letter from Sarah B. Deutsch, Vice President and Chief Intellectual Property Counsel for Bell Atlantic Network Services, Inc. to Emanuel Goldstein (May 5, 2000), available at <http://www.2600.com/news/2000/0508.html>. This letter raised a flurry of criticism on the International Trademark Association chatroom, whose members are usually most sympathetic to the assertions of trademark owners. It has also prompted the registrant of verizonreallysucks.com to register a domain name that "uses the new 63 character maximum length name": VerizonShouldSpendMoreTimeFixingItsNetwo.Id.

[FN188]. Lemley, supra note 29, at 898 ("Intellectual property law is expanding on an almost daily basis as new rights are created or existing rights are applied to give intellectual property owners rights that they never would have had in an earlier time").

[FN189]. [15 U.S.C. § 1125\(d\) \(1997\)](#).

[FN190]. Di Mari Ricker, Studios v. Celebrities in a Profitable Name Game, available at www.callaw.com/weekly/glitz/glitzy08.html. The Recorder/Cal Law, Nov. 8, 1999.

[FN191]. Id. Within a month of the Act's passage, actor Brad Pitt sued a cybersquatter for registering maddpitt.com. Pitt v. Alzooroni, No. 99-12626 GAF (C.D. Cal. filed Dec. 2, 1999). In addition to the Anticybersquatting Act, celebrities found a new ally under the Uniform Domain Name Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN). In recent cases, Madonna, Dan Marino, and Jethro Tull have recaptured domain names from cybersquatters, although Bruce Springsteen's and Sting's similar efforts failed. <http://arbiter.wipo.int/domains.decisions/html/2000>.

[FN192]. [15 U.S.C. §1125\(d\) \(1997\)](#).

[FN193]. See [Eldred v. Reno, 74 F. Supp. 2d 1 \(D.D.C. 1999\)](#), aff'd, [239 F.3d 372 \(D.C. Cir. 2001\)](#) (holding that the latest extension did not violate the constitutional requirement that copyrights endure for "limited times.").

[FN194]. Sonny Bono Copyright Term Extension Act of [1998, Pub. L. No. 105-298](#), 112 Stat. 2827 (1998). The role of the eponymous Sonny Bono in the intellectual property life of this country awaits full appreciation. Perhaps the essence of a late-twentieth-century celebrity, Bono could neither sing nor act nor play music, yet he became a hit recording artist and TV star who rode his celebrity to become mayor of Palm Springs, California, and a member of Congress. As a Congressman, he was a powerful member of the House Judiciary Committee's subcommittee on intellectual property and was instrumental in the passage of the Federal Trademark Dilution Act of 1995. At the hearings on the Bill he expressed outrage that such famous American trademarks as Samsonite and Reebok could find themselves "ripped off" by foreign imitators after they had expended great sums in establishing their famous names. Madrid Protocol Implementation Act and Federal Trademark Dilution Act of 1995: Hearing on H.R. 1270 and H.R. 1295 Before the Subcommittee of Courts and Intellectual Property of the House Committee on the Judiciary, 104th Cong. 121 (July 19, 1995). Bono died in a skiing accident in January 1998. His fellow Congressmen named the Copyright Term Extension Act after him, apparently undeterred at the irony of prolonging the copyright term in the name of a colleague whose own term was cut short. The issue of whether Congress could legitimately exploit Sonny Bono's celebrity by naming a Bill after him seems not to have arisen. This was, after all, not a "commercial" use of his name. Further, Bono's widow, who was elected to his seat in Congress, may not have raised any objections.

[FN195]. See Sophie Boukhari, A Virtual Library on the Web, UNESCO Courier, June 1, 1999, at 43; see also Paul Lewis, The Artist's Friend Turned Enemy: A Backlash Against the Copyright, N.Y. Times, Jan. 8, 2000, at B1 (noting that extending a dead author's copyright, like that protecting the image of Mickey Mouse, "won't encourage [the author] to write another book").

[FN196]. [Eldred, 74 F. Supp. 2d, at 2](#).

[FN197]. Boukhari, supra note 195.

[FN198]. The No Electronic Theft ("NET") Act, [Pub. L. 105-147](#), 111 Stat. 2678 (1997), imposes criminal penalties for willful infringements of copyright either for commercial advantage or with a certain value or frequency. The Act, intended to combat digital piracy" and heavily lobbied for by the software industry, was recently stiffened by raising some of its penalties fifty percent. [Pub. L. No. 106-160](#), H.R. 3456 (1999).

[FN199]. Lawrence Lessig, Reclaiming a Commons, Keynote Address at The Berkman Center's Building A Digital Commons (May 20, 1999), at <http://www.cyber.law.harvard.edu>.

[FN200]. [Panavision Int'l L.P. v. Toeppen](#), 945 F. Supp. 1296 (C.D. Cal 1996), aff'd, [141 F.3d 1316](#) (9th Cir. 1998).

[FN201]. See supra text accompanying notes 144-148.

[FN202]. [Playboy Enters., Inc. v. AsiaFocus Int'l, Inc.](#), No. 97-734-A, 1998 U.S. Dist. LEXIS 10359 (E.D.Va. Feb. 2, 1998).

[FN203]. [Playboy Enters. v. Welles](#), 7 F. Supp. 2d 1098 (S.D. Cal) aff'd, [162 F.3d 1169](#) (9th Cir. 1998).

[FN204]. The applicability of traditional legal theories and defenses to Internet-related litigation has been widely noted. See, e.g., Bruce P. Keller, [Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property](#), 11 [Harv. J.L. & Tech.](#) 401 (1998); Bruce P. Keller & Peter Johnson, Are the "New" Cyberspace Legal Developments Really So New? LDRC Bull., 169, Dec. 16, 1999.

[FN205]. "Vaudeville" has its roots in "Vau de Vire," the valley of the Vire River, which was a hotbed of satirical lyric rewrites in medieval times. For a discussion of Rabelais' satirical use of popular song lyrics, see Nan Cooke Carpenter, Rabelais and Music 22-45 (1954).

[FN206]. [Campbell v. Acuff-Rose Music, Inc.](#), 510 U.S. 569 (1994).

[FN207]. [Fisher v. Dees](#), 794 F.2d 432 (9th Cir. 1986).

[FN208]. [Berlin v. E.C. Publications, Inc.](#), 329 F.2d 541 (2d Cir.), cert. denied, [379 U.S. 822](#) (1964).

[FN209]. [Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.](#), 109 F.3d 1394 (9th Cir.), cert. denied, [521 U.S. 1146](#) (1997).

[FN210]. [Suntrust Bank v. Houghton Mifflin Co.](#), 136 F. Supp. 2d 1357, 1377 (N.D. Ga.), vacated, [252 F.3d 1165](#) (11th Cir. 2001).

[FN211]. [Campbell](#), 510 U.S. at 588 ("[T]he parody must be able to conjure up at least enough of that original to make the object of its critical wit recognizable.").

[FN212]. [Benny v. Loew's Inc.](#), 239 F.2d 532 (9th Cir. 1956), aff'd, [356 U.S. 43](#) (1958).

[FN213]. [Walt Disney Prods. v. Air Pirates, 581 F.2d 751 \(9th Cir.\)](#), cert. denied, 439U.S. 1132 (1978).

[FN214]. [60 F.2d 301 \(2d Cir.\)](#), cert. denied, [506 U.S. 934 \(1992\)](#).

[FN215]. The court tipped its hand in its "Background Facts" section by describing photographer Rogers as a "professional artist-photographer, [who] has a studio and home at Point Reyes, California, where he makes his living by creating, exhibiting, publishing and otherwise making use of his rights in his photographic works." Koons, on the other hand, "worked at a number of jobs, principally membership development at the Museum of Modern Art in New York. While pursuing his career as an artist, he also worked until 1984 as a mutual funds salesman, a registered commodities salesman and broker, and a commodities futures broker.... A New York Times critic complained that 'Koons is pushing the relationship between art and money so far that everyone involved comes out looking slightly absurd.'" Rogers, 960 F.2d at 303-04. The court thus plumped for the "romantic" notion of authorship as embodied by Rogers.

[FN216]. *Id.* at 310.

[FN217]. M. Buskirk, *Appropriation Under the Gun*, 80 *Art In Am.* 37 (1992), quoted in Robert A. Gorman & Jane C. Ginsburg, *Copyright for the Nineties* 609 (1993).

[FN218]. *Id.*

[FN219]. See *supra* text accompanying notes 158-160.

[FN220]. See *supra* text accompanying notes 9-10. Although the Star Trek recodifications went unchallenged in pre-Web days, the creation of an authorized Star Trek website by Viacom--owner of the Star Trek copyrights--led it to crack down on unauthorized uses of Star Trek materials on unofficial Star Trek Web sites. <http://www.off-hg.org/viacom.html> (visited July 11, 2001). Other corporate owners have staged similar web crackdowns on recordings they tolerated off-line. See Coombe & Herman, *supra* note 29, at 602-03. ("Barbie Doll Benson, former nude Miss Canada, used the Barbie Doll stage name for sixteen years, but it was only when she produced a Web page that Mattel complained.").

[FN221]. The Web too has created commodity/sign rumors. One, entitled "Barney Is Satan," took the phrase "Cute Purple Dinosaur," changed the u's to Roman v's, extracted the numerals CV, V, L, DI, and V, and added up their decimal equivalents to total 666, "the notorious Biblical number of the beast." Revelations 13:16-18. Garber, *supra* note 166, at 185 (citing [http:// www.io.com/-hitchken/barney.satan.html](http://www.io.com/-hitchken/barney.satan.html)).

[FN222]. Marty Rimm, [Marketing Pornography on the Information Superhighway: A Survey of 917, 410 Images, Descriptions, Short Stories and Animations Downloaded 8.5 Million Times by Consumers in over 2000 Cities in Forty Countries, Provinces, and Territories](#), 83 *Geo. L.J.* 1849 (1995).

[\[FN223\]](#). Mike Godwin, Fighting a Cyberporn Panic, in *Cyber Rights 206* (1998); Johnson, *supra* note 156, at 224. ("Within a week of the study's publication, the Internet, the very medium purportedly studied, breathed a firestorm of flame messages, discrediting both the study and its author.").

[\[FN224\]](#). See, e.g., Esther Dyson, *Communities, in Release 2.0, A Design for Living in the Digital Age 31* (1997).

[\[FN225\]](#). Thomas Pynchon, *The Crying of Lot 49* (1965).

[\[FN226\]](#). *Id.* at 101.

[\[FN227\]](#). See *supra* note 187.

[\[FN228\]](#). To give Coombe the last word:

We are seeing a field of power shifting in digital terrain. As systems of univocal proprietary control give way to an interactive ethics that interrogates the claims of property with questions of propriety, we have a unique opportunity to challenge the impositions of privilege and insist upon new forms of responsibility and social accountability in digital environments. Coombe & Herman, *supra* note 29, at 632.
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