

# 1 Introduction

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## 1.1 Overview

The ‘celebrity’ is developed to make money. The fact is – celebrity sells. We see famous faces at every turn – on billboards, on television, on public transport, on social media, in the newspapers and magazines, and even on cereal boxes at our breakfast tables. As cultural studies scholar Graeme Turner suggests,

it is the pervasiveness of celebrity across the modern mass media that encourages us to think of it as a new development ... The exorbitance of celebrity’s contemporary cultural visibility is certainly unprecedented, and the role that the celebrity plays across many aspects of the cultural field has certainly expanded and multiplied in recent years.<sup>1</sup>

Bolstered by their ubiquitous presence in the mass media and the Internet, the commercially valuable reputations of celebrities are often widely exploited. Indeed there are multiple forms of fame, ranging from fame attributed by the mainstream media that a person is worthy of mass adulation to a more localised fame within small communities and interest groups.<sup>2</sup> Nonetheless, any form of fame is inevitably accompanied by myriad opportunities for economic exploitation.

Hollywood stars jostle with Olympic gold medalists to endorse products. Reality television show contestants vie with fashion supermodels for Instagram and Twitter followers. Pop singers compete with fashion designers to launch clothing lines. The contemporary celebrity does not need to be an individual of notable abilities in the fields of sports, music or movies. Fame in a new media age is markedly different from traditional fame defined by one’s distinguished achievements.<sup>3</sup> What characterises

<sup>1</sup> Graeme Turner, *Understanding Celebrity* (2nd edn, 2014) 4.

<sup>2</sup> David Giles, *Illusions of Immortality: A Psychology of Fame and Celebrity* (2000) 6.

<sup>3</sup> Some cultural scholars have attempted to distinguish ‘fame’ from ‘celebrity’, but this book adopts the broader notion that ‘fame’ in the twenty-first century is simply based on well-knownness. However, Robin Barnes has argued that ‘[f]ame has traditionally been associated with individual demonstrations of superior skill or striking deeds as displayed by

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‘fame’ today is simply a heightened visibility in the public consciousness.<sup>4</sup> Referring to the public obsession with the life of Kim Kardashian, Turner astutely observes that ‘the modern celebrity may claim no special achievements other than the attraction of public attention’ and ‘celebrities in the twenty-first century excite a level of public interest that seems . . . disproportionate’.<sup>5</sup> From a famous individual’s point of view, his or her personal objective is most likely to be the management of a viable and financially lucrative career through the strategic distribution and adroit regulation of the sales of the celebrity commodity.<sup>6</sup>

This book is concerned with how the commercial exploitation of fame may be regulated by the right of publicity and passing off laws in common law jurisdictions and how an understanding of the cultural phenomenon of the contemporary celebrity may better shape the development of these laws.

The right of publicity, broadly defined as the ‘inherent right of every human being to control the commercial use of his or her identity’,<sup>7</sup> has been well established in the United States for over sixty years.<sup>8</sup> It ensures that the right to control the commercial exploitation of an individual’s fame or public notoriety belongs to the individual with whom it is identified. It is a curious creature. It is not a trademark right, but it protects the ‘associative value’ that celebrities bring to products and services.<sup>9</sup> It does not require one to prove a likelihood of confusion, but it requires a proof of fame. It exists neither for the furtherance of the

a select few, then chronicled by contemporary authors and historians. Celebrity, on the other hand, is more transient, relying on marketing, timing, and instant appeal.’ Robin D Barnes, *Outrageous Invasions: Celebrities’ Private Lives, Media, and the Law* (2010) 19.

<sup>4</sup> E.g. Jeffrey Sconce, ‘A Vacancy at the Paris Hilton’ in Jonathan Gray, Cornel Sandvoss and C Lee Harrington (eds), *Fandom: Identities and Communities in a Mediated World* (2007) 328, 331. Sconce observes that Paris Hilton’s strategy ‘has been to leverage her wealth, privilege, ignorance, and lack of talent in such a manner that *she might become famous for wanting to be famous based on her wealth, privilege, ignorance, and lack of talent*’. Furthermore, in this paradoxical scenario, ‘the more the public professes to hate Paris Hilton for her “fake” celebrity, the more *truly* famous she becomes’. *Ibid.*

<sup>5</sup> Turner, above n 1, 3.

<sup>6</sup> *Ibid.* 37. See also Graeme Turner, Francis Bonner and P David Marshall, *Fame Games: The Production of Celebrity in Australia* (2000) 13.

<sup>7</sup> J Thomas McCarthy, *The Rights of Publicity and Privacy* (2nd edn, 2000) (April 2016 update) § 3:1.

<sup>8</sup> It was first recognised by the Second Circuit in 1953 that baseball players had a ‘right of publicity’ in their images. *Haelan Laboratories Inc v Topps Chewing Gum Inc*, 202 F 2d 866, 868 (2nd Cir, 1953). In the only right of publicity case ever to reach the US Supreme Court, the court affirmed the recognition of such an actionable right. *Zacchini v Scripps-Howard Broadcasting Company*, 433 US 562 (1977).

<sup>9</sup> Sheldon W Halpern, ‘The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality’ (1995) 46 *Hastings Law Journal* 853, 856, 859–60.

interests of consumers nor for the progress of the arts and sciences, but for the benefit of the famous individual. It has been called the ‘right to manage fame’.<sup>10</sup> Generally perceived to be a property right akin to an intangible or intellectual property right,<sup>11</sup> the right of publicity has been invoked mainly by celebrities to monetise their identity and to prevent unauthorised commercial uses of various aspects of their persona. Given its relatively short history, and ‘considering its present state of doctrinal muscularity, the rate of growth of publicity rights law can be fairly described as savage’.<sup>12</sup> Outside the United States, the common law passing off action is the claim relied upon by celebrities in common law jurisdictions, such as the United Kingdom, Australia, Hong Kong and Singapore, which do not recognise a right of publicity, to protect themselves against the commercial appropriation of their fame. Although the right of publicity and passing off claims share a basic similarity in that both protect the valuable commercial goodwill that inheres in a famous individual’s persona, the elements of the two causes of action are fundamentally different.

There is a wealth of legal literature in the United States – both cases and academic commentaries – that discusses a broad range of issues from the doctrinal justifications for the right of publicity to its interaction with free speech values protected by the First Amendment. However, very few contributions to this field of law have studied the connections between cultural practices and the right of publicity (or passing off) in depth, and these writings tend to use cultural studies in a postmodern tradition to challenge the legal recognition of the right of publicity. This book offers a different contribution by using relevant insights from cultural studies in a pragmatic manner to evaluate how an understanding of contemporary production, circulation and consumption of the celebrity personality could assist a doctrinally focused understanding of the right of publicity and the passing off action that would be useful to legal scholars and practitioners.

Contemporary culture in developed nations today is characterised by a vibrant kaleidoscope of images and spectacles that permeate the fabric of everyday life, influencing consumption choices and political views and providing meaningful materials out of which people may shape their own identities. To paraphrase Jean Baudrillard, to what

<sup>10</sup> Daniel Gervais and Martin L. Holmes, ‘Fame, Property, and Identity: The Scope and Purpose of the Right of Publicity’ (2014) 25 *Fordham Intellectual Property, Media & Entertainment Law Journal* 181, 195.

<sup>11</sup> E.g. *Comedy III Productions Inc v Gary Saderup Inc*, 25 Cal 4th 387, 399 (2001).

<sup>12</sup> Michael G. Bennett, ‘Celebrity Politicians and Publicity Rights in the Age of Obama’ (2014) 36 *Hastings Communications & Entertainment Law Journal* 339, 348.

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extent do we no longer partake of the drama of alienation, but are in the ecstasy of communication?<sup>13</sup> Indeed it is in ‘hybrid mode’ as ‘consumer-citizens’ that ‘individuals participate to express freedom, choice and identity’.<sup>14</sup> The conceptual framework of cultural studies can help one better understand why certain cultural artefacts are popular, and their impact within the environment they inhabit, and more importantly, can provide insights into how the law may respond in the context of this cultural milieu. Learning to identify the hidden culture codes and signifying systems that shape our beliefs and behaviour<sup>15</sup> can better help us formulate legal responses that are consonant with such codes. The celebrity personality – or the commercially valuable public persona of what we generally call ‘celebrity’ – is a collective product of the celebrity individual, the audience and the cultural producers. The *celebrity individual* is the physical human person as distinct from the public image of the famous personality that the audience perceives and with whom it identifies. The *audience* encompasses anyone who consumes or uses the celebrity commodity or any product associated with a celebrity; this includes consumers and users of the mass media and purchasers of goods and services. The *cultural producers* include the mass media and other cultural intermediaries, like advertising agencies, transnational corporations, local businesses, brand consultants, talent management and public relations firms, that contribute to the creation, development and propagation of the celebrity personality. Many cultural studies scholars have in fact made these observations. For instance, Charles Leadbeater commented that Princess Diana’s persona was ‘created in part by her consumers’ and ‘she was jointly owned by the people who consumed her image, the readers of *Hello!* magazine, the media and Diana herself’.<sup>16</sup> In a study of stars in Hong Kong, Leung Wing-Fai also noted that stars there are ‘treated as model individuals who embody the different social roles available while also being symbolically assigned a collective identity’.<sup>17</sup> Other legal scholars have also touched on this cultural construction of the celebrity personality.<sup>18</sup>

<sup>13</sup> Jean Baudrillard, *The Ecstasy of Communication* (Bernard Schütze and Caroline Schütze trans, 2012) 26.

<sup>14</sup> Ian MacRury, *Advertising* (2009) 19 (internal quotations omitted).

<sup>15</sup> E.g. Daniel Chandler, *Semiotics: The Basics* (2002) 147 and 148; Arthur Asa Berger, *The Objects of Affection: Semiotics and Consumer Culture* (2010) 25–7.

<sup>16</sup> Charles Leadbeater, *Living on Thin Air: The New Economy* (2000) 25.

<sup>17</sup> Leung Wing-Fai, *Multimedia Stardom in Hong Kong: Image, Performance and Identity* (2015) 107.

<sup>18</sup> E.g. Andrew Kenyon and Esther Milne, ‘Images of Celebrity: Publicity, Privacy, Law’ (2005) 10 *Media & Arts Law Review* 311; Michael Madow, ‘Private Ownership of Public Image: Popular Culture and Publicity Rights’ (1993) 81 *California Law Review* 127.

However, in adjudicating the right of publicity claims, courts often do not consider how the relationships and interactions between the constituents of this ‘celebrity trinity’ may influence, if at all, the doctrinal development of publicity laws. The law invariably focuses only on the celebrity individual as the equivalent of the celebrity personality, ignoring the quintessential roles of the audience and the producers. In sum, this book seeks to demonstrate that an important value that cultural studies can bring to the laws governing the commercial appropriation of fame lies in its investigation of the celebrity trinity, in particular, through its understanding and critique of ideological codings and its examination of identity formation practices, and to uncover a pragmatic framework for the application of cultural studies to key elements of the right of publicity and passing off claims.

## 1.2 Scope of This Book

Although the bulk of this book focuses on the right of publicity, observations and conclusions on the production, circulation and consumption of the celebrity may also be relevant to another area of law outside the United States that regulates the commercial exploitation of the celebrity personality. In particular, the common law passing off action in the United Kingdom and Australia will be considered in detail. There are academic commentaries suggesting that, unlike the right of publicity, the passing off action does not adequately protect the commercial value of the contemporary celebrity persona.<sup>19</sup> However, there is limited literature attempting a cultural studies analysis of passing off, and this book advances the proposition that the legal recognition of impressionistic association as capable of satisfying the requirement of misrepresentation is congruous with contemporary consumption behaviour. In a number of European civil law jurisdictions, for instance, in France and Germany, there are specific personality rights or *droit à l’image* that protect against the commercial appropriation of personality.<sup>20</sup> The bases for protection

<sup>19</sup> E.g. Rosita Zapparoni, ‘Propertising Identity: Understanding the United States Right of Publicity and Its Implications – Some Lessons for Australia’ (2004) 28 *Melbourne University Law Review* 690; John McMullan, ‘Personality Rights in Australia’ (1997) 8 *Australian Intellectual Property Journal* 86; Savan Bains, ‘Personality Rights – Should the United Kingdom Grant Celebrities a Proprietary Right in Their Personality (Part 3)’ [2007] *Entertainment Law Review* 237. Contra David S Caudill, ‘Once More Into the Breach: Contrasting US and Australian “Rights of Publicity”’ (2004) 9 *Media & Arts Law Review* 263, 276.

<sup>20</sup> E.g. *Bürgerliches Gesetzbuch* §12 (*Civil Code 1900 – BGB*), *Kunsturheberrechtsgesetz* §22 (*Act on Copyright in Works of Visual Arts 1907 – KUG*) (Germany); *Code civil* art 1382 (France). See also Elisabeth Logeais and Jean-Baptiste Schroeder, ‘The French Right of Image: An Ambiguous Concept Protecting the Human Persona’ (1998) 18 *Loyola of Los*

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in the civil law tradition tend to be drawn from the notion of individual autonomy and human dignity and appear to be less relevant to the majority of common law jurisdictions seeking to regulate the commercial exploitation of fame. The civil law perspectives on the legal protection of personality have been expertly covered in other writings<sup>21</sup> and will not be addressed here.

This book starts with the premise that legal analysis and doctrinal development may benefit from observations and empirical research conducted in cultural studies, particularly on consumption behaviour and identity politics relating to uses of the celebrity personality. Scholars from cultural studies have considered these issues at length and from different perspectives, and it appears likely to be a useful exercise to consider what that literature could add to legal approaches.

As cultural studies is a diverse discipline that incorporates perspectives from other fields like anthropology, gender studies, media studies, semiotics and sociology, this book will adopt a combination of resources based on revised, updated and reconstructed readings of the Frankfurt School, of British cultural studies and of some positions of postmodern and deconstruction theories. As cultural scholar Douglas Kellner notes, instead of selecting a particular theory of cultural studies, this ‘multiperspectival approach’ is not only ‘pragmatic contextualist’ in its orientation but can also yield ‘more insightful and useful analyses than those produced by one perspective alone’.<sup>22</sup> Such an approach is evident in the celebrity studies of contemporary cultural scholars like Richard Dyer,<sup>23</sup> David Marshall<sup>24</sup> and Graeme Turner,<sup>25</sup> and of Stuart Hall, whose writings constitute an invaluable resource for

*Angeles Entertainment Law Journal* 511; Alain J Lapter, ‘How the Other Half Lives (Revisited): Twenty Years Since Midler v Ford – A Global Perspective on the Right of Publicity’ (2007) 15 *Texas Intellectual Property Law Journal* 239.

<sup>21</sup> E.g. Huw Beverley-Smith, Angsar Ohly and Agnès Lucas-Schloetter, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation* (2005); David S Welkowitz, ‘Privatizing Human Rights? Creating Intellectual Property Rights from Human Rights Principles’ (2013) 46 *Akron Law Review* 675; Giorgio Resta, ‘The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspectives’ (2011) 26 *Tulane European and Civil Law Forum* 33; James Q Whitman, ‘The Two Western Cultures of Privacy: Dignity versus Liberty’ (2004) 113 *Yale Law Journal* 1151; Silvio Martuccelli, ‘The Right of Publicity under Italian Civil Law’ (1998) 18 *Loyola of Los Angeles Entertainment Law Journal* 543.

<sup>22</sup> Douglas Kellner, *Media Culture: Cultural Studies, Identity and Politics between the Modern and the Postmodern* (1995) 26.

<sup>23</sup> E.g. Richard Dyer, *Stars* (1979); Richard Dyer, *Stars* (2nd edn, 1998); Richard Dyer, *Heavenly Bodies: Film Stars and Society* (1986); Richard Dyer, *White* (1997).

<sup>24</sup> P David Marshall, *Celebrity and Power: Fame in Contemporary Culture* (1997); P David Marshall, *New Media Cultures* (2004); P David Marshall, *Celebrity and Power: Fame in Contemporary Culture* (2nd edn, 2014).

<sup>25</sup> Turner, above n 1; Graeme Turner, *Film as Social Practice* (4th edn, 2006).

this research.<sup>26</sup> Dyer's groundbreaking work *Stars* in 1979 provided the first seminal analysis of Hollywood stars as a social phenomenon and their semiotic significance in the areas of consumption and social identity construction. His ideas have influenced the development of subsequent cultural studies writings that investigate the celebrity phenomenon, some of the more significant ones being Marshall's *Celebrity and Power* (which analysed the ideological power of celebrity signs and their principal functions in capitalist democracies) and Turner's *Understanding Celebrity* (which studied the contemporary cultural processes involved in the production and consumption of the celebrity). At the same time, the scholarship of Stuart Hall, often seen to be highly influential in the British cultural studies movement, has also made significant contributions to the study of the semiotic connotations of the celebrity sign. Over the last two decades, the research of Grant McCracken on the celebrity endorsement effect in economic consumption, drawing on semiotics and other cultural writings, has also influenced other scholars exploring the connection between the star aura and consumer behaviour.<sup>27</sup> These works will form the foundation of the cultural studies approach adopted in this book.

Indeed cultural studies is an evolving field and is increasingly more receptive to celebrity effects in contemporary society.<sup>28</sup> The usefulness of cultural studies to the right of publicity doctrine rests in its examination of

<sup>26</sup> E.g. Stuart Hall, 'Encoding/Decoding' in Stuart Hall, Dorothy Hobson, Andrew Lowe and Paul Willis (eds), *Culture, Media, Language* (1980) 128; Stuart Hall, 'The Rediscovery of "Ideology": Return of the Repressed in Media Studies' in Michael Gurevitch, Tony Bennett, James Curran and Janet Woollacott (eds), *Culture, Society and the Media* (1982) 56.

<sup>27</sup> E.g. Grant McCracken, 'Who Is the Celebrity Endorser? Cultural Foundations of the Endorsement Process' (1989) 16 *Journal of Consumer Research* 310; Grant McCracken, *Culture and Consumption: New Approaches to the Symbolic Character of Consumer Goods and Activities* (1990). See also Marina Sejung Choi, Hee-Jung Kim and Wei-Na Lee, 'Lessons from the Rich and Famous: A Cross-Cultural Comparison of Celebrity Endorsement in Advertising' (2005) 34 *Journal of Advertising* 85; B Zafer Erdogan, Michael J Baker and Stephen Tagg, 'Selecting Celebrity Endorsers: The Practitioner's Perspective' (2001) 41 *Journal of Advertising Research* 39.

<sup>28</sup> In 2015, a new journal *Persona Studies* was launched. According to the chief editors, the 'culture of producing and monitoring our public selves is the focus of this journal as online culture blends with everyday culture and leads to an insistent proliferation of personas for both presentation and for strategic purposes in order to manage very new notions of value and reputation'. Furthermore, '[h]ow we read celebrity from the position of Persona Studies is that celebrity represents a powerfully visible exemplification of persona: celebrities are public presentations of the self and they inhabit the active negotiation of the individual defined and reconfigured as social phenomenon'. See P David Marshall and Kim Barbour, 'Making Intellectual Room for Persona Studies: New Consciousness and A Shifted Perspective' (2015) 1 *Persona Studies* 1, 9. See also Joseph A Boone and Nancy J Vickers, 'Introduction – Celebrity Rites' (2011) 126(4) *Publications of the Modern Language Association of America* 900; Joshua Gamson,

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the roles and meanings of celebrities in contemporary society and how people consume them and incorporate them into their daily lives. Some of these ideas are evident in the writings of legal scholars like Rosemary Coombe and Michael Madow who have drawn from cultural studies to criticise the right of publicity and other intellectual property regimes for their restrictive impact on the public domain.<sup>29</sup> For example, Madow argues that ‘no such [justification] has yet been made with respect to star images’ that celebrities should be granted ‘property rights in our culture’s basic linguistic, symbolic, and discursive raw materials’.<sup>30</sup> Even courts have sometimes attempted to import cultural studies considerations into their evaluation of the right of publicity claims.<sup>31</sup> However, the perfunctory application of these cultural insights by the Sixth Circuit has met with a number of criticisms.<sup>32</sup> This book will use cultural studies in a manner different from the postmodern agenda of these legal scholars and will engage with it more closely than the existing case law has done. It will instead employ cultural studies with a pragmatic orientation to discover what it has to offer to the advancement of the right of publicity and passing off doctrine.

This book has nine chapters.

Chapter 2 highlights key aspects in cultural studies writings about the contemporary celebrity phenomenon to indicate how some of these may be relevant to the analysis of the elements of a right of publicity claim. It explains how cultural studies has been used by legal scholars writing in a postmodern tradition to criticise the legal recognition of the right of publicity and the impact that the commodification of identity has on the public domain. It will outline how cultural studies will be used in a different manner in this book. With a pragmatic orientation, the final part of this chapter will engage in an analysis of key cultural studies texts which are relevant to an understanding of the cultural, political and economic significance of contemporary celebrity and its relationship

‘The Unwatched Life Is Not Worth Living: Elevation of the Ordinary in Celebrity Culture’ (2011) 126(4) *Publications of the Modern Language Association of America* 1061.

<sup>29</sup> E.g. Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (1998); Rosemary J Coombe, ‘Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue’ (1991) 69 *Texas Law Review* 1853; Madow, above n 18; Keith Aoki, ‘Adrift in the Intertext: Authorship and Audience “Recoding” Rights’ (1993) 68 *Chicago-Kent Law Review* 805; David Lange, ‘Recognizing the Public Domain’ (1981) 44(4) *Law & Contemporary Problems* 147.

<sup>30</sup> Madow, *ibid* 239.

<sup>31</sup> E.g. *ETW Corp v Jireh Publishing Inc*, 332 F 3d 915, 933 (6th Cir, 2003).

<sup>32</sup> E.g. Michael Sloan, ‘Too Famous for the Right of Publicity: *ETW Corp.* and the Trend towards Diminished Protection for Top Celebrities’ (2005) 22 *Cardozo Arts & Entertainment Law Journal* 903, 928–30.

with the audience. It derives two broad insights which will be further explored in the subsequent chapters: (1) that the contemporary celebrity personality is defined in cultural studies by the notion of ‘well-knownness’; and (2) that the majoritarian values or ideals which the celebrity personality may exemplify as a cultural sign can have a significant impact on the consumption of commodities and identity politics which utilise the celebrity symbolically in speech that contributes to a participatory democracy.

Chapter 3 addresses the main theoretical justifications for recognising the right of publicity and outlines the key elements of a right of publicity claim.

Chapter 4 contends that insights from cultural studies support the expansive interpretation of the first element of a right of publicity claim – the ‘indicia of identity’ requirement. It analyses this requirement in purely doctrinal terms before moving to evaluate how cultural studies perspectives on the symbolic meanings that audiences accord to the celebrity personality when making their consumption decisions can support the judicial recognition of other aspects of identity that extend beyond name and likeness. By examining the influential works of cultural scholars who discuss the contemporary celebrity phenomenon, like Dyer, Marshall and Turner, this chapter argues that all forms of *evocative identification* of the celebrity ought to be accepted as being sufficient to satisfy the threshold requirement of identifiability in a right of publicity claim.

Chapter 5 discusses why the second element of commercial appropriation – widely accepted in legal literature as the crux of a publicity claim – is often glossed over by the courts and suggests that only uses of the associative value of the celebrity identity should be actionable. As pointed out in Part II, the right of publicity is not a pure misappropriation tort, and this chapter argues that a narrower interpretation of appropriation should be embraced: only such unauthorised uses of associative value that result in commercial harm should be found to satisfy the element of commercial appropriation. It also contends that perspectives in cultural studies, particularly the findings of McCracken who studied the associative impact of celebrities on the consumption decisions of audiences, support the conclusion that the law ought to focus on *associative appropriation*. Although the right of publicity doctrine does not require the showing of misrepresentation, the judicial presumption that identification is tantamount to misappropriation<sup>33</sup> overly favours the celebrity individual and merits

<sup>33</sup> E.g. *Restatement (Third) of Unfair Competition* § 46 (1995) cmt a; McCarthy, above n 7, § 1:35; *Eastwood v Superior Court for Los Angeles County*, 149 Cal App 3d 409, 420 (1983); *Wendt v Host International, Inc*, 125 F 3d 806, 811–2 (9th Cir, 1997).

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a degree of circumspection. It further recommends the adoption of a direct and substantial connection standard which would better direct judicial attention to the determination of whether the associative value of the celebrity's identity has in fact been appropriated by the defendant; this inquiry ensures that liability is imposed only in the circumstances where the defendant has sought or has realised the transfer of affective values from the celebrity persona to the defendant's product.

Chapter 6 argues that cultural studies supports the protection of certain uses of the celebrity identity as political speech within First Amendment doctrine. It examines how courts have devised various tests to resolve the conflict between the proprietary right of publicity and free speech values protected by the First Amendment. Its doctrinal analysis is premised on a participatory theory of the First Amendment which finds support in Supreme Court decisions and analyses of other legal commentators. Drawing on the cultural writings of scholars like Dyer and Turner, as well as Michael Warner and Rosemary Coombe, this chapter explains why particular uses of celebrity identity, in addition to their economic significance in consumption, may be categorised as 'political speech'. It further suggests how present judicial tests can take into account such *political recordings* of the celebrity sign so as to give greater protection to speech that contributes to democracy.

Chapter 7 considers what lessons, if any, the findings from this research project suggest for another area of law which regulates the commercial exploitation of the celebrity personality. The common law passing off action – the claim relied upon by celebrities in common law jurisdictions, like the United Kingdom and Australia, which do not recognise a right of publicity – is examined. The conclusions are that the insights from cultural studies support the justification for a passing off action that determines liability based on consumers' impression of whether the affective values have been transferred from the celebrity persona to the defendant's product, and that free speech interests, especially political recordings, may be accommodated within the element of misrepresentation. If one accepts the notion of affective transfer as the basis for liability as argued in Chapter 5, then the element of damage should also be evaluated against this understanding. Finally, the analysis suggests that the extended passing off action not only appears to be adequate in protecting against unauthorised exploitation of the associative value of a celebrity's persona but is also able to consider, in a more holistic manner than the right of publicity, the interests of the constituents of the celebrity trinity.

Chapter 8 highlights some important challenges that the digital age in the twenty-first century presents for the laws regulating the commercial

appropriation of fame, focusing, in particular, on the phenomenon of digital fandom, the proliferation of social media platforms and fantasy video games.

Chapter 9 summarises the findings emerging from the doctrinal analysis and relevant writings in cultural studies that are pertinent to the right of publicity and passing off laws. This book demonstrates that, far from being just a theoretical discipline concerned with the politics of power and identity, cultural studies can provide a useful analytical framework for judges, scholars and lawyers to further their understanding of the extra-legal issues relating to the laws protecting the commercial value of contemporary fame.