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Show Me The Money: Movie Quotes as Intellectual Property

SHOW ME THE MONEY: MOVIE QUOTES AS INTELLECTUAL PROPERTY

by Rebecca Shaw

ABSTRACT

Movie quotes are valuable. They make movie studios money and enrich our cultural lexicon through our everyday quoting of movie lines. These movie quotes have value, but are they protectable? And if so, which legal regime would extend protection to movie quotes? After reviewing the relevant legal landscape, this article determines that these valuable phrases could be protected under copyright and trademark law by the courts in infringement actions. But how far should this protection stretch? Extending protection to movie quotes presents the unsettling possibility of overprotection, which can lead to the restriction of free expression and the shrinking of our cultural commons. In light of these concerns, this article argues that movie quotes warrant a very limited scope of protection—something akin to moral rights. It is only through a narrow scheme of protection that the public's right of free expression and our cultural commons can avoid peril.

INTRODUCTION

How much would you pay for a word? A phrase? A sentence? Phrases are worth millions of dollars. Just ask Michael Buffer, the proud owner of the trademark “Let’s get ready to rumble.”¹ In three years, the trademark raked in \$150 million through licensing and infringement litigation.² The value of phrases and words is also evident in the movie industry, as words and phrases compose the scripts that are the essence of movies. And why not? The movie industry stands as one of the leading revenue generators in the United States.³ Production companies will pay for their

words. In 2007, the script for *The Lovely Bones* sold for \$70 million.⁴ Production companies use titles—words and short phrases—to market their movies, and they spend a good deal of money on them too. In the 1990s, Disney paid \$600 thousand for the rights to the movie title “Ransom.”⁵

These figures illustrate the immense value inherent to these words. What if movie production companies took after Mr. Buffer and proactively tried to capitalize on the value of their movie quotes outside of merchandising,⁶ pursuing other legal avenues for revenue generation and value exploitation? Mr. Buffer lamented the fact that no one capitalized on the famous quote “Show me the money!” from *Jerry Maguire*.⁷ The time may come when a production company sets up a strategy to mine the dormant gold from its characters’ words. Our intellectual property laws do not, and should not, support rights holders overreaching and taking these quotes from the mouths of those who have a right to use them.

This article analyzes whether movie quotes are protectable under two intellectual property regimes—copyright and trademark law—and the rights of publicity, as the potential protection of movie quotes depends on how and why the words are used.⁸ Even

2008, and up 37% over 2005.” MOTION PICTURE ASSOCIATION OF AMERICA, *THE ECONOMIC CONTRIBUTION OF THE MOTION PICTURE & TELEVISION INDUSTRY TO THE UNITED STATES* (2010). Further, the motion picture “industry had a positive services trade surplus of \$11.9 billion in 2009, or 8% of the total U.S. private-sector trade surplus in services.” *Id.* Additionally, “the motion picture and television services surplus was larger than the surpluses of the telecommunications, management and consulting, legal, medical, computer, and insurance services sectors.” *Id.* In 2002, the revenue generated through box office sales was \$9.1 billion. MOTION PICTURE ASSOCIATION OF AMERICA, *THEATRICAL MARKET STATISTICS* (2011).

4. Patrick Goldstein, *Cost of Movie Scripts Adds up to a Lot More Than Just Dollars*, CHI. TRIB., June 10, 2007, at Arts & Entertainment 15, available at http://articles.chicagotribune.com/2007-06-10/news/0706080609_1_scripts-lovely-bones-dreamworks.

5. Patrick Goldstein, *Hey, Let’s Play the Movie Title Game!*, LOS ANGELES TIMES, Aug. 20, 1997, at F1, available at http://articles.latimes.com/1997/aug/20/entertainment/ca-24037_.

6. “Merchandising is a multi-billion dollar enterprise.” JOANNA R. JEREMIAH, *MERCHANDISING INTELLECTUAL PROPERTY RIGHTS* § 1.1, at 1 (1997).

7. Chang, *supra* note 2.

8. See Richard W. Stim, *E.T. Phone Home: The Protection*

1. LET’S GET READY TO RUMBLE, Registration No. 2,405,492.

2. Andrew Chang, *Squeezing Millions from a Phrase: How a Few Words, in the Right Hands, Can Mean a Fortune*, ABCNEWS.COM, Apr. 11, 2002, <http://abcnews.go.com/International/story?id=80018>.

3. In 2002, the United States combined projected revenue for motion pictures, television, and video was \$17 billion. STEPHEN E. SIWEK, *COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2004 REPORT* v. 9 (2004) (noting that the report was prepared for the International Intellectual Property Association). “There were \$13.8 billion in film and television exports in 2009, up 3% over

if movie quotes are protectable, significant policy arguments strongly oppose making movie quotes the property of one rights holder.

In Part I, a review of the relevant legal landscape, this article determines whether movie quotes are protectable under any of the three legal regimes. Protection of movie quotes boils down to what is known as the “if value, then right” theory. If something is valuable, one should have the right to exploit it and, more importantly, the corollary right to receive revenues from that exploitation. Because value exists in these movie quotes, which are arguably independent property rights, someone should have a right to exploit them.

This article first reviews the current state of copyright law because movie quotes are pieces of larger copyrightable works—scripts and motion pictures. Consequently, movie quotes might find some level of protection as literary works under this regime. This article determines that courts will protect movie quotes under copyright law, although these quotes are not copyrightable.⁹ In doing so, this article identifies the danger of courts allowing copyright holders to use a single movie quote—without anything more—to defeat a claim of fair use in an infringement action. Consequently, current copyright law could allow an uncopyrightable quote from a copyrighted movie script to prevent any use of the script, thus making the movie quote a powerful and silencing rights-protection tool. This article addresses this chilling proposition in depth.

This article proceeds by considering the protection of movie quotes under the law of trademarks, as movie quotes are embedded in our culture and are strongly associated with particular movies. This article reviews the objectives of the Lanham Act and the basic legal framework for the protection of a mark. This article then applies these propositions to movie quotes, concluding that they cannot be used as trademarks in connection with a movie.

Finally, this article considers the potential value of rights of publicity, which have been extended to catchphrases. By analyzing the right of publicity not of an actor, a producer, or even a fictional character, but of a movie itself, current law suggests that movie

quotes cannot be protected under rights of publicity.

After surveying the intellectual property landscape to determine if movie quotes are protectable intellectual property, this article presents several policy arguments in support of little to no protection of movie quotes under any legal regime. First, movie quotes are part of the cultural commons. By incorporating these quotes into our cultural lexicon, the public adds value to movie quotes, granting the public the right to use them freely. Second, the overextension of intellectual property rights to movie quotes intrudes on First Amendment rights. Finally, courts risk allowing trademark law to substitute for copyright protection by extending trademark protection to movie quotes. In essence, aggressively protecting movie quotes would stifle our cultural commons and restrict free speech.

I. “THERE’S GOLD IN THEM THAR HILLS”¹⁰ — IF VALUE, THEN RIGHT

The logic is simple: if something is valuable, then you should have the right to exploit that value by excluding others from using it.¹¹ The right/value theory, the premise that “if value, then right,” has been primarily used in connection with establishing new property rights in intangible assets.¹² However, this concept was controversial when first introduced¹³ and continues to be criticized by scholars.¹⁴ Nevertheless, courts use the right/value theory in common law to determine and enforce rights¹⁵ and could continue this

10. *DESTROY RIDES AGAIN* (Universal Pictures 1939).

11. Lawrence Lessig nicely summarizes the theory through the lens of piracy when he writes:

Creative work has value; whenever I use, or take, or build upon the creative work of others, I am taking from them something of value. Whenever I take something of value from someone else, I should have their permission. The taking of something of value from someone else without permission is wrong. It is a form of piracy.

LAWRENCE LESSIG, *FREE CULTURE* 18 (Penguin eds., 1st ed. 2005).

12. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 239–40 (1918) (finding value in “hot news” because the news was made valuable “as the result of organization and the expenditure of labor, skill, and money”); see also *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (“Whether [something] be labelled [sic] a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.”).

13. See *Int’l News Serv.*, 248 U.S. at 246 (Holmes, J., dissenting) (“Property, a creation of law, does not arise from value, although exchangeable—a matter of fact.”).

14. See Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 *NOTRE DAME L. REV.* 397, 407 (1990) (“The fallacies in the right/value theory can be revealed in a number of ways.”).

15. See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic*

of Literary Phrases, 7 *U. MIAMI ENT. & SPORTS L. REV.* 65, 67–68 (1989).

9. This article delves into this distinction in the discussion below, but offers a brief summary here. Generally, a movie quote is not sufficiently original to stand on its own as a copyrightable work. However, a movie quote can receive protection in an infringement action while still not being independently copyrightable, as a movie script would be.

reliance to expand intellectual property rights.¹⁶

Movie quotes have strong value. In many instances, they can “sell” a movie through trailers or advertising, or entice people to see the movie repeatedly. What is *The Wizard of Oz* without “[t] here’s no place like home?” Movie quotes imbue the movie with all of its memorable “moments”:¹⁷ “You had me at hello;”¹⁸ “This is the beginning of a beautiful friendship;”¹⁹ and “I think we’re going to need a bigger boat.”²⁰ Each quote is “kind of a verbal shorthand for the film.”²¹

Production companies invest time and money in movie quotes when they pour money into bidding on and developing a script before a film is even made. Actors deliver them with the perfect inflection, gesture, and nuance so that viewers repeat them, sometimes incessantly, when they leave the theater.²² Thus, the value of movie quotes derives from both the movie itself and the cultural value that it acquires when viewers fold it into their daily lives and, thus, into our culture.²³ Regardless of the source of a movie quote’s value, either from the public or the movie itself, under the value/right theory production companies argue that they should have a right to exploit the enormous value their movie quote represents. The question is, how far will production companies go to enforce and expand their rights in court?

Comm., 483 U.S. 522, 532 (1987) (explaining that in the context of trademarks, “when a word acquires value ‘as the result of organization and the expenditure of labor, skill, and money’ by an entity, that entity constitutionally may obtain a limited property right in the word.”) (quoting *Int’l News Serv.*, 248 U.S. at 239).

16. See Dreyfuss, *supra* note 14, at 405 (finding that courts are likely to use the value/right theory to expand the reach of trademark owners’ rights).

17. Piet Levy, *Yeah, Baby! You Heard It Here First: Quotes Speak for Themselves, but Had Help Learning to Talk*, MILWAUKEE J. SENTINEL, June 21, 2005, at E Cue. These particular quotes are why the American Film Institute aired a three-hour special on the 100 greatest American movie quotes. One of the criteria for judging was “cultural impact,” in which jurors took into account whether viewers use the quotes in their own lives, whether the quote had circulated through popular culture, and whether the quote had become part of the American lexicon. American Film Institute, *AFI 100 Years . . . 100 Movie Quotes*, <http://www.afi.com/100years/quotes.aspx> (last visited Nov. 15, 2011).

18. JERRY MAGUIRE (TriStar Pictures 1996).

19. CASABLANCA (Warner Bros. Pictures 1942).

20. JAWS (Zanuck/Brown Productions 1975).

21. Levy, *supra* note 17 (quoting Michael T. Marsden, co-editor of the *Journal of Popular Film and Television*).

22. Donna Isabell Walker, “*Yeah, Baby!*,” GREENVILLE NEWS, Jan. 30, 2005, at D.1 (“Those lines and phrases can . . . worm their way into your vocabulary.”).

23. See Levy, *supra* note 17 (showing that movie quotes have become part of popular culture); Walker, *supra* note 22 (writing that memorable quotes become part of our cultural lexicon).

A. “But you didn’t get his permission, and that’s copyright infringement”²⁴ —
Copyright

The most logical place to begin the analysis of potential protection of movie quotes is copyright, as this area of the law has directly addressed the protection of short phrases and words. Copyright protection extends to creative works generally, such as movie scripts, novels, and song lyrics. Copyright is a constitutionally based form of intellectual property protection that covers literary, dramatic, artistic, and certain other intellectual works.²⁵ Screenplays qualify as copyrightable dramatic works, and movie quotes comprise parts of the screenplay. If copyright protects the screenplay then, so the logic goes, why cannot copyright extend to a movie quote independent of the larger work? For example, copyright would protect the script to *Gone With the Wind* and “Frankly, my dear, I don’t give a damn.” With this in mind, this article first reviews the pertinent copyright law landscape and then applies these principles to determine if movie quotes could, indeed, stand alone as protectable intellectual property.

1. General Principles of Copyright Law

Copyright law promotes the progress of the arts and dissemination of knowledge by giving authors a limited monopoly in the exclusive rights to their works.²⁶ To be entitled to copyright protection, a work must be original and “fixed in a tangible medium of expression.”²⁷ Originality, in the context of copyright law, is not novelty, but rather independent creation.²⁸ To satisfy the originality requirement of copyright, a work must possess at least some minimal level of creativity.²⁹ In *Feist Publications v. Rural Telephone*

24. THE PEOPLE VS. LARRY FLYNT (Columbia Pictures 1996).

25. U.S. CONST., art. 1, § 8, cl. 8. See generally 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08 (4th ed. 1994 & Supp. 2010) (reviewing the scope of works protected under the Constitution); Tom Bragelman, *Copyright Law in and Under the Constitution: The Constitutional Scope and Limits to Copyright Law in the United States in Comparison With the Scope and Limits Imposed by Constitutional and European Law on Copyright Law in Germany*, 27 CARDOZO ARTS & ENT L.J. 99, 104–09 (2009) (reviewing the scope of “writings” under the art. 1, § 8, cl. 8 of the Constitution).

26. U.S. CONST., art. 1, § 8, cl. 8. This limited monopoly lasts for the author’s life plus 70 years. 17 U.S.C. § 302(a) (2006).

27. 17 U.S.C. § 102(a).

28. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

29. *Id.*

Service Co.,³⁰ the Supreme Court explained, “the requisite level of creativity is extremely low; even a slight amount will suffice.”³¹ For instance, writing a short note on a cocktail napkin to remind yourself to take the trash out and pick up the kids would satisfy the originality requirement.³²

Despite the low bar for originality, copyright does not extend to any “idea, procedure, process, system, method of operation, concept, principle, or discovery.”³³ Copyright only covers the expression of these uncopyrightable elements.³⁴ This is known as the “idea/expression” dichotomy.³⁵ It represents the proposition that facts and ideas are available for all to use, whereas an individual’s expression of these ideas and facts is copyrightable.³⁶ For instance, you cannot copyright the idea of two young lovers whose families are feuding. However, you can copyright the entire screenplay that originally expresses and plays out this very idea.³⁷

Related to the idea/expression dichotomy is the concept of merger, where the expression is so inextricably merged with an idea that there are a limited number of ways in which to express the idea.³⁸ This is known as the “merger doctrine.” For instance, there are only so many ways to describe grocery products on an online grocery shopping system, and accordingly, such descriptions are uncopyrightable.³⁹ There are also only so many ways to write certain movie quotes to express a crazy man’s threat, such as “You talkin’ to me?”⁴⁰ or a woman’s desire for a little breathing room, such as “I want to be alone.”⁴¹

Along with being original, a work must be

“fixed” in a “tangible medium of expression.”⁴² The fixation requirement is flexible. A movie script, and of course movie quotes, can be fixed on a movie reel, a DVD, a computer chip, a hard drive, and old-fashioned paper.⁴³

In reviewing just the above principles of copyright law, one could legitimately conclude that a movie quote should be copyrightable. A quote could be sufficiently original standing on its own and fixed in a tangible medium of expression. However, the Copyright Office and a majority of the courts would disagree.

2. Copyright Office Policies and the Courts

As noted above, courts could consider arbitrary and fanciful original movie quotes copyrightable literary expression, as neither the Copyright Clause nor the Copyright Act rule out such copyrightability.⁴⁴ However, “mere words and short phrases, even if they occur in a copyrighted work, do not themselves enjoy protection against copying.”⁴⁵ For example, literary titles are not copyrightable under the Copyright Act.⁴⁶ This proposition is based in part on the Copyright Office’s longstanding policy of barring registration of single words and short phrases.⁴⁷ The Copyright Office has steadfastly held to this policy, even intervening where courts have attempted to expand copyright to single words and short phrases.⁴⁸

An illustrative example of the Copyright Office’s adherence to its practice of not registering single words or short phrases is *Cook v. Robbins*,⁴⁹ an

30. *Id.*

31. *Id.* (presenting what is hereafter referred to as the “*Feist* rule”).

32. *See id.*

33. 17 U.S.C. § 102(b).

34. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 557 (1989); *Baker v. Selden*, 101 U.S. 99, 103 (1879).

35. *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991); *see Baker*, 101 U.S. at 103.

36. *Feist*, 499 U.S. at 350; *Baker*, 101 U.S. at 103.

37. For example, how many versions of *Romeo and Juliet* have you seen?

38. *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967) (“When the uncopyrightable subject matter is very narrow, so that ‘the topic necessarily requires,’ if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party . . . by copyrighting a mere handful of forms, could exhaust all possibilities of future use” [of the expression.]) (internal citations omitted).

39. *See MyWebGrocer, LLC v. Hometown Info, Inc.*, 375 F.3d 190, 194 (2d Cir. 2004).

40. *TAXI DRIVER* (Columbia Pictures 1976).

41. *GRAND HOTEL* (Metro-Godwyn-Mayer 1932).

42. 17 U.S.C. § 102(a) (2006).

43. *See id.* § 101 (defining “fixed” as embodied in a medium “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”). Because movies and their respective scripts and quotes are sufficiently fixed, this article will not focus on the fixation requirement for copyright protection.

44. *See NIMMER, supra* note 25, § 2.16, at 185–86 (discussing the copyrightability of titles, which consist of short phrases).

45. *Arvelo v. Am. Int’l Ins. Co.*, Copy. L. Rep. (CCH) P27,493, at *2 (1st Cir. 1995).

46. *See NIMMER, supra* note 25, § 2.16, at 185 (“It is . . . clear, as a matter of statutory construction by the courts (as well as Copyright Office Regulations), that titles may not claim statutory copyright.”) (footnotes omitted).

47. 37 C.F.R. § 202.1(a) (2005) (excluding from protection “[w]ords and short phrases such as names, titles, and slogans”); *see U.S. COPYRIGHT OFFICE, COPYRIGHT CIRCULAR 34: COPYRIGHT PROTECTION NOT AVAILABLE FOR NAMES, TITLES, OR SHORT PHRASES* (2010).

48. *See Justin Hughes, Size Matters (or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575, 591 (2005).

49. *Cook v. Robbins*, Nos. 98-36242, 99-35141 (9th Cir. Nov.

unpublished case from the Ninth Circuit. Wade Cook was the author of a best-selling book titled *Wall Street Money Machine*, in which he used “his experiences as a former taxi cab driver to advocate strategies for stock and stock option transactions.”⁵⁰ The Ninth Circuit found that two short phrases from Cook’s book were copyrightable, referring to evidence that the two phrases were, according to author Cook, “an ‘important part of my book.’”⁵¹ Two of the investment concepts that Cook developed for and presented in the book are the “meter drop” and the “rolling stock.”⁵² Anthony Robbins, a financial expert, taught several financial seminars in which the driving theme was the “ring toss concept.” However, once Robbins read Cook’s *Wall Street Money Machine*, he incorporated “meter drop” and “rolling stock” into a new seminar called “Financial Power.”⁵³ Specifically, the Financial Power seminar manual included the phrase “meter drop” nine times and “rolling stock” twice.⁵⁴ In later editions of the Financial Power manual, the phrase “meter drop” appeared in six places, but “rolling stock” was eliminated.⁵⁵

Cook filed for copyright infringement of *Wall Street Money Machine* based on eleven different passages from the Financial Power manual.⁵⁶ The jury found that Robbins had infringed two of the four phrases at issue—“Money is made on the Meter Drop” and “No one I know has come up with a name for the type of investing I call ‘Rolling Stocks’”—and awarded Cook \$655,900 in damages.⁵⁷ Subsequently, Robbins moved for judgment as a matter of law. The judge granted the motion because Cook did not prove a causal relation between the infringing phrases and Robbins’s profits from his Financial Power seminars.⁵⁸

On appeal, the Ninth Circuit reversed the district court and ordered the jury award to be reinstated. The court based its reasoning on the Feist rule that to be entitled to copyright protection, a work must possess a minimal level of creativity and that the

required level is extremely low to satisfy “originality.”⁵⁹ The court focused on Robbins’s testimony that he used Cook’s “unique phrases because of their creativity” and that he had never used the terms “meter drop” or “rolling stock” before reading Cook’s book.⁶⁰ Consequently, the court concluded that “Cook’s complete expressions in conveying the meaning of ‘meter drop’ and ‘rolling stock’ are creative, even if only minimally so, and are protected by his copyright in *Wall Street Money Machine*.”⁶¹

The Ninth Circuit’s decision greatly concerned the Copyright Office, as it believed that the Ninth Circuit had ignored the “longstanding fundamental doctrine of copyright law” that copyright law does not protect short phrases.⁶² Further, the Office feared that if the decision from one of the leading copyright circuits stood, the Copyright Office’s “longstanding examination practices,” codified in Rule 202.1(a) and reflected in *Compendium II: Copyright Office Practices*,⁶³ would be eroded.⁶⁴ Consequently, the Office recommended to the Department of Justice that the United States intervene to request rehearing en banc.⁶⁵ However, no intervention was required. Before the U.S. Government had decided on a course of action, the parties settled and the Ninth Circuit ordered the withdrawal of the opinion.⁶⁶

As evidenced by its planned intervention in Cook, the Copyright Office remains dedicated to maintaining the fundamental principle that single words and short phrases are unprotected by copyright.

Similar to the Copyright Office, courts generally⁶⁷ do not find single words and short phrases

16, 2000).

50. *Id.* at *3.

51. *Id.*

52. *Id.* “Meter drop” describes the technique of making small gains in lieu of waiting for a single big transaction. *Id.* A “rolling stock” is “stock that tends to consistently roll up to a specific price point and then drop down to a specific price point in an obvious pattern of repeated waves.” *Id.*

53. *Id.* at *3–4.

54. *Id.* at *4.

55. *Id.*

56. *Id.*

57. *Id.* at *6.

58. *Id.*

59. *Id.* at *12.

60. *Cook v. Robbins*, Nos. 98-36242, 99-35141, at *12 (9th Cir. Nov. 16, 2000).

61. *Id.* at *12–13.

62. Letter from David O. Carson, Gen. Counsel, U.S. Copyright Office, to Robert E. Kopp, Civil Div., U.S. Dep’t of Justice (Dec. 13, 2000) (copy on file with author) [hereinafter Carson Letter I]. The letter even notes that the Ninth Circuit acknowledged the “words and short phrases doctrine” in a previous case. *Id.*; see *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, n. 7 (9th Cir. 1993).

63. The *Compendium* is the Office’s internal manual of guidelines for examination applications to register copyrights. The Office is currently revising the *Compendium*. U.S. COPYRIGHT OFFICE, PRIORITIES AND SPECIAL PROJECTS OF THE UNITED STATES COPYRIGHT OFFICE 13 (2011), available at <http://www.copyright.gov/docs/priorities.pdf>.

64. Carson Letter I, *supra* note 60.

65. *Id.*

66. Letter from David O. Carson, Gen. Counsel, U.S. Copyright Office, to Robert E. Kopp, Civil Div., U.S. Dep’t of Justice (Dec. 26, 2000) (copy on file with author); Hughes, *supra* note 46, at 591.

67. Generally does not mean never, as *Cook v. Robbins* demonstrates. See *Health Grades, Inc. v. Robert Wood Johnson*

copyrightable because they do not possess the requisite amount of originality to receive copyright protection.⁶⁸ Many courts refer to Rule 202.1(a) in making this decision.⁶⁹ For instance, the Central District of California District Court, in *Columbia Pictures Indus. v. Miramax Films Corp.*,⁷⁰ refused to consider a copyright infringement claim in the movie tag line

Univ. Hosp., Inc., 634 F. Supp. 2d 1226, 1238 (D. Colo. 2009) (“[I]t does not make sense to state categorically that no combination of numbers or words short enough to be deemed a ‘phrase’ can possess ‘at least some minimal degree of creativity’” as required for copyright protection under *Feist*); *Johnston v. Twentieth Century-Fox Film Corp.*, 187 P.2d 474, 482 (Cal. Ct. App. 1947) (“[A] person may have a property right and the right to the exclusive use of arbitrary or fictitious or fanciful or artificial or technical names or titles.”). However, as Professors Nimmer states, “Such suggestions, however, must be regarded as contrary to the generally prevailing rule that [short words and phrases] may not claim copyright protection under either common law or statutory copyright principles.” NIMMER, *supra* note 25, § 2.16, at 186.

68. 37 C.F.R. 202.1(a); see *Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1385 (Fed. Cir. 2007) (holding that “[c]opyright does not protect individual words and ‘fragmentary’ phrases when removed from their form of presentation and compilation”); *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996) (“It is axiomatic that copyright law denies protection to ‘fragmentary words and phrases’ . . . on the grounds that these materials do not exhibit the minimal level of creativity necessary to warrant copyright protection.”) (internal citations omitted); *Acuff-Rose Music, Inc. v. Jostens, Inc.*, 988 F. Supp. 289, 294 (S.D.N.Y. 1997) (finding the song lyric “You’ve got to stand for something or you’ll fall for anything” uncopyrightable because the phrase lacked the requisite originality and did not originate with the song’s creators); see also *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 534 (5th Cir. 1994) (finding that “specific words, phrases, and sentences” were not copyrightable); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1072–73 (2d Cir. 1992) (noting that single words and short phrases in copyrighted text were not copyrightable). See generally NIMMER, *supra* note 25, § 2.01[b] (discussing the copyrightability of words and short phrases in the context of originality).

69. See *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286 (3d Cir. 2004) (“We believe that the Copyright Office’s longstanding practice of denying registration to short phrases merits deference.”); *CMM Cable Rep, Inc.*, 97 F.3d at 1520 (“Copyright Office’s own interpretive regulations explicitly embrace this rule of non-copyrightability” of words and short phrases.); *Prunte v. Universal Music Grp., Inc.*, 699 F.Supp.2d 15, 25–26, 29 (D.D.C. 2010) (citing to Rule 202.1(a) in finding titles, words, and short phrases are not copyrightable); *Magic Mktg., Inc. v. Mailing Servs. of Pittsburgh, Inc.*, 634 F. Supp. 769, 771–72 (W.D. Penn. 1986) (using Rule 202.1(a) to support the proposition that words and phrases do “not exhibit the minimal level of creativity necessary to warrant copyright protection.”); see also *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959) (finding that while this policy “does not have the force of statute, it is a fair summary of the law”). However, in one case, the District of Colorado was unconvinced about the stature of the Copyright Office regulations, finding that they were “a rough starting point for an originality analysis, not a shortcut for avoiding this analysis. Short phrases are typically unprotectable because they are either insufficiently independent or insufficiently creative or both.” *Health Grades, Inc.*, 634 F. Supp. 2d at 1238. This court’s view has not been taken hold.

70. 11 F. Supp. 2d 1179 (S.D. Cal. 1998).

“PROTECTING THE EARTH FROM THE SCUM OF THE UNIVERSE,” finding it unprotected by copyright because of the Copyright Office’s bar against words and short phrases.⁷¹ Thus, under the majority of the case law, movie quotes fall in the category of “short words and phrases” and, therefore, are not copyrightable.⁷²

Additionally, individuals hauled into court to defend a copyright infringement claim have two defenses. This article discusses these in the context of alleged infringement of short phrases from a larger copyrighted work. First, the defendant can argue *de minimis* copying. Under this theory, the copyright owner fails to prove that the defendant has taken enough of the copyrighted work to satisfy the required elements of substantial similarity to support an infringement claim.⁷³ The second line of defense available is fair use. Under fair use, a defendant’s otherwise infringing copying of another’s material does not qualify as illegal provided the defendant copied the material for a limited and transformative purpose.⁷⁴

3. The *De Minimis* Defense

For a plaintiff to have a successful *prima facie* copyright infringement case, she must establish that the defendant has copied her work.⁷⁵ Copying, in this context, has two components the plaintiff must prove: (1) that the defendant actually copied protected elements of her copyrighted work, and (2) that the defendant’s subsequent work is substantially similar to the original work.⁷⁶ Where the copying is so minimal that it cannot uphold a finding of substantial similarity, it is considered *de minimis*.⁷⁷ As discussed

71. *Id.* at 1185.

72. *Murray Hill Publ’ns, Inc. v. ABC Commc’ns, Inc.*, 264 F.3d 622, 633 (6th Cir. 2001) (declining to extend copyright protection to a movie quote because it was an “insignificant part of a much larger work and it is a phrase or slogan not worthy of copyright protection in its own right”); see NIMMER, *supra* note 25, § 2.01(b), at 16–17 (referring to the majority rule that short words and phrases are not copyrightable).

73. NIMMER, *supra* note 25, § 13.03(A)(2)(a), at 58–59; see Connor Moran, *How Much Is too Much? Copyright Protection of Short Portions of Text in the United States and European Union After Infopaq International A/S V. Danske Dagblades*, 6 WASH. J. L. TECH. & ARTS 247, 249 (2011). This article will expand on substantial similarity in the larger *de minimis* discussion.

74. NIMMER, *supra* note 25, § 13.05. This article expands upon what limited and transformative purpose qualify as fair use below.

75. *Id.* § 13.01 (noting that the second element is the plaintiff’s ownership of the copyright in the allegedly infringed work).

76. *Id.* § 13.01(B).

77. *Id.* As Judge Learned Hand wrote over a century ago,

above, copyright does not protect all elements of a work—like ideas or facts—but only those that contain a minimal level of creativity to satisfy copyright’s originality requirement.⁷⁸ Copyright extends only to the expression of those unprotected elements.⁷⁹

Copying similar or identical words or short phrases generally qualifies as *de minimis* and does not constitute infringement.⁸⁰ Nevertheless, protection of short phrases in the infringement context has varied widely across different courts and cases.⁸¹ What is more, courts have suggested that particularly original or important phrases or single words from a larger copyrighted work might merit protection in a copyright infringement claim.⁸² These cases crucially do not find that these words or phrases are copyrightable—that is, capable of standing alone as copyrightable works under the Copyright Act⁸³ apart from the larger work that spawned them. These cases clearly indicate that short phrases could receive protection in the limited context of a suit for a copyright infringement action.⁸⁴ Thus, it appears that courts are willing to find short phrases protectable in a copyright infringement action,

if the court finds that the phrases are sufficiently original or significant to the original work.

4. Fair Use

Fair use, unlike the *de minimis* defense, is an affirmative defense.⁸⁵ Under the doctrine of fair use, otherwise infringing uses of a copyrighted work do not subject an individual—an amateur filmmaker, perhaps—to liability because such uses are socially and culturally valuable.⁸⁶ The Copyright Act lists four factors the courts use to determine if a defendant’s use of a work is indeed a fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁸⁷

As fair use relates to movie quotes, the length of the alleged infringement, here a line from a long movie script, implicates primarily the first and third factors. Courts should not, however, analyze these factors in isolation; rather, “[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright.”⁸⁸

Unlike most modern movies, no two fair use analyses are alike. A court’s decision depends on the significance it places on each factor in its analysis.⁸⁹

“Even where there is some copying, that fact is not conclusive of infringement. Some copying is permitted. In addition to copying, it must be shown that this has been done to an unfair extent.” *W. Publ’g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (C.C.E.D.N.Y. 1909).

78. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

79. *Id.*

80. *See CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519–20 (1st Cir. 1996) (finding no substantial similarity based on defendant’s use of an identical phrase to describe a radio call-in competition similar to plaintiff’s); *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393, 1404 (S.D.N.Y. 1973) (finding the song lyric “Got my mojo working but it just won’t work on you” not sufficiently unique or qualitatively significant to support a finding of substantial similarity).

81. *Compare Dawn Assocs. v. Links*, 203 U.S.P.Q. 831, 835 (N.D. Ill. 1978) (finding substantial similarity, and thus copyright infringement, in defendants’ use of the sentence, from plaintiff’s screenplay, “When there is no more room in hell . . . the dead will walk the earth” in advertising materials), *with Stratchborneo*, 357 F. Supp. at 1404 (failing to find substantial similarity in defendants’ use of a song lyric because it was not sufficiently unique to support such a finding).

82. *See Heim v. Universal Pictures Corp., Inc.*, 154 F.2d 480, 487 n.8 (2d Cir. 1946) (suggesting that copyright protection would be accorded such lines as “Euclid alone has looked on Beauty bare” and “Twas brillig and the slithy toves” in a copyright infringement action); *Life Music, Inc. v. Wonderland Music Co.*, 241 F. Supp. 653, 656 (S.D.N.Y. 1965) (suggesting that a single word “SUPERCALAFRAJALISTICK-ESPEEALADOJUS” was “conceivably” protectable in an infringement action).

83. As discussed above, copyrightable works must satisfy the statutory requirements of copyrightable subject matter—fixation and originality—in § 102.

84. *See NIMMER*, *supra* note 25, § 2.01(B), at 17 n.41 (“[The court] was not discussing copyrightability, but rather the extent of copying necessary to establish an infringement.”).

85. *Id.* § 13.05, at 155.

86. *See Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980) (“The doctrine of fair use . . . permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”).

87. 17 U.S.C. § 107 (2006). In an attempt to provide further guidance for the courts in determining whether a use is fair, the preamble to § 107 lists the following protected purposes: “criticism, comment, news reporting, teaching . . . , scholarship, or research.” *Id.* However, this is not an exhaustive list of fair use examples, so courts are not limited to these uses in considering what constitutes a protective purpose in their fair use analyses. *Bouchat v. Baltimore Ravens Ltd. P’ship*, 619 F.3d 301, 307–08 (4th Cir. 2010) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985)).

88. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

89. For example, the importance courts (including the Supreme Court) place on the fourth factor has waxed and waned. *See, e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (“This last factor is undoubtedly the single most

Depending how a court marshals the fair use factors, a seemingly fair use can become decidedly infringing in litigation. In other words, no one knows if a use is fair until a court has conducted its analysis, especially when “there is no amount of copying so small as to be presumptively fair use.”⁹⁰

The discussion above illustrates the flexibility of the fair use analysis, but that same flexibility often produces unpredictable and inconsistent results. Indeed, fair use is a difficult doctrine for courts to apply. To begin, the Copyright Act provides no guidance as to the relative weight a court should ascribe to each of the four factors.⁹¹ Additionally, the Copyright Act delineates each factor in only the most general terms,⁹² leaving courts with seemingly complete discretion in deciding whether any one factor is present in any specific case.⁹³ In other words, the Copyright Act offers courts little guidance in rendering any fair use decision because it is silent on how to apply these nicely bundled, broadly defined, four factors. As one court expressed it, the doctrine of fair use is “the most troublesome in the whole of copyright law.”⁹⁴ The troublesome nature of the doctrine can

important element of fair use.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 476 (1984) (Blackmun, J., dissenting) (“[P]erhaps the most important, [is] the ‘effect of the use upon the potential market for or value of the copyrighted work.’”); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1407 (6th Cir. 1996) (Ryan, J., dissenting) (“The fourth factor is the single most important element of fair use.”). *But see* *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) (“The Supreme Court has recently retreated from its earlier cases suggesting that the fourth statutory factor is the most important element of fair use.”); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 926 (2d Cir. 1994) (suggesting that the Supreme Court has “abandon[ed] the idea that any factor enjoys primacy [and] instructs that ‘[a]ll [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright.’”) (citing *Campbell*, 510 U.S. at 578).

90. *Campbell*, 510 U.S. at 577; Moran, *supra* note 71, at 251.

91. *Sony Corp. of Am.*, 464 U.S. at 476 (Blackmun, J., dissenting); NIMMER, *supra* note 25, § 13.05; *see* 17 U.S.C. § 107 (2006) (failing to offer any guidance on how to weigh the four factors put forth).

92. NIMMER, *supra* note 25, § 13.05; *see* 17 U.S.C. § 107.

93. NIMMER, *supra* note 25, § 13.05; *see* Elizabeth Dauer & Allison Rosen, *Copyright Law and the Visual Arts*: Fairey v. AP, 8 U. DENV. SPORTS & ENT. LAW J. 93, 103 (2010) (identifying the “broad discretion given trial judges in applying the four fair use factors”); Giselle Fahimian, *How the IP Guerrillas Won: ®™Mark, Adbusters, Negativland, and the “Bullying Back” of Creative Freedom and Social Commentary*, 2004 STAN. TECH. L. REV. 1, 39 (2004) (identifying the application of the fair use doctrine as “often haphazard and arbitrary” because of the “broad discretion of courts with regard to the weight given to each [fair use] factor”); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 453 (2002) (writing that “Congress expressly contemplated that fair use would remain a flexible doctrine that judges could freely adapt to meet changing circumstances”).

94. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir.

produce disconcerting results.

5. Copyright Law Principles as (Mis) Applied by the Courts

Despite the general proposition that short phrases are not copyrightable, some courts have extended protection to these ordinarily uncopyrightable phrases,⁹⁵ including movie quotes. Moreover, some courts do so without a fair use or de minimis analysis.⁹⁶ The implication of this line of jurisprudence is significant for movie quotes as it represents the danger that courts could find a perfectly legitimate use of a movie quote infringes another’s copyright.

One primary example is *Universal City Studios, Inc. v. Kamar Indus., Inc.*,⁹⁷ in which the court reviewed both trademark and copyright infringement claims in considering the likelihood of success on the merits as part of a preliminary injunction analysis. In *Kamar*, the district court concluded that the lines “I love you, E.T.” and “E.T. phone home!” from the movie *E.T.: The Extra-Terrestrial*, spoken by the eponymous E.T., were copyrightable.⁹⁸

Before conducting its copyright and trademark infringement analyses, the court determined that Universal had valuable trademark rights in both the famous E.T. character and the name “E.T.”⁹⁹ In doing so, the court did not expressly find that Universal had rights in the quotes “E.T., phone home” and “I love you, E.T.”¹⁰⁰

Nevertheless, the court listed as “findings of fact” that Universal had established trademarks in the character and the name “E.T.” and that Kamar had likely infringed on these trademarks. Specifically, the court wrote that the quotes “would be recognized

1939) (per curiam). *See, e.g., Sony Corp. of Am.*, 464 U.S. 417, 475 (1984) (Blackmun, J., dissenting); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1255 (2d Cir. 1986); *Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980); *Wojnarowicz v. American Family Ass’n*, 745 F. Supp. 130, 142 (S.D.N.Y. 1990); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968); *see also* 4 NIMMER, *supra* note 25, § 13.05.

95. *See* Hughes, *supra* note 46, at 583–84 (describing *Universal City Studios, Inc. v. Kamar Indus., Inc.* in which short phrases from the movie *E.T.: The Extra Terrestrial* were considered protected by copyright).

96. *Id.*

97. 217 U.S.P.Q. 1162 (S.D. Tex. 1982).

98. *Id.* at 1164.

99. *Id.* at 1164.

100. *Id.* at 1164–65. The court describes these quotes as thematic tropes that drove the overarching theme of movie’s story. *Id.* at 1165 (“These themes are consistently emphasized and repeated throughout the movie in the sentences “I love you, E.T.” and “E.T. phone home!”).

readily by the average lay observer as having been appropriated from Universal's copyrighted motion picture";¹⁰¹ and that Kamar's "unauthorized use of the name "E.T." on its products, and its reproduction of lines of dialogue from [the film] are likely to cause confusion as to the source of Kamar's products."¹⁰² Note that the court did not characterize Kamar's use of the quotes as "unauthorized" as it did the name "E.T."

After making these factual findings, the court delved into its copyright analysis, stretching both the facts and the law to establish de facto copyright protection of the two famous quotes from the movie.¹⁰³ Using the average lay observer test to determine if Kamar's use was copyright infringement,¹⁰⁴ the court reasoned that the "E.T." quotes on Kamar's products "would be readily recognizable to the lay observer as key lines of dialogue from the copyrighted movie."¹⁰⁵ Taking a further leap, the court concluded that Kamar had infringed Universal's copyrights.¹⁰⁶

It appears that because the court found that the "E.T." name and character were Universal's valuable trademarks, it did not conduct any sort of recognizable copyright analysis, such as a de minimis or a fair use analysis, but based its decision on how important the quotes were to the film.¹⁰⁷ Under the court's theory, if a movie quote is "readily recognizable" in terms of its relationship to the movie, it will be protected by copyright.¹⁰⁸ Kamar's specific application of copyright law, however, seems to be anomalous—the only case directly citing to its copyright infringement rationale distinguished the cases' facts.¹⁰⁹ Further, the

court's confused conclusion likely resulted from the intertwined trademark/copyright analysis,¹¹⁰ preventing the case's reasoning from gaining traction, and from being published in the federal reporter.¹¹¹ Nevertheless, it does indicate that a movie quote could be protectable intellectual property under copyright law, though it is not copyrightable.

Continuing in Kamar's trend, courts have found that a defendant's use of a short textual, not copyrightable, excerpt in a secondary work is not a fair use. Courts do so under the doctrine of qualitatively substantial copying, which allows courts to extend the short excerpt protection from infringement.¹¹² This clearly pertains to movie quotes, which are short textual excerpts of a larger work. The doctrine of qualitatively substantial copying concerns the third fair use factor, in which courts consider both the quantitative and the qualitative nature of the defendant's use.¹¹³ In other words, courts examine not only the length of the appropriated text, but "whether [the defendant's use is reasonable] in light of the purpose and character of the use."¹¹⁴ In measuring the qualitative substantiality of an allegedly infringing use, the courts rely on

work—is not anomalous.

110. Hughes, *supra* note 46, at 583.

111. In *Dawn Assocs. v. Links*, 203 U.S.P.Q. 831 (N.D. Ill. 1978), which preceded *Kamar*, the court conducted a very similar analysis to the court in *Kamar* to find both copyright and trademark infringement in the use of a line from the plaintiff's screenplay and advertising materials. *Id.* at 385. Like in *Kamar*, the trademark and copyright issues were intertwined in the court's analysis, and the court did not conduct a fair use or *de minimis* analysis in finding copyright infringement. *Id.* Further, the court did not distinguish the plaintiff's screenplay—a large copyrighted work—from the plaintiff's advertising—consisting of the allegedly infringed phrase "When there is no room left in hell . . . dead will walk the earth"—in finding infringement. *Id.* Consequently, the decision does not indicate whether the court would have found infringement if only copyright in the screenplay were at issue. Notably, no subsequent case has followed or even cited to *Dawn Associates*, including *Kamar*, for its copyright infringement analysis.

112. Hughes, *supra* note 46, at 585–86.

113. 17 U.S.C. § 107(3). This doctrine has existed for some time and is firmly established. See *Roy Exp. Co. Establishment of Vaduz, Liechtenstein, Black, Inc. v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (finding that copying excerpts of less than two minutes each from four films ranging from seventy-two to eighty-nine minutes could be found to be "qualitatively substantial" even if "quantitatively small"); *Story v. Holcombe*, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) ("The infringement of a copyright does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages, they take from it that in which its chief value consists.").

114. *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1314 (11th Cir. 2008); see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994) (determining, in the context of parody, "how much more is reasonable will depend . . . on the extent to which the [secondary use's] overriding purpose and character is to parody the original").

101. *Id.* at 1165.

102. *Id.*

103. Hughes, *supra* note 46, at 584.

104. *Kamar Indus., Inc.*, 217 U.S.P.Q. at 1166 (articulating the test as "whether an average lay observer would recognize the alleged copy as having been appropriated from a copyrighted work").

105. *Id.*

106. *Id.*

107. See Hughes, *supra* note 46, at 584. This reasoning is similar to the Ninth Circuit's rationale in *Cook v. Robbins*, which so disturbed the Copyright Office. See *Cook v. Robbins*, Nos. 98-36242, 99-35141, at *3, *12 (9th Cir. Nov. 16, 2000); Carson Letter I, *supra* note 60.

108. The court's reasoning is strikingly similar to a "secondary meaning" analysis in trademark law. See *supra* Part I.B.1 (discussing secondary meaning and its significant role in federal trademark law).

109. See *Murray Hill Publ'ns, Inc. v. ABC Communs., Inc.*, 264 F.3d 622, 633 (6th Cir. 2001) ("Neither is the Line a 'readily recognizable' portion of the Movie as were the disputed lines considered by the court in *Universal City Studios, Inc. v. Kamar Industries Inc.*"). Though *Kamar* has not gained precedential value, the proposition for which it stands—a court will protect an uncopyrightable short phrase in an infringement action decision if the specific phrase is deemed important to the larger

plaintiffs' assertions of the excerpted text's importance and the courts' own subjective determinations of such importance.¹¹⁵ Consequently, as Professor Hughes recognized, "it is clear that [the qualitatively substantial doctrine] can produce de facto protection of short [textual] phrases."¹¹⁶

The Supreme Court applied the doctrine of qualitatively substantial copying in *Harper & Row Publications, Inc. v. Nation Enterprises*,¹¹⁷ finding de facto protection in short excerpts from a book. Former President Gerald Ford had contracted with Harper & Row and Reader's Digest to publish his memoirs.¹¹⁸ The publishing contract gave the publishers the right to license prepublication excerpts.¹¹⁹ As the book neared publication, the publishers decided to exploit the first serial rights and entered into an exclusive prepublication licensing agreement with Time.¹²⁰ However, these plans were thwarted when The Nation sneakily acquired a copy of the Ford manuscript and quickly prepared a news story composed of paraphrases, facts, and quotes taken directly from the manuscript.¹²¹ Scooped by The Nation article, Time cancelled its piece and reneged on its contractual agreements with Harper & Row.¹²² Harper & Row sued The Nation for copyright infringement, and in response, The Nation argued fair use.¹²³

In framing its fair use analysis, the Court stated, "the unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use."¹²⁴ The Court found that the first factor—the purpose of the use—weighed in favor of infringement, as The Nation's "stated purpose [was] scooping the forthcoming hardcover and Time abstracts."¹²⁵ Moving onto the second factor,

the nature of the copied work, the Court focused on the unpublished status of President Ford's memoir and found that this factor weighed heavily in favor of Harper & Row.¹²⁶ However, the Court qualified its conclusion by stating that "substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press."¹²⁷

The Court then addressed the third factor, the amount and substantiality of the portion used, and found that, while the amount taken by The Nation was quantitatively insignificant, namely 300 to 400 words out of a 200,000-word book, "The Nation took 'what was essentially the heart of the book' . . . because they qualitatively embodied Ford's distinctive expression."¹²⁸ Finally, the Court found that the fourth factor, the market effect of the defendant's use on the original work, clearly weighed in favor of Harper & Row, because there was an actual effect on the market in the form of Time's cancellation of its contracted serialization.¹²⁹ After conducting the fair use analysis, the Court concluded that The Nation's use of these verbatim excerpts from the unpublished manuscripts was not a fair use.¹³⁰

In a vehement dissent, Justice Brennan decried that the majority's "zealous defense of the copyright owner's prerogative will . . . stifle the broad dissemination of ideas copyright is intended to nurture."¹³¹ He argued that the Court had broadened copyright owners' rights beyond traditional bounds by applying an "exceedingly narrow definition of the scope of fair use."¹³²

The Court's reasoning in *Harper & Row* has been applied to subsequent fair use cases involving unpublished works,¹³³ and its "heart of the work"

115. See, e.g., *Campbell*, 510 U.S. at 587 (holding that the third factor requires courts to consider not only the quantity of the materials taken, but also "their quality and importance" to the original work); *Harper & Row Publ'ns, Inc. v. Nation Enters.*, 471 U.S. 539, 564–65 (1985) (emphasizing that a fair use analysis places greater weight on the importance of the material copied than the amount of material copied).

116. Hughes, *supra* note 46, at 587.

117. 471 U.S. 539 (1985).

118. *Id.* at 542. (noting that although this case did not deal with movie quotes, it provided the framework for how court would likely apply the doctrine of qualitative substantiality in the movie quote context).

119. *Id.*

120. *Id.*

121. *Id.* at 543.

122. *Id.*

123. *Id.* at 544–45.

124. *Id.* at 554–55 (internal quotation marks omitted) ("The author's right to control the first public appearance of his first undissemated expression will outweigh a claim of fair use.").

125. *Id.* at 562.

126. *Id.* at 563–64.

127. *Harper & Row*, 471 U.S. 539, 564 (1985) (indicating that taking isolated phrases is likely a fair use and that "[s]ome of the briefer quotes . . . are arguably necessary . . . to convey the facts. . . . But *The Nation* did not stop at isolated phrase and instead excerpted subjective descriptions and portraits of public figures.").

128. *Id.* at 564–65.

129. *Id.* at 567.

130. *Id.* at 569.

131. *Id.* at 579 (Brennan, J., dissenting).

132. *Id.* Justice Brennan also rejected the Court's categorical presumption against fair use of unpublished works. *Id.* at 595.

133. See, e.g., *Wright v. Warner Books, Inc.*, 953 F.2d 731, 738 (2d Cir. 1991); *Salinger v. Random House, Inc.*, 811 F.2d 90, 95–99 (1987). These courts applied almost a bright-line rule, refusing to find fair use where a copyrighted work was unpublished. However, in 1992, Congress amended § 107 to add the following: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." 17 U.S.C. § 107 (1992). Subsequently, courts have considered the unpublished nature of a work as but one factor

language has been appropriated by many courts in analyzing fair use¹³⁴ outside of the context of unpublished works. The most important factor in *Harper & Row* was the unpublished status of the appropriated work, not the amount of the work taken, and the decision's rationale should be confined to the facts of the case.

The logical result of expanding the protection of short phrases into the realm of published works and movie quotes is the stifling of free expression, as Justice Brennan predicted.¹³⁵ Nevertheless, the consequence of giving the doctrine of qualitative substantiality such great weight is that courts find short phrases protectable under their fair use analysis. Under this doctrine, an uncopyrightable movie quote could defeat a claim of fair use, merely for having "quality and importance," which a movie quote can undoubtedly develop.¹³⁶

In sum, a court could find a single movie quote protectable, while not copyrightable, in an infringement action so long as the rights holder, or the court in its analysis, identifies it as a qualitatively important part of the copyrighted screenplay and story therein. While this possibility of protection under copyright law would not arise until the rights holder initiates an infringement action, the power of the movie quote to protect the entire copyrighted work and perhaps defeat what would be a fair use in other circumstances exists and seems to be growing stronger. This potential poses a serious threat to our cultural commons and to our right to free expression.

to consider in a fair use analysis. *See Sundeman v. Seajay Soc'y*, 142 F.3d 194, 204–05 (4th Cir. 1998) (finding fair use in quoting portions of a deceased author's unpublished novel in scholarly paper).

134. *See, e.g.,* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994); *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir. 1997); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1406 (6th Cir. 1996); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 923 F. Supp. 1231, 1247 (N.D. Cal. 1995).

135. *Harper & Row Publ'ns, Inc. v. Nation Enters.*, 417 U.S. 539, 579 (1985) (Brennan, J., dissenting); *see Hughes, supra* note 46, at 586–91 (discussing the legacy of the *Harper & Row* decision). *See also* *Cook v. Robbins*, Nos. 98-36242, 99-35141, 14711–13 (9th Cir. Nov. 16, 2000) (citing readily to *Harper & Row* and showing that the Ninth Circuit tracked the Court's construction of the fair use doctrine).

136. *See generally* *Universal City Studios, Inc. v. Kamar Indus., Inc.*, 217 U.S.P.Q. 1162, 1165–66 (S.D. Tex. 1982).

B. "That's my official trademark catchphrase that I got from the Web!"¹³⁷ — Trademarks

The second most logical intellectual property regime under which a rights holder would want to protect her valuable movie quote is trademark law. Movie quotes have already been trademarked, but only in connection with merchandising the movie from which the quote sprung, such as by placing quotes on mugs, T-shirts, and posters.¹³⁸ This section focuses on the applicability of trademark law to a movie quote used in connection with and as a source identifier for a specific movie, rather than a film series.¹³⁹

1. Framework of Federal Trademark Law

The Lanham Act¹⁴⁰ provides federal protection for trademark holders.¹⁴¹ Trademarks are words, names, or symbols used by an entity or person "to

137. *DISASTER MOVIE* (Universal Studios 2008).

138. *See, e.g.,* *THERE'S NO PLACE LIKE HOME*, Registration No. 2,540,752 (indicating that the trademark covers men's, women's, and children's clothing; from the movie *The Wizard of Oz*); *THERE'S NO PLACE LIKE HOME*, Registration No. 2,522,947 (highlighting that the trademark covers posters, books, calendars, gift-wrapping paper, and other paper goods); *VOTE FOR PEDRO*, Registration No. 3,248,228 (delineating that the trademark covers calendars, greeting cards, bumper stickers, and other paper goods; from the movie *Napoleon Dynamite*); *VOTE FOR PEDRO*, Registration No. 3,238,048 (stating that the trademark only covers novelty buttons); U.S. Trademark Application, Serial No. 85,444,895 (filed Oct. 11, 2011) (representing the application for *THERE'S NO PLACE LIKE HOME* in connection with mugs, bowls, plates, and other "earthenware goods"). However, many applications for registration consisting of movie quotes in connection with movie products have been abandoned. *See, e.g.,* U.S. Trademark Application Serial No. 75,398,912 (filed Dec. 2, 1997) (abandoned Oct. 7, 2001) (presenting the application for *THERE'S NO PLACE LIKE HOME* in connection with motion picture films); U.S. Trademark Application Serial No. 73,374,299 (filed Jul. 12, 1982) (abandoned Nov. 4, 1983) (identifying the application for *E.T.* in connection with motion picture films).

139. In a large segment of the entertainment industry, movies are just one component of a larger line of merchandising, especially in children's entertainment. Think of the *Harry Potter* series, Lemony Snicket's *A Series of Unfortunate Events* series, or the *Star Wars* franchise. The quotes from movies can be an integral part of such a merchandising or franchising campaign, such as "Use the force, Luke." It is, indeed, intriguing to look at movie quotes in this context, to see if this will have any effect on the protection of the movie quotes. However, the analysis will likely not change if solely focusing on the movie quotes. As discussed above, quotes from *E.T.: The Extraterrestrial* received protection in such a merchandising context. *See* *Universal City Studios, Inc. v. Kamar Indus., Inc.*, 217 U.S.P.Q. 1162, 1169 (S.D. Tex. 1982).

140. 15 U.S.C. § 1051 *et seq.* (2006).

141. This section focuses solely on protection under this federal scheme. Thus, all definitions and analyses pertain to federal trademark law.

identify and distinguish his goods, including a unique product¹⁴² from those produced by others and “to identify the source.”¹⁴³ Your toothpaste, delicious candy bar, romance vampire novel, and aging car all fall under the broad category of goods. Service marks,¹⁴⁴ close cousins of trademarks, “identify and distinguish the services of one person . . . from the services of others and to indicate the source of the services.”¹⁴⁵ Service marks, unlike trademarks, include “[t]itles, character names, and other distinctive features of radio or television programs.”¹⁴⁶ For example, both “E.T.”—the character name—and “JIFFY LUBE” are service marks.¹⁴⁷

Under the Lanham Act, sellers and producers’ time, energy, and advertising expenditures investments are protected from others who may subsequently use the rights holder’s mark on their products.¹⁴⁸ Thus, the purpose of trademark law is twofold: (1) to prevent consumer confusion over the source of goods or services and (2) to enable producers to differentiate their products from others on the market.¹⁴⁹ Because they are used to identify the source of products, trademarks are “a very peculiar kind of property [because, unlike copyrights, trademarks have] no existence apart from the goodwill of the product or service it symbolizes.”¹⁵⁰

The primary means to secure protection under the Lanham Act requires a mark holder to also establish

bona fide use of the mark in commerce.¹⁵¹ Bona fide use of a mark in commerce means a bona fide sale or transport of goods and bona fide display of the mark in the sale or advertisement for services rendered in commerce. In the context of federal trademark law, commerce includes all commercial activity “which may lawfully be regulated by Congress.”¹⁵² To maintain, and prove, ownership of mark an owner must establish (1) that it used the mark sometime in the past and (2) that its use of the mark continues into the present.¹⁵³ This is known as the “continuous use requirement.” To satisfy the continuous use requirement under trademark law, this use must be of something more than a sporadic nature.¹⁵⁴

Once an owner has a mark, the strength of that mark determines how much protection it receives in the courts. Courts have identified a spectrum of marks under which to gauge a mark’s “eligibility to trademark status and the degree of protection accorded.”¹⁵⁵

The spectrum, in ascending order of protection, is: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful.¹⁵⁶ A generic mark is the name of the product or service itself—for instance, the mark TERRIFYING HORROR MOVIE SERIES for use in connection with a super-scary horror movie series such as *Saw*.¹⁵⁷ Generic terms can never function as marks to indicate the origin of goods or services.¹⁵⁸

Descriptive terms are those that communicate information about specific characteristics or qualities of a good or service—for example, 5-MINUTE for glue that sets in five minutes.¹⁵⁹ These terms can serve as protectable marks only if they acquire

142. 15 U.S.C. § 1127.

143. *Id.*

144. This article will refer to these marks as “trademarks” and “service marks” when discussing one individually. When discussing both, this article uses the term “marks.”

145. 15 U.S.C. § 1127.

146. *Id.*

147. *See, e.g.*, E.T., Registration No. 1,314,514; JIFFY LUBE, Registration No. 1,384,672.

148. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 2:30 (4th ed. 1996); Lauren P. Smith, *Trademarks to the Movies: “An Af-Fair Use” to Remember*, 48 CLEV. ST. L. REV. 415, 418 (2000). However, “[a] large expenditure of money does not in itself create legally protectable rights.” *Smith v. Chanel, Inc.*, 402 F.2d 562, 568 (9th Cir. 1968); *see Fleetwood Co. v. Mende*, 298 F.2d 797, 799 (C.C.P.A. 1962) (stating that a “vast amount of money [invested] in advertising [a] product by [a] trademark” does not, without more, give rise to a legally protectable right).

149. As Congress wrote, the Lanham Act was intended to make “actionable the deceptive and misleading use of marks” and “to protect persons engaged in such commerce against unfair competition.” 15 U.S.C. § 1127; *see M. B. H. Enters, Inc. v. WOKY, Inc.*, 633 F.2d 50, 54 (7th Cir. 1980) (“A trade or service [mark’s] . . . purpose . . . is to separate those goods or services from others in the public consciousness, to identify them as the product of a single source, and to represent them in the mind of the public.”).

150. MCCARTHY, *supra* note 144, at § 2:15, at 39–40.

151. 15 U.S.C. § 1127 (requiring use in commerce for marks); *see* 15 U.S.C. § 1051(a) (requiring bona fide use in commerce to federally register a mark).

152. 15 U.S.C. § 1127.

153. MCCARTHY, *supra* note 144, § 16:9; *see D. & M. Antique Imp. Corp. v. Royal Saxe Corp.*, 311 F. Supp. 1261, 1272 (S.D.N.Y. 1969) (“As property rights subject to ‘ownership,’ trademarks are sui generis Ownership grows out of and depends upon the continuance of use.”).

154. MCCARTHY, *supra* note 144, § 16:9; *see Dep’t of Parks & Recreation for C.A. v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118, 1126 (9th Cir. 1996) (holding that a party “cannot rely on a few instances of use of the marks in the distant past that were ‘casual’ or had ‘little importance apparently attached to [them]’”).

155. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2nd Cir. 1976).

156. *Id.*

157. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) (“A generic term is one that refers to the genus of which the particular product is a species.”).

158. *Abercrombie*, 537 F.2d at 9–10; MCCARTHY, *supra* note 144, § 12:1.

159. MCCARTHY, *supra* note 144, § 11:16.

secondary meaning.¹⁶⁰ Secondary meaning refers to the consumers' association of a mark with the source—the seller, manufacturer, or service provider—and not with the product or service to which the mark attaches.¹⁶¹ Thus, even though a term is descriptive, it can serve as a protectable trademark if consumers associate the mark with the source, such as FIVE HOUR ENERGY.

Unlike descriptive marks, suggestive marks do not require secondary meaning. Aptly named, a suggestive mark does not describe a product's features, but suggests them.¹⁶² CHICKEN OF THE SEA¹⁶³ for canned tuna represents a prominent example of this distinction. Because suggestive marks require “imagination, thought, and perception to arrive at the qualities or characteristics of the goods,” they do not require proof of secondary meaning to receive trademark protection.¹⁶⁴

Fanciful marks are “coined” words or phrases that are created solely to function as marks,¹⁶⁵ such as KODAK photographic supplies. Similar to fanciful marks, arbitrary marks are those “in which an otherwise common word is used in an unfamiliar way.”¹⁶⁶ Perhaps the most famous example of this is APPLE for computer and phone products. Both fanciful and arbitrary marks, like suggestive marks, are considered “inherently distinctive” and are protectable without secondary meaning.¹⁶⁷ Even if a mark receives trademark protection as discussed above, a mark loses protection for the holder's failure to use the mark in commerce¹⁶⁸ or from becoming generic.¹⁶⁹

Under a strict reading of the Lanham Act, a movie quote used in connection with a single movie

would not fit into the definition of a service mark, and thus a broad reading of the Lanham Act renders a diverging reading. A movie quote used in connection with a single movie could not serve as a service mark. Our hypothetical service mark holder is not using it in connection with series of films, nor is the movie quote a “distinctive feature” of a radio or television program¹⁷⁰ or an analogous feature, like a newspaper column title.¹⁷¹ The quote is a short extract taken from the larger work, the script, which is a unique literary production, unlike serial publications or broadcasts, which provide a regular service such as music, news, entertainment, etc. Neither a movie nor the movie script is a service; each is a singular artistic product.

However, under this same strict reading of the Lanham Act, a movie quote could serve theoretically as a trademark under the act if the quote were to acquire secondary meaning.¹⁷² Accordingly, a movie quote would be a descriptive mark, requiring secondary meaning to serve as a trademark.¹⁷³ First, the movie itself is a “good.”¹⁷⁴ In the United States, the motion picture industry generates a significant portion of the country's gross domestic product through box office sales.¹⁷⁵ Further, individuals do associate specific movie quotes with their movies of origin, such as how “Say hello to my little friend” conjures up Scarface.¹⁷⁶ Consequently, these quotes arguably could be protected under the Lanham Act.¹⁷⁷ However, further reflection

170. 15 U.S.C. § 1127 (2006).

171. See *Metro Publ'g, Ltd. v. San Jose Mercury News*, 987 F.2d 637, 640 (9th Cir. 1993) (finding a newspaper column name consistent with the Lanham Act's definition of trademark “because it serves to identify the column as the product of a particular writer or paper and to distinguish it from surrounding copy and the features of competing publications”).

172. This would be similar to the theory of literary titles serving as trademarks upon the acquisition of secondary meaning, as discussed below. See *Warner Bros. Pictures, Inc., v. Majestic Pictures Corp.*, 70 F.2d 310, 311 (2d Cir. 1934) (explaining how a literary title can acquire secondary meaning).

173. See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 10 (2d Cir. 1976).

174. See William S. Hendon & Anna M. Starvaggi, *Using the Nonprofit Arts in the Growth of Trade?*, 22 J. ARTS MGMT. L & Soc'y 155, 155 (1992) (classifying movies as “artistic cultural goods”); see also SIWEK, *supra* note 3, at i-ii (including movies in the category of “knowledge-intensive intellectual property-based goods”).

175. See SIWEK, *supra* note 3, at 6; MOTION PICTURE ASSOCIATION OF AMERICA, *supra* note 3; U.S. CENSUS BUREAU, *supra* note 3, at 767 tbl.1229 (demonstrating that motion pictures are a growing aspect of the U.S. economy).

176. A search of the Internet for “movie quotes” yields thousands of Web sites dedicated to movie quotes. Search the title of your favorite film and “movie quotes,” and you will find several Web sites collecting the most memorable quotes from films such as *Donnie Darko* or *The Maltese Falcon*.

177. See *Warner Bros. Pictures*, 70 F.2d at 311.

160. *In re Nett Designs, Inc.*, 236 F.3d 1339, 1341 (Fed. Cir. 2001). The Lanham Act uses the term “acquired distinctiveness” in lieu of “secondary meaning.” 15 U.S.C. § 1052(f) (2006).

161. See *Levi Strauss & Co. v. Blue Bell, Inc.*, 632 F.2d 817, 820 (9th Cir. 1980) (“[S]econdary meaning is a mental recognition in buyers' and potential buyers' minds that products connected with the symbol or device emanate from or are associated with the same source.”).

162. *Zobmondo Entm't, LLC v. Falls Media, LLC*, 602 F.3d 1108, 1114 (9th Cir. 2010) (quoting *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1047 n.8 (9th Cir. 1998)).

163. See CHICKEN OF THE SEA, Registration No. 0097192.

164. *In re Nett Designs*, 236 F.3d at 1341; see *Zobomondo Entm't, LLC*, 602 F.3d at 1114 (defining a suggestive mark as one for which “a consumer must use imagination or any type of multistage reasoning to understand the mark's significance”) (internal quotations and citation omitted).

165. *Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 143 (2d Cir. 1997).

166. *Lever Bros. Co. v. Am. Bakeries Co.*, 693 F.2d 251, 256 (2d Cir. 1982).

167. McCARTHY, *supra* note 144, § 11:4.

168. *Id.* § 17:9.

169. *Id.* § 12:26.

and a review of the case law demonstrates the fallacy of that contention.

2. Law of Literary Titles Theory Underlying Cases Involving Literary Works

To determine the protection of movie quotes, trademark law's treatment of titles is illustrative. Similar to the Copyright Office, the United States Patent and Trademark Office (PTO) will not register titles for single, or individual literary, works.¹⁷⁸ However, the Lanham Act protects the title of an individual literary work in an infringement action, specifically false advertising and/or false designations of origin,¹⁷⁹ even though the quote is not registrable as a trademark.

Despite their artistic and literary nature, movies, plays, and books are commercial products sold in the marketplace.¹⁸⁰ As the Second Circuit explained:

[t]he purchaser of a book, like the purchaser of a can of peas has a right not to be misled as to the source of the product. Thus, it is well established that where the title of a movie or a book has acquired secondary meaning—that is, where the title is sufficiently well known that consumers associate it with

a particular author's work—the holder of rights to that title may prevent the use of the same or confusingly similar titles by other authors.¹⁸¹

Accordingly, a movie title can serve as a trademark if it acquires secondary meaning.

A literary title acquires secondary meaning through consumers' association of the title with a single source of the literary work.¹⁸² This association can be with one anonymous source¹⁸³—“[t]hat is, the consumer need not know the trade name of the source, but is entitled to assume that all works or goods under that title are controlled by some single source.”¹⁸⁴ The author of the work may serve as the single source, but a reasonable guideline is that the consumers' association can be with the owner of the copyright in the literary work, as that entity, or person, controls the work's use.¹⁸⁵ Thus, a production company or publisher can serve as the source, even though consumers do not know the entity's name. For example, which “Vote for Pedro” quoting consumers know that Twentieth Century Fox produced *Napoleon Dynamite*?

Literary titles will receive narrow protection in infringement suits under specific circumstances. As the court articulated in the influential case *Rogers v. Grimaldi*,¹⁸⁶ the “overextension of Lanham Act restrictions in the area of titles might intrude on First Amendment values.”¹⁸⁷ Consequently, to determine if a title merits trademark protection, courts balance the right of the trademark owner to prevent confusion against the free speech rights of the creator of the allegedly infringing literary work.¹⁸⁸

Thus, as established in what is referred to

178. Trademark Manual of Examining Procedure (TMEP) § 1202.08 (6th ed. 2010); see Application of Cooper, 254 F.2d 611, 613 (C.C.P.A. 1958). However, the United States Patent and Trademark Office (PTO) will register the title of a series comprised of several works—i.e., *Harry Potter* series. TMEP § 1202.08(d). PTO will also register magazine/newspaper column titles. See discussion *supra* note 167 and accompanying text (establishing that newspaper column titles can be protected); *Metro Publ'g*, 987 F.2d at 640–41. However, because this article addresses a movie quote used as a trademark in connection with a single movie and not a series, such registration shall not be discussed further.

179. Specifically, § 43(a) of the Lanham Act makes liable in a civil action:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

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

15 U.S.C. § 1025(a).

180. *Rogers v. Grimaldi*, 875 F.2d 994, 997 (2d Cir. 1989).

181. *Id.* at 997–98.

182. See *Warner Bros. Pictures*, 70 F.2d at 311; see *Tri-Star Pictures, Inc. v. Unger*, 14 F. Supp. 2d 339, 348 (S.D. N.Y. 1998) (“[M]otion picture titles acquire secondary meaning when the title becomes so well known that consumers associate it with a particular author's work.”).

183. *Jackson v. Universal Int'l Pictures*, 222 P.2d 433, 438 (Cal. 1950). (“There is no logical basis for holding that a public well acquainted with the title and the play could not confer secondary meaning upon that title merely because of unfamiliarity with the author's name.”).

184. McCARTHY, *supra* note 144, § 10:10, at 30.

185. *Id.*; see *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 36 (2003) (concluding that the source of goods “refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods”); *Edgar Rice Burroughs, Inc. v. Manns Theatres*, 195 U.S.P.Q. 159 (C.D. Cal. 1976).

186. 875 F.2d 994, 997–98 (2d Cir. 1989).

187. *Id.* at 999.

188. *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc.*, 886 F.2d 490, 494 (2d Cir. 1989).

as the Rogers test, a title will not receive protection under the Lanham Act unless the title has “no artistic relevance to the underlying work [e.g., the movie] or, if it has some artistic relevance, unless the title explicitly misleads as to source or content of work.”¹⁸⁹ For example, in *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ’g Grp., Inc.*,¹⁹⁰ the court found that a parody of the Cliffs Notes books, “Spy Notes” did not infringe on the “Cliffs Notes” trademark.¹⁹¹ The court concluded that although the parody cover of Spy Notes conjured up the original and even used some of the same colors and features of the original design, the public interest in free expression outweighed the small chance of consumer confusion it posed, especially because parody requires mimicry of the original.¹⁹²

Movie quotes may be able to function as trademarks for a single movie in light of the law of literary titles. One might immediately conclude that movie quotes are more apt to serve as trademarks than movie titles. Unlike movie titles, movie quotes’ primary function in relation to a literary work is not to identify and describe the work, in this case the movie.¹⁹³ Movie quotes are less inherently descriptive than movie titles because movie quotes are not “labels” designed to describe the literary work with which they are associated, as are titles.¹⁹⁴ As singular pieces of the script taken out of context, movie quotes serve to develop the character, propel the plot, and perhaps catch on with the public. However, writers and production companies do not create a movie quote to serve as the movie’s identifier. It seems that this fact

should not preclude a rights holder from putting the movie quote to use as a trademark.

Though this has not been tested in court, a movie quote could legitimately serve as a trademark in connection with a single movie under the logic of the case law establishing trademark rights in literary titles.¹⁹⁵ By making this conclusion, this article does not mean that it would be a registrable trademark, but that courts would afford it protection under the Lanham Act in an infringement action. First, courts have historically protected the titles of single literary works under the Lanham Act in infringement actions.¹⁹⁶ Therefore, the fact that the quote serves to identify the source of a single movie should not be a bar to protection. Additionally, that consumers will likely not associate the movie quote with the production company, or designated rights holder, does not bar protection. As in the law of titles, consumers need only assume that the movie is controlled by some single source.¹⁹⁷

Finally, under the Rogers test, movie quotes are artistically relevant to the movie because movie quotes are an essential expressive part of the movie.¹⁹⁸ This is likely why our Mr. Buffer bemoaned the fact that no one capitalized on “Show me the money” from Jerry Maguire: The quote was a central part of the plot, character development, and expressive nature of the film. Accordingly, a movie quote, if used as a trademark in connection with a single movie, would likely receive protection under the Lanham Act in an infringement action.¹⁹⁹

189. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989). In looking to the artistic relevance at issue, the *Rogers* court held that “the title ‘Ginger and Fred’ surpassed the minimum threshold of artistic relevance to the film’s content” for two reasons. *Id.* “The central characters in the film are nicknamed ‘Ginger’ and ‘Fred,’ and these names are not arbitrarily chosen just to exploit the publicity value of their real life counterparts but instead have genuine relevance to the film’s story.” *Id.* Though the *Rogers* test originated in circumstances where a celebrity’s name was used in a title, the courts have expanded the test to pertain to all literary titles. *See Cliffs Notes*, 886 F.2d at 495.

190. 886 F.2d 490 (2d Cir. 1989).

191. *Id.*

192. *Id.* at 497.

193. *See Application of Cooper*, 254 F.2d 611, 614–15 (C.C.P.A. 1958) (denying protection for descriptive book names). This is true unless the quote is the same as the title, such as the line “Dude, where’s my car?” from the film *Dude, Where’s My Car?*

194. It is well established that movie titles can acquire secondary meaning sufficient to overcome their “descriptive” status. *See Rogers*, 875 F.2d at 997; *supra* notes 183–86 and accompanying text. Like movie titles, movie quotes can acquire secondary meaning, in that viewers—the consumers—associate a certain quote with a specific movie. “Yeah, Baby!” has come to signify *Austin Powers*, just as “Say hello to my little friend” brings to mind *Scarface*.

195. This assumes that the quote is put to use as a trademark, of course. That is, it “perform[s] the job of identification: to identify one source and distinguish it from other sources.” McCARTHY, *supra* note 144, § 3:3, at 6.

196. *See, e.g., Tri-Star Pictures, Inc. v. Unger*, 14 F. Supp. 2d 339, 347–48 (S.D.N.Y. 1998) (finding that the section of Lanham Act prohibiting false designation of origin includes movie titles).

197. *See* McCARTHY, *supra* note 144, § 10:10.

198. *See Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989) (emphasizing the importance of the artistic relevance of the title).

199. The Lanham Act, however, provides trademark holders, including corporate entities with a means of protection similar to the right of publicity—an action for trademark dilution. 15 U.S.C. § 1125(c) (2006). Trademark dilution is the weakening of a mark’s ability to distinguish clearly a single source. McCARTHY, *supra* note 144, § 24:67. There are two types of dilution, namely “blurring” and “tarnishment.” 15 U.S.C. § 1125(c). Dilution by “blurring” is where the majority of the legal action is, whereas tarnishment is quite rare. *See* McCARTHY, *supra* note 144, at § 24:67. Blurring occurs when the use of another’s mark creates “the possibility that the mark will lose its ability to serve as a unique identifier of the plaintiff’s product.” *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 805 (9th Cir. 2002) (quoting *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1326 n.7 (9th Cir. 1998)). Tarnishment, however, occurs “when a famous mark is improperly associated with an inferior or offensive product or service.” *Id.* To file for trademark dilution or

Nevertheless, the long-term value of investing in a movie quote trademark is likely questionable. The movie quote trademark, if the movie quote catches on with the public so that the quote is used without any connection to the film, might not last very long. In other words, the mark could be deemed abandoned²⁰⁰ by a court if the quote became so part of the cultural lexicon²⁰¹ that it dissociates itself from the movie and becomes generic, without any relation to the film that spawned it.²⁰² If a movie quote becomes so ubiquitous as to become a cultural reference, such as “I’m as mad as hell, and I’m not going to take this anymore!”²⁰³ rather than a source identifier, such as to the amazing 1976 film *Network*, a court would likely find that the production company has abandoned the mark and lost all associated trademark rights.²⁰⁴ As Professor Nimmer noted, “[s]uch a result is sometimes characterized as ‘abandonment,’ although the semantic usage of consumers may be entirely beyond the control of the trademark owner.”²⁰⁵ So, while a movie quote trademark may be protectable, it might not be the wisest investment.

tarnishment in this article’s context, a movie studio would need to have a valid movie-quote trademark, which, as we discussed above, is highly unlikely.

200. Under the Lanham Act, a mark is deemed abandoned when either:

(1) [I]ts use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment[;] [or]

(2) [A]ny course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. Purchaser motivation shall not be a test for determining abandonment under this paragraph.

15 U.S.C. § 1127.

201. See Levy, *supra* note 17 (“These phrases have gotten so deep into the language they’re being used by people who don’t know the origin. . . . They have left the arena of film into the popular culture.”); see also Ed Susman, *Favorite Movie Quotes Transcend Ages*, UNITED PRESS INTERNATIONAL, SCIENCE NEWS, Aug. 7, 2000 (“Many quotes come from movies that the people never saw.”).

202. McCARTHY, *supra* note 144, § 17:8. An in-depth analysis of this argument is beyond the scope of this article. However, proving that a movie quote mark was abandoned would likely be difficult for several reasons, one of which being that the public likely associates a well-known quote with the movie in which it appears—i.e., “Show me the money” comes from *Jerry Maguire*. Nevertheless, the burden of proving that the mark, or quote, has been abandoned in litigation would likely rest on the party alleging abandonment. See 15 U.S.C. § 11,064(3) (allowing a party to petition to cancel a mark on the grounds that it has been abandoned).

203. NETWORK (Metro-Goldwyn-Mayer 1976).

204. See McCARTHY, *supra* note 144, § 17:8.

205. *Id.*

3. Law of Slogans

If a production company is planning a massive advertising campaign for a soon-to-be-released movie, it might consider using a slogan to support said campaign. Could this slogan be a movie quote? Certainly, the quote “I’m kind of a big deal” would have served as an effectively hilarious, and appropriate, slogan for *Anchorman: The Legend of Ron Burgundy*.²⁰⁶ It would have been a creative, amusing way to communicate to potential viewers that they should see the movie—it is a big deal. Despite this valuable proposition, a movie quote is not a protectable trademark under the law governing slogans. We have all heard slogans, and sometimes even get sick of them. A slogan is a “catch phrase” used in an advertising campaign²⁰⁷ that “accompanies other marks such as house marks and product line marks.”²⁰⁸ As such, a “slogan” is intended to remind the consumer of the brand.²⁰⁹

Under the established case law, a movie quote could not acquire trademark protection as a slogan for a single movie title. First, a movie quote is not a brand. The quote is simply part of the product (the movie) that is being trademarked, not an actual trademark for the entire product. Therefore, a movie quote cannot get over the threshold requirement of use in connection with a brand.²¹⁰

Further, a movie quote would not receive protection as a slogan because common phrases cannot obtain trademark protection under the Lanham Act, as the public will not identify it with just one source of goods.²¹¹ Most movie quotes that could be potential slogans are common phrases or slang and

206. ANCHORMAN: THE LEGEND OF RON BURGUNDY (DreamWorks Pictures 2004).

207. Michael F. Aylward, *Covering Your Tracks: Will There Be Insurance Coverage for False Marking Claims?*, 3 LANDSLIDE 19, 22 (2011).

208. McCARTHY, *supra* note 144, § 7:19, at 45.

209. *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 619 (2d Cir. 2001). A brand is “[a] name or symbol used by a seller . . . to identify goods or services and to distinguish them from competitors’ goods or services.” BLACK’S LAW DICTIONARY 213 (9th ed. 2009).

210. Even if a movie title were a brand, words used as taglines to for distinctive brands are generally not protectable under trademark law. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 842 (9th Cir. 2002).

211. *M.B.H. Enters, Inc. v. WOKY, Inc.*, 633 F.2d 50, 54 (7th Cir. 1980); *B & L Sales Assocs. v. H. Daroff & Sons, Inc.*, 421 F.2d 352, 354 (2d Cir. 1970); see McCARTHY, *supra* note 144, § 7:22 (“[T]he ordinary consumer would not take such ordinary advertising phrases to identify a single source.”). PTO will not register common phrases and slogans. *In re Boston Beer Co.*, 47 U.S.P.Q.2d 1914 (T.T.A.B. 1998).

would thereby be precluded from serving as slogans. A search on Google returns over sixty thousand hits for “I’m kind of a big deal.” This probably makes the movie quote a common phrase, but it could receive protection as a slogan under the Lanham act if it acquires secondary meaning. While this is possible, it is a quite a feat to do so. How do you acquire secondary meaning in a phrase that is so ubiquitous in the public lexicon? For a commonly used movie quote to acquire secondary meaning, the would-be trademark owner would have to advertise to such an extent that the public would associate only one company with the common phrase where several other competing companies may be advertising with the identical language.²¹² That would be difficult, indeed.

Similarly, a movie quote would likely be considered a descriptive phrase that “impart[s] information” regarding the movie’s content, thus depriving it of trademark status.²¹³ “I’m kind of a big deal” communicates Ron Burgundy, the eponymous Anchorman, with arrogance and lack of self-awareness that is central to his character and to the film. Thus, a court could reasonably consider the phrase as merely describing the movie’s content.

Finally, a movie quote would not be able to serve as a slogan because, as we have established above, a movie quote cannot be a legitimate trademark for a single movie in most circumstances. Under trademark law, a “‘slogan’ must be something, other than the house mark or product mark itself, that provides such a reminder.”²¹⁴ A house mark “is a mark used on several different goods or services which themselves use a particular ‘product mark.’”²¹⁵ For example, “Apple” is a house mark, whereas “iPhone” and “iPad” are product marks. In the context of movie quotes serving as marks for specific movies, the movie or the movie title would have to be the house mark, whereas the movie quote would have to be the product mark. However, the movie is a single good—to be a house mark, the mark must be used on several different goods. Thus, the movie cannot serve as its own house mark. Even though a movie quote cannot serve as a slogan, remember that it can likely receive protection as a trademark under the Lanham Act in an infringement action.²¹⁶ But can a movie quote get protection under the right of publicity?

C. “It’s just publicity. It helps everyone”²¹⁷— Rights of Publicity

This article analyzes right of publicity in a movie quote not in connection with an actor, a producer/director, or even a character, but in connection with a specific movie itself. The right of publicity has its origins in the right to privacy.²¹⁸ The Second Circuit firmly established in *Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc.*²¹⁹ the right to publicity when it held that “in addition to and independent of that right of privacy, . . . a man has a right in the publicity value of his photograph.”²²⁰ Initially, the right of publicity was limited to the right of a person to control the commercial use of his or her identity.²²¹ It has since expanded to cover an individual’s “name, likeness, or other indicia of identity”²²² and has become an independent doctrine distinct from the right of privacy.²²³ It is a legal right “inherent to everyone to control the commercial use of identity and persona” and to make actionable any unpermitted taking.²²⁴ The right of publicity is based in state law.²²⁵ It is

217. THE RUNAWAYS (River Road Entertainment 2010).

218. Gil Peles, *The Right of Publicity Gone Wild*, 11 UCLA ENT. L. REV. 301, 304 (2004); see Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

219. 202 F.2d 866 (2d Cir. 1953).

220. *Id.* at 868. The court stated that this “right might be called a ‘right of publicity.’”

221. Peles, *supra* note 211, at 304.

222. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

223. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (noting the right to publicity in voice); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (establishing Carson’s right to publicity in catchphrase “Here’s Johnny”).

224. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.3 (2th ed. 2012).

225. At least nineteen states have statutes that confer a right to publicity or analogous rights on its citizens. See, e.g., CAL. CIV. CODE §§ 3344–3344.1 (West 1969) (disallowing the unauthorized commercial or advertising use of name, voice, signature, photograph or likeness); N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1995) (prohibiting the unauthorized use for advertising or trade purposes, of the name, portrait or picture of any living person); 42 PA. CONS. STAT. § 8316 (2002) (prohibiting the unauthorized use of name or likeness); TEX. PROP. CODE ANN. § 26.001–.015 (West 1987) (prohibiting the unauthorized use of a deceased individual’s name, voice, signature, photograph, or likeness in any manner, including commercial and advertising uses); UTAH CODE ANN. § 45-3-1–45-3-6 (LexisNexis 1999) (disallowing unauthorized commercial use of an individual’s personal identity in a way that implies approval or endorsement of a product or subject matter); WASH. REV. CODE § 63.60.010 *et seq.* (1998) (recognizing that every individual or personality has a property right in the use of his name, voice, signature, photograph or likeness), held unconstitutional by *Experience Hendrix, L.L.C. v. HendrixLicensing.com, LTD*, 766 F. Supp. 2d 1122 (W.D. Wash. 2011).

212. MCCARTHY, *supra* note 144, § 7:23.

213. *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 641 (7th Cir. 2001).

214. *Hugo Boss Fashions, Inc. v. Federal Ins. Co.*, 252 F.3d 608, 619 (2d Cir. 2001) (emphasis in original).

215. MCCARTHY, *supra* note 144, § 23:43, at 217–18.

216. See *supra* Part 1.B.2.a.

also codified in the Lanham Act²²⁶ and articulated in Restatement (Third) of Unfair Competition.²²⁷

Since it was first established in Topps Chewing Gum, the right of publicity has expanded greatly to cover a person’s likeness,²²⁸ voice,²²⁹ catchphrase,²³⁰ or distinctive object²³¹ that identify a person. Despite this expansion, his right has not expanded beyond the realm of human beings—non-human entities like corporations or organizations cannot claim a right of publicity.²³² It appears that the courts have not heeded Professor Nimmer’s encouragement of the extension of publicity rights beyond humans: “Since animals, inanimate objects, and business and other institutions all may be endowed with publicity values, the human owners of these non-human entities should have a right of publicity (although no right of privacy) in such property.”²³³ Indeed, as the law stands, courts recognize a right to publicity only in humans.

226. 15 U.S.C. § 1125(a) (2006).

227. RESTATEMENT, *supra* note 215, § 46.

228. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993) (finding that use of a blonde-wig-and-dress-donning robot turning letters on a game show set violated Vanna White’s right of publicity).

229. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (finding use of a Tom Waits “sound alike” in a snack food commercial violated Waits’s right of publicity); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (holding that the use of a Bette Midler “sound alike” singer in automotive advertising violated Midler’s right of publicity).

230. *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (finding the use of Johnny Carson’s catch phrase “Here’s Johnny” in connection with portable toilets violated Carson’s right of publicity because the public identified him with that phrase).

231. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (holding that the use of likeness of a race car driver’s race car in an advertisement, even though viewers could not see the driver’s image, violated his right of publicity because the public would identify the driver from the car).

232. *Felsher v. Univ. of Evansville*, 755 N.E.2d 583, 594 (Ind. 2001) (following the “overwhelming majority of other states” that have held a corporation has not right of privacy); *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.2d 452, 455 (N.Y.S. 1965) (finding that a university is not a “living person” under the New York statute); *Schubert v. Columbia Pictures Corp.*, 189 Misc. 734, 742 (N.Y.S. 1947) (finding that a corporation is not a “living person” under New York publicity law); *McCARTHY*, *supra* note 217, § 4:39, at 268. The farthest case law has extended the right of publicity beyond humans is to recognize a right of publicity in a music group. See *Apple Corps. v. A.D.P.R., Inc.*, 843 F. Supp. 342, 348 (M.D. Tenn. 1993) (finding that “The Beatles” was protected under the Tennessee statute as an “individual”); *Brockum Co. v. Blaylock*, 729 F. Supp. 438, 466 (E.D. Pa. 1990) (recognizing a right of publicity in “The Rolling Stones”).

233. Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

1. Application of Law of Rights of Publicity to Movie Quotes

For a movie quote to be protected under a right of publicity, the movie itself would have to have a right to publicity. This is untenable under established case law—and common sense—as the right to publicity covers only natural persons.²³⁴ Courts have rejected extending the right of publicity to non-human entities that are composed of people, such as organizations and corporations, so courts are certainly not poised to recognize a right of publicity in an entirely inanimate object such as a movie. The thrust of this reasoning is that recognizing a right of publicity in movies, rather than in the actors therein, would distort the right beyond its original purposes.²³⁵ If movies do not have a right to privacy, just like organizations and corporations do not have a right of privacy under state statutes, then movies should not have a right of publicity. Indeed, to extend a right of publicity to movies would be absurd since it would effectively allow a movie to enforce the same rights that individuals have. This absurdity becomes abundantly clear when you consider that no court has accepted Nimmer’s invitation to extend the right of publicity to more understandable situations—for example, to animals or corporations.²³⁶

II. “PERHAPS YOU THINK YOU’RE BEING TREATED UNFAIRLY?”²³⁷ — WHY MOVIE QUOTES SHOULD RECEIVE LIMITED PROTECTION

As illustrated above, movie quotes are likely protectable to a limited extent under copyright and trademark law in infringement actions. This is understandable because movie quotes are valuable and the rights holders should have the ability to capitalize on this value. However, this extension of

234. See, e.g., *FLA. STAT. § 540.08* (1967) (noting that the statute covers a “natural person”); *NEV. REV. STAT. § 597.810* (explaining that the statute covers a “natural person”); *N.Y. CIV. RIGHTS LAW § 50* (McKinney 1995) (highlighting that the statute covers a “living person”); *TENN. CODE ANN. § 47-25-1102* (1984) (stating that the statute applies to a “human being”); *Pump, Inc. v. Collins Mgmt., Inc.*, 746 F. Supp. 1159 (D. Mass. 1990) (expressing doubt that the Massachusetts statute covers commercial names or trademarks); *Eagle’s Eye, Inc. v. Ambler Fashion Shop, Inc.*, 627 F. Supp. 856 (E.D. Pa. 1985) (holding that the right of publicity does not protect trademarks).

235. See *McCARTHY*, *supra* note 217, § 4:39 (“The danger comes from expanding the right of publicity beyond its reason for being.”).

236. See Nimmer, *supra* note 226, at 216.

237. *STAR WARS: EPISODE V: THE EMPIRE STRIKES BACK* (Lucasfilm 1980).

protection, and the means with which rights holders can mine the gold from their movie quotes, should be narrow, balancing the interests of the rights holder with the public interest in free expression and cultural development.²³⁸ Cultural development does not necessarily correspond with sophistication or artistry. “Toga! Toga!” is not a highbrow expression of American existentialism or an articulation of the downfall of our educational system, but it holds an important place in our cultural heritage—it is Americana 101, if you will.

Copyright and trademark protection should be extremely limited in their application here because movie quotes exist as part of our cultural commons. Our society has incorporated these lines into our cultural lexicon. Movie lines, trademarks, and famous characters all become parts of our culture, and we use them as a means of communication.²³⁹ “We’re not in Kansas anymore” no longer references only The Wizard of Oz, but means, “we are out of our comfort zone.” “We’re not in Kansas anymore” has transcended the initial meaning it had when Dorothy, played by Judy Garland, uttered the words.²⁴⁰ Movie quotes become a part of our daily lives and are a “particularly powerful means of conjuring up the image of their owners, [thus becoming] an important, perhaps at times indispensable, part of the public vocabulary.”²⁴¹ Legal regimes that overly protect rights holders’ intellectual property restrict the use of well-known movie quotes may therefore restrict society’s communication of ideas.²⁴² Courts should be acutely aware of this potential chilling effect on free speech and adjudicate accordingly.

The limitation on the protection of movie quotes is further buttressed by the fact that these movie quotes, in a sense, belong to and derive their value from the people. In the context of trademark law, trademarks partially serve to protect the goodwill of the trademark owner, which necessarily derives its value from the esteem in which consumers hold a

good or service.²⁴³ Our culture fills them with meaning beyond their original sense, as they appeared as a few frames in a movie.²⁴⁴ However, as Professor Dreyfuss acknowledges in writing about rights of publicity, this can be readily adapted to movie quotes: “[e]ven the most heavily recoded image—the image that owes most of its strength to meaning provided by the audience—would be unavailable to the public without some investment by its initial purveyor.”²⁴⁵ Nevertheless, once brought to their attention, the people add the value to movie quotes. So, logically, the people deserve the right to use them freely. Under the “if value, then right theory,” the public has added the value to the quotes, so it should have the right to use them freely.

Because our society has incorporated movie quotes into its lexicon, overextension of intellectual property rights to movie quotes would intrude on First Amendment free speech rights. In copyright, fair use and the idea/expression dichotomy are “built-in First Amendment accommodations.”²⁴⁶ Allowing movie script rights holders to liberally defeat fair use, and thus preclude individuals from using uncopyrightable movie quotes, would infringe upon free speech rights and render the fair use provision meaningless. Furthermore, awarding protection to a short phrase like “show me the money” would chip away at the idea/expression dichotomy by practically eliminating the merger doctrine. One can say “show me the money” in only one way, and it is a phrase that individuals said before Jerry Maguire and continue to say. If courts overly extend protection to movie quotes, individuals will live in fear of litigation for potential trademark or copyright infringement if they use a movie quote in a

238. See, e.g., *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989) (providing a good example of such considerations).

239. See Dreyfuss, *supra* note 14, at 408 (“[T]he public may enjoy the expressive dimensions of a trademark more than it values the underlying product.”).

240. If this line were protectable, countless movies would not be able to use this instantly recognizable, culturally significant line. For instance, Cypher in *The Matrix* says this very line to Neo when Neo arrives in the “real world.”

241. Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of the Trade Symbols*, 1982 WIS. L. REV. 158, 195–96 (1982).

242. *Id.* at 196.

243. See McCARTHY, *supra* note 144, § 2.15 (emphasizing that a trademark is “a symbol of the good will of the owner’s goods or services”).

244. “Toga! Toga!” was hilarious when it appeared in *Animal House* in 1972, but it has taken a life of its own after its release into the cultural lexicon. It has remained a vital part of our culture for forty years. This cannot just be because it appeared in a movie. Society’s continued use of the phrase perpetuates and increases its value.

245. Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123, 141–42 (1996); see also *Allied Artists Pictures Corp. v. Friedman*, 68 Cal. App. 3d 127, 135, (Cal. Ct. App. 1977) (finding, in the context of trademarks in literary titles, that “[i]t is unimportant that the secondary meaning resulted from the activities of persons other than” the rights holder, and “[t]he critical question is whether the secondary meaning had been established in the public mind and not the precise manner in which it was created”). One could extend this logic to state that regardless of how a movie quote has acquired value the right holder should still reap the benefits of the value.

246. *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003).

subsequent literary work.²⁴⁷

As a more specific caution, courts should also be careful when protecting movie quotes under the Lanham Act. Allowing a trademark in a movie quote used in connection with a movie risks trademark law acting as a substitute for a copyright or courts finding copyright infringement where there should be fair use. Kamar, discussed above, is illustrative of such a proposition.²⁴⁸ While the case has not gained traction, it sets a dangerous example for courts and rights holders because its analysis provides a means for courts to skirt standards for copyright infringement and expand owners' rights into the realm of the public sphere.²⁴⁹ Melding the two regimes would expand them beyond their bounds and would create a chilling effect on how individuals use others' work.²⁵⁰ Additionally, fusing copyright and trademark law could gut the legislative and statutory intent of the Copyright and Lanham Acts, and render the most powerful part of these laws meaningless.²⁵¹ The fusion could produce a legitimate fear of over-aggressiveness on the part of rights owners in exercising their rights and courts acquiescing by expanding the regimes' respective realms of protection.

247. See Hughes, *supra* note 46, at 618 (“If a . . . short phrase . . . is independently protectable, then a person who thinks she has taken just the tiniest bit from a book . . . or other normal-size work will find herself liable for copyright infringement.”).

248. *Universal City Studios, Inc. v. Kamar Indus., Inc.*, 217 U.S.P.Q. 1162 (S.D. Tex. 1982).

249. See Hughes, *supra* note 46, at 584–85 (lamenting that the *Kamar* opinion contained “no *de minimis* discussion, no fair use analysis, and no discussion of how . . . quantitatively insubstantial phrases were nevertheless so qualitatively important to the film”).

250. See *Zuffa, LLC v. Justin.tv, Inc.*, 838 F. Supp. 2d 1102, 1106 (D. Nev. 2012) (finding that if the plaintiff “were allowed to proceed on a trademark claim for the display . . . or other trademarks inherently part of the copyrighted broadcast, [the plaintiff] would possess a mutant-copyright or perpetual copyright because nobody would ever be able to copy the video and display it regardless of whether the copyright had entered the public domain”); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37–38 (2003) (holding that the Lanham Act did not allow an author to bring a claim under the Act for failing to give credit for uncopyrighted material, because such a broad reading of the phrase “origin of goods” in 15 U.S.C. § 1125 would create a perpetual right to bring a copyright claim long after the copyright expired); McCarthy, *supra* note 144, § 6:17.50 (writing that trademark law “cannot be used as a substitute for a copyright”).

251. See *Dastar Corp.*, 539 U.S. at 35 (“Reading ‘origin’ in § 43(a) [of the Lanham Act] to require attribution of uncopyrighted materials would pose serious practical problems. Without a copyrighted work as the basepoint, the word ‘origin’ has no discernable [sic] limits.”); Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473, 1516 (2004) (“Concurrent copyright and trademark protection disrupts the balance established by Congress and deprives the public of the benefits of the copyright bargain.”).

III. “YOU ARE A VERY ADVANCED RACE. TOGETHER WE CAN LOOK FOR A SOLUTION.”²⁵² — A POTENTIAL STEP IN THE RIGHT DIRECTION

So far, this article has pointed out the expansive rights our legal system could afford to rights holders of movie quotes. Here, this article proposes a potentially workable scope of protection for movie quotes. While a detailed proposal is beyond the scope of this article, this article lays the groundwork for a solution that will satisfy movie quote owners, people who quote movies, policy advocates, and the courts. This proposal is situated in a twilight realm of protection between copyright and trademark law that mimics the moral rights afforded to Continental authors.²⁵³ Because a movie already enjoys significant copyright protection, courts might protect individual movie quotes excised from a script and subsequently used by and attributed to another through the analog to a moral right against the quote’s misattribution. This article offers this solution with the keen awareness that such a right could be dangerously expansive, allowing rights holders to police and control any use of their movie quotes. This article does not advocate for such a broad right. This proposal is far more limited and would be reserved to the use of a movie quote that grossly misattributes or misrepresents the movie from which it originates. To illustrate, using “E.T. phone home” as the title to a pornographic film could present an actionable infringement of the movie studio’s moral rights.

Though current U.S. copyright law does not recognize “moral rights” in literary works,²⁵⁴ the courts

252. *ICE AGE: THE MELTDOWN* (Blue Sky Studios 2006).

253. These rights are generally understood to be the following: (1) the right to nonattribution—that is, to publish anonymously; and (2) the right to prevent misattribution—that is a right to both prevent your name from being attached to works that are not yours and to keep others’ names from being attached to your works. Justin Hughes, *American Moral Rights and Fixing the Dastar Gap*, 2007 UTAH L. REV. 659; 662–63 (2007).

254. See *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) (“American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation.”). The current Copyright Act does contain a provision providing moral rights to artists. See *Visual Artists Rights Act of 1990* (V.A.R.A.), Pub. L. 101-650, 104 Stat. 5089, codified at 17 U.S.C. § 106A (2006). Specifically, V.A.R.A. extends the rights of attribution and integrity to artists whose works are protected under the provision. 17 U.S.C. § 106A(a). However, V.A.R.A. applies only to “works of visual art,” expressly excluding any “motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication.” 17 U.S.C. § 101; see 17 U.S.C. § 106A(a). Therefore, neither the authors of nor owners of the copyright to movie scripts can sue a secondary user for

have creatively found ways to provide moral rights-like protection for the owners of copyrights to literary works. An oft-cited example is *Gilliam v. American Broadcasting Companies*,²⁵⁵ where the Second Circuit recognized a cause of action under § 43(a) of the Lanham Act in an allegation that a party broadcasted a distorted version of the plaintiff's television show *Monty Python's Flying Circus*.²⁵⁶ In other words, the plaintiffs prevailed on a Lanham § 43(a) cause of action based on a misattribution claim.²⁵⁷ This theory still holds some sway in the courts.²⁵⁸

There are potential problems with affording rights holders something akin to moral rights, especially where there is no clear statutory boundary for the courts to follow. Two of these potential problems are particularly threatening to the value of free expression. First, there is potential for interference with the bedrock principle of fair use, particularly by stifling the creation of derivative works such as parodies because of the fear of being sued for infringing a rights holder's moral rights.²⁵⁹ Second, such an extension of rights presents an "inherent conflict [with] the desire to allow works to become a part of the public domain."²⁶⁰ Only with the development of clear, limited parameters for such rights would an equitable balance be struck.²⁶¹

CONCLUSION

Movie quotes are valuable intellectual property. The value of these words is both tangible and intangible. Quotes help movie studios generate greater profits and merchandizing opportunities, and they enrich our cultural lexicon. The competing considerations of rights holders and society—i.e., those who enjoy quoting movies—are evident even in listing the value inherent in movie quotes. Our court system has demonstrated it will protect rights holders' property—including short phrases—in court. Nevertheless, while rights holders should be able to protect and enforce their rights, courts should not allow them to trample on society's free speech and cultural commons, and society should stand up when rights holders attempt to overextend their rights. Quotes are part of the fabric of our society, and we should use them without fear of abusive litigation from rights holders.

misattribution or distortion of the script.

255. 538 F.2d 14 (2d Cir. 1976). See Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 809 (2001) (describing *Gilliam* as "the most celebrated victory for authors, the pinnacle of moral rights protections, though under Lanham Act clothing").

256. *Gilliam*, 538 F.2d at 24–25. Section 43(a) of the Lanham Act creates a federal remedy for the use of a "false designation of origin, false or misleading description of fact, or false or misleading representation of fact" in connection with any goods or services. 15 U.S.C. § 1125(a) (2006).

257. Hughes, *supra* note 246, at 670.

258. See *Marradi v. Capital Entm't Indus.*, No. CV 01-02622 DDP, 2002 U.S. Dist. LEXIS 28488, at *16 (C.D. Cal. Nov. 22, 2002) ("An allegation that a defendant has presented to the public a 'garbled,' distorted version of the plaintiff's work should be recognized as stating a cause of action under the Lanham Act.") (citing *Gilliam*, 538 F.2d at 24).

259. Kimberly Y.W. Holst, *A Case of Bad Credit?: The United States and the Protection of Moral Rights in Intellectual Property Law*, 3 BUFFALO INTELL. PROP. L.J. 105, 116 (2006); Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 78 (1997).

260. Holst, *supra* note 252, at 116.

261. See Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 2006 (advocating for "a narrowly tailored right of integrity designed to vindicate the author's right to inform the public about the original nature of her artistic message and the meaning of her work").