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How the Grateful Dead Turned Alternative Business and Legal Strategies Into A Great American Success Story

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TRUCKIN' IN STYLE

"Goddamn, well, I declare. Have you seen the like? Their walls are Uncle John's Band by the riverside. Got some things

At first glance, considering the Grateful Dead as a subject of legal analysis seems counterintuitive. For anyone possessing even a marginal understanding of the band's place in American music's history, the very thought should elicit a smile. Most of the available information concerning the Dead and their 30 years of operations has the character of children's stories or fairy tales, oral hand-me-downs from people who ate the wrong cake and took a detour through Wonderland. But for those who have caught a glimpse of the Grateful Dead's experience, legally oriented suspicions about how the band carried on their business ring familiar. For one, their practice of allowing their audiences to tape their live performances is commonly known. There are tapes, still in circulation today, of concerts 10 years older than the Copyright Act of 1976.[2] The Dead allowed fans to tape their shows, and even to distribute copies of these sound recordings, when no one else was[3] (and, incidentally, after the rest of the recording industry had declared war on bootleggers[4]). Instinct—at least a legal instinct—says that this practice is a very bad idea. In reality, the band's decision to allow tapers was not flirtation with disaster, but an astute business stratagem.

Similarly, the Dead's notion of copyrighting their compositions deviated from what the law seems to prescribe and what the mainstream recording industry follows. Obtaining a federal copyright amounted to separate endeavors of writing down the composition and then recording it (assuming one was both author and first performer) prior to the 1976 Act's implementation in 1978[5] and then to fixing the work in the tangible medium of a "copy" or "phonorecord" thereafter.[6] The band never regarded this regime as merely a ceremonious formality. Still, they routinely played compositions in their concerts numerous times before ever recording them onto an album for sale, fiddling with arrangements and gauging audience responses for what sounded good.[7] In other words, they in some instances spent years *writing* their material.[8] This notion does not fit neatly into the spectrum of American copyright law.[9]

And then there is the no-holds-barred attitude with which rock musicians, such as Billy Joel and the Beatles, appear to enter the courtroom.[10] For a band of the Dead's success and renown, they radi-

ate a belying nonchalance about conforming to legal ordinances. Though such a conclusion *is* a misperception, it appears that on only two occasions did they find it necessary to litigate against unauthorized infringers.[11] Simply put, the Grateful Dead has never fit the stereotype of musicians being legally aggressive.

That the Grateful Dead were "different" undoubtedly is true on a broad social level. But it is not so easy to ascertain how they were different in the business and legal aspects of their enterprise. The ephemeral nature of their approach stems from the fact that they conducted their affairs within and alongside the world of statutes and contracts and yet provided themselves with a great degree of independence from that world. This Note will comment on the Dead's perspective on and their ultimate rejection of many of the business and legal strategies traditionally ascribed to in the industry.

After a brief introduction to the ethos of the Grateful Dead—essential as a frame of reference into their collective character—this Note will provide summaries of common music

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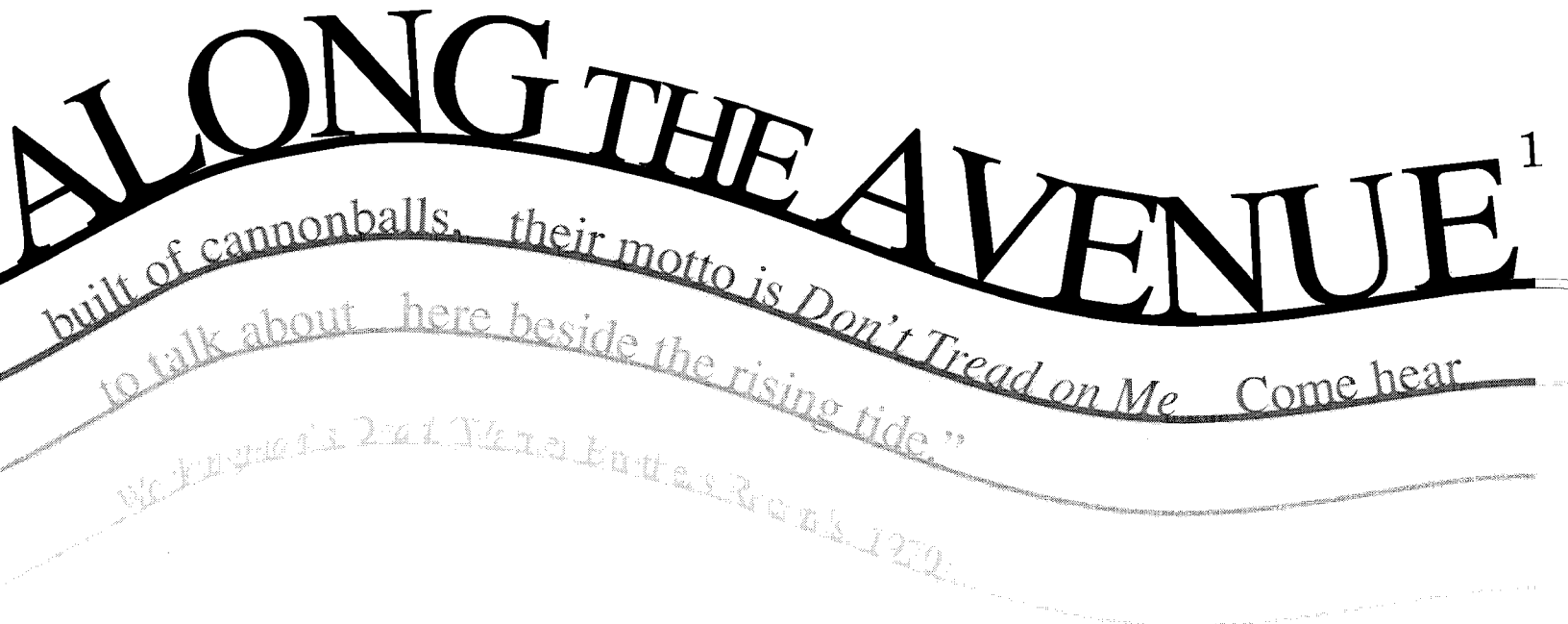

industry practices involved in signing onto a recording label and getting one's material marketed, distributed, and sold. It will then examine the law that protects exposure of artists and their work. The reader should keep in mind that the law views songwriters and recording artists as separate entities.[12] In practice, this distinction applies in most instances. This Note, however, will assume that these parties are one and the same, partly because the Dead both wrote and recorded their material, and partly to avoid the inconvenience and redundancy of having to draw out this distinction *in passim*.

What this Note will *not* argue is that existing practices should be altered to favor artists. The system runs the way it does not so much because large corporate interests have lobbied it until lopsided, but rather because it works for the majority of its participants. Still, problems are common, and the existing structures of the music industry and United States law may be unfit or too inflexible to address them. What the Grateful Dead did so well –what this Note will illustrate—was to avoid the pitfalls inherent in the music business and entertainment law. They took substantial risks in choosing their particular course, risks that perhaps only a band of their nature and with their objectives could possibly embrace. As this Note explains, their success as performers resulted directly from their decision to make independence and artistic freedom a priority. There are currently a handful of musicians and bands who appear to have taken note of the Dead's strategy and are profiting greatly by it.[13] Ultimately, this Note will argue that more should follow suit.

UNCLE JOHN'S BAND[14]

Grateful Dead concerts were original in our time. To their following, these events were gatherings, family reunions, ritual rites of celebration. To outsiders –a vast majority of the American public—this adoration sounds like nostalgia for a time and idealism long since passed. The band was born amidst the communal phenomenon of San Francisco in the 1960s. But what became the "Summer of Love" was merely a scene ripe for the exploitation-minded. Television news cameras arrived alongside tourists; merchandisers came with their lawyers; the FBI and organized crime are suspected to have been involved in the drug scene.[15] The Grateful Dead, generally recognized as the only survivors of the Haight-Ashberry counterculture,[1617] emerged intact because they shunned the spotlights and ran their business on their terms alone. They left the counterculture fountainhead at the intersection of Haight and Ashberry Streets for the road at the end of the Sixties, and stayed there for another 25 years.[16] During these years, the band became the most successful touring group in the industry and attracted a more devoted fan base than any other rock 'n' roll act in history.[18]

The Dead's concerts often resembled a cross between a carnival and a mass baptism. Mythologist Joseph Campbell, during his first encounter with the Deadheads and their leaders,[19] referred to the fans at the concert as though they were a congregated tribe, proclaiming:

> Now I've seen similar manifestations, but nothing as innocent as what I saw with this bunch. This was sheer innocence. And when the great beam of light would go over the crowd, you'd see these marvelous young faces all in utter rapture for five hours! This is a wonderful, fervent loss of self in the larger self of a homogenous community. This is what it's all about![20]

This spirit is why the people came to the shows in ever-increasing numbers for 30 years. This is why they spent nomadic summers following the band from city to city, creating an American Odyssey. It explains the taping of concerts, the maniacal legions of barterers and archivists capturing for posterity American history as it occurred. This is why their music was so beloved, and yet their studio albums invariably mediocre.[21] Remarkably, despite having had only a few of their songs ever receive radio play (only one of these, "Touch of Grey" off 1987's *In The Dark* album, broke the Top Ten), their popularity remains undiminished five years after the death of Jerry Garcia.[22]

The band itself was endowed with awareness that doing *this* was their *raison d'être* and that it could only be done by reinventing the rules that corporate America had made and its musicians followed. As drummer Mickey Hart explains, "We went on a head-hunting mission for twenty-five years. We went out there and got this army in tow. And said, Okay, you guys are *something*; you're a thing. And they themselves recognized their own identity and grew bigger than we ever could imagine."[23] In many ways, every other rock band, as well as every record label from New York to Los Angeles shares this quest, for the obvious reason that it translates into rev-

enue. The difference why it worked for one but not for so many otherslies in their disparate approaches to everything from advertising and marketing to copyright and trademark control.

Despite the Dead's evident sense of manifest destiny, little other than their actual playing was left to the muses.[24] Rather, they employed deliberate strategies for attracting and holding a fan base that the industry often overlooks.[25] Their modi operandi, though having the appearance of disorder and mismanagement, were actually well thought-out and efficiently conducted.[26] They were the paragons of rock 'n' roll debauchery and self-abuse, and yet they worked incessantly.[27] And although their musical output was formidable, after 1978's *Shakedown Street* album they spent little time in the studio.[28] It was not until the 1980s that they began filling the larger venues, despite the fact they were constantly recycling old material.[29] They rarely promoted new albums, instead testing their material on the road before putting it on vinyl.[30] For most bands this is an abominable concept not using an album to promote a tour virtually ensures poor ticket receipts or, conversely, poor album sales.[31]

The Grateful Dead employed deliberate strategies for attracting and holding a fan base that the industry often overlooks. Their modi operandi, though having the appearance of disorder and mismanagement, were actually well thought-out and efficiently conducted. They were the paragons of rock 'n' roll debauchery and self-abuse, and yet they worked incessantly.

The Dead staged free concerts[32] and contributed material to or played at benefits in support of everything from now-fashionable environmental concerns to less desirable interests such as the Hells Angels, the Black Panthers, and San Franciscan prostitutes.[33] And yet, despite being linked to characters traversing the perimeter of social acceptance, they did not espouse anything in the way of radical political views.[34] The Grateful Dead thus never received much in the way of either media or critical attention. Indeed, they sought to avoid the mainstream promotional tactics of the music business. They sold a significant portion of their tickets by mailing them directly to their fans, thereby avoiding promotion fees.[35] For the remainder that went to promoters and agents, the Dead demanded that ticket prices be kept reasonable.[36] And other than through direct fan newsletters, they did little to advertise.[37] Thus, just as they played on unnoticed by much of the American public, they remained elusive and enigmatic to record company executives. In her social commentary on the Dead, Carol Brightman observed that, "With a ready-made audience, beholden to Grateful Dead Productions, there never was much incentive for the music industry to make collateral investments."[38]

The Grateful Dead consistently sought to protect their community and their fans — the so-called Grateful Dead Family—from corporate America's intrusions, something that undoubtedly contributed to their swelling popularity during the 1980s and 1990s.[39] But they did not achieve this through the implementation of aggressive or exclusive policies. In fact, if one single element of the band's character can be lauded for allowing the "family" mystique to flourish, it is that they and their music were accessible in ways other musicians and their music most often are not. They welcomed everyone who would come along for the ride, and what happened was a phenomenon, a *movement*, that is 30 years old and counting.

PROBLEMS WITH THE INDUSTRY, LOOPHOLES IN THE LAW, AND THE WAY OF THE DEAD

THE NATURE OF THE BUSINESS

Dire Straits' most noted song, "Money For Nothing,"[40] ironically criticizes the way the music industry radiates an image of generosity to the artists who are its lifeblood. It describes the stereotypical guitarist of music video lore, prancing about the television screen and contorting over his instrument melodramatically while surrounded by proof of the good life. The singer (Mark Knopfler) comments, "Now look at them yo-yo's that's the way you do it/ You play the guitar on the MTV/ That ain't workin'

that's the way you do it/ Money for nothin' and chicks for free."[41] The song's appeal may lie in that its narrator *is* the man who enjoys fame because he plays guitar "on the MTV," but at the same time is the satirical insider.

The trappings (or rewards, depending on viewpoint) of musical fame that the song romanticizes most certainly orbit the power structure of the industry. But they are not for free. In order even to get four minutes "on the MTV," one ordinarily must mortgage the very product of one's creativity early on, and then simply be lucky enough—or in the rare case, good enough—to get there. Most of "them yo-yos" are neither.

The Cost of Getting Signed

Most musicians and songwriters begin their careers with little in the way of notoriety or personal resources. In the world of record production, this translates into a need for outside help in everything from recording and producing one's work to advertising, marketing, and distribution.[42] More importantly, it also means that the songwriter or musician has little bargaining power, other than the quality of his or her work, which, until it sells in packaged format, remains unproven.[43] Thus, even though the songwriter may own first copyright to the material by virtue of being its author,[44] the publisher (which is often a subsidiary of a larger production corporation) usually obtains this ownership by assignment.[45] The reason behind this transfer is obvious: the publisher is the entity responsible for taking the work from its creative stages to its commercial end-goal, a process that requires a high degree of control over how the composition or recording is to be used and marketed.[46] But publishers can wield their expertise-based bargaining superiority to gain control over rights for creating derivative works,[47] publicity rights and biographical information,[48] editing and revision rights,[49] and even the assignment of third party songwriters to rewrite or retool the original composition.[50]

This power of publishers can be problematic for the songwriter because it leaves her with little control over what is done with her material and sometimes leads to later conflict. For a songwriter who carries an emotional attachment to her work, the fact that a publishing company may alter the work's arrangement or content to better exploit it is at the very least unseemly. Moreover, should the artist eventually build a successful name for herself in the recording business, protection of earlier material may take on an even deeper importance than initially felt.

Often, this situation will give rise to royalty disputes as well.[51] If a new artist contracts with a publisher for its services, he will normally receive only a minimal royalty percentage.[52] Thus, if the work happens to sell well, the publisher and production companies enjoy a percentage of the profits that arguably would go to the artist had he operated independently. This situation becomes further aggravated when the publisher or producer advances monies to the artist on the condition that they be credited against future royalties, or compensated by even greater ownership control over the artist's work.[53] Future litigation over ownership rights and use of the songwriter's material is virtually impossible since publishers tend to reserve in the original contract the right to settle "in the manner [they] alone determine to be in the best interest" of all parties involved.[54] The corporate partner, therefore, can easily dispose of lawsuits, a practice that undoubtedly has prevented the law from evolving in the direction of protecting musical artists from unfair exploitation.

The songwriter can avoid the drawback of a publishing agreement by self-publishing. This is what the Grateful Dead did. They maintained ownership of the publishing rights to every song they wrote, even before the establishment of their in-house publishing company, Ice Nine Publishing.[55] Of course, one must remain mindful of the uniqueness of their situation. Most songwriters sell the publishing rights to their compositions because they are not also recording artists; they require someone to record and perform their songs if they are to earn a living in the music business. The Dead, however, played both roles.[56] Thus, the band did not depend upon other performers to supply them with income from performance royalties. Conversely, they did not have to distribute any of their earnings to publishing companies since generally they refused to employ songwriters outside their own organization.[57]

Because the Grateful Dead began as, and remained, an act whose success resulted from the strength of its live performances, their concern for studio success was always secondary.[58] Thus, they could write dozens of songs and play them for years before they made their way onto a studio album.[59] Long-time manager of the Dead, Rock Scully, comments:

> The Grateful Dead manner of writing songs is a very haphazard, hit-or-miss business. Nothing is nailed down. First

It is through litigation details that many of the underhanded business practices of the music industry have come to light. The legal issues and lawsuits that artists and their estates become involved in can have as much impact on the music we hear as do the musicians with whom the artists work or even the songs they choose to record. Often, lawsuit begets lawsuit in an ever-deepening pool of claims. STAN SOOCHER, THEY FOUGHT THE LAW: ROCK MUSIC GOES TO COURT (1999).

[I]mportant . . . was the symbiosis that developed between the band and its audience—a reciprocity likely unequaled in pop history. At the heart of this connection was the Dead themselves and their self-built business organization....This model of an autonomous cooperative helped spawn what was perhaps the largest genuine alternative communion in all of rock: a sprawling coalition of fans, entrepreneurs, and homegrown media that surrounded the band, and that promoted the group as the center for a worldwide community of idealists—and that community thrived largely without the involvement or support of the established music industry or music press.

JOHN PARELES, NIGHT BEAT: A SHADOW HISTORY OF ROCK & ROLL 374 (1998).

> they try their songs out in front of an audience. For most groups the song gets written and arranged, then it comes out on record and gets played on the radio. Only then does the band go out on the road and back up the record, basically lip-synching their own songs. The Dead, however, like to go out onstage and play a totally new song—something that they've just written or are still writing—long before it ever appears on an album.[60]

For the Dead, choosing what to release on their studio albums was a simple matter; they knew what their followers appreciated, having already exposed them to the unreleased material. Amazingly, some of their most beloved and well-known songs were released only on live albums, while still others never made it off the stage. Ultimately, the Grateful Dead obtained a high level of artistic integrity by claiming the freedom to determine what they played live and, to a lesser degree, what they recorded. Quite simply, the band wanted no one else to have control over their work or their musical direction.[61] The Dead were the first band to sign with a major label (Warner Brothers) with the condition that all publishing rights be kept within their own organization.[62] Though the battles over this issue were furious,[63] the band eventually prevailed. Unlike artists desperate to break into the business, the Grateful Dead did not care for recording an album if this would mean assigning away artistic control and copyright to their music.[64] The band's negotiation tactics paid off; not only did they receive a larger cut of their albums' sales revenue by maintaining publishing rights, but their stubbornness also resulted indirectly in raising overall royalty percentages for recording artists.[65] Contrary to industry philosophy, the risks they took did not result in failed careers.

Recording and Producing An Album

The recording artist, as opposed to the songwriter, must contend with an entirely different set of demands. The initial success of an album will depend largely upon the amount of exposure it receives.[66] Because recording companies only can do so much to advertise a new artist's work, radio play is an essential component (if not the primary method) in ensuring that consumers will become aware of the music.[67] This reality determines not only which songs will end up being recorded onto an album, but also the number of songs that will be included, their arrangement in relation to each other, and their length and style.[68]

Peter Muller, in THE MUSIC BUSINESS—A LEGAL PERSPECTIVE, writes that A&R executives:[69]

> [T]end to listen for a sound that has a wide appeal, that will remain fresh album after album, and that possesses a distinctive yet recognizable quality. The winning combination often represents a commercially successful artist/record company relationship that is highly profitable for all parties connected with

the artist and the record company.[70]

This description is a romanticized summary of what actually happens during an album's song selection and production phases. Because radio audiences of popular music typically do not possess either great patience or a remarkable attention span, production departments necessarily select singles that are catchy in sound and whose playing length falls between three and five minutes.[71] The royalty payment system simply reinforces this design as overall sales depend heavily upon positive airplay.[72] Because the recording company will normally advance production costs to the artist on the condition that they be subtracted from the artist's royalty cuts in the album, recording executives reserve the final authority over what is put on an album.[73] This can mean that longer, and often more serious, compositions that an artist desires to record, but that are not considered commercially attractive, will struggle to make it onto an album.[74] In sum, the artist's decisions and endeavors are to an alarming degree the properties of her business partner.[75]

Touring is also a crucial support feature to promoting an album.[76] For the new artist not experiencing adequate airplay, opening for a more well known act or traveling with a high profile concert festival (H.O.R.D.E., Further, Lollapalooza, among others[77]) can mean exposure to large audiences.[78] But when the tour is designed as a revenue engine to ride the crest of momentum created by radio play, musicians find themselves stuck in a particularly strange Catch-22. Though they may wish to demonstrate the breadth of their repertoires and talents, musicians are confronted with the reality that most concert goers pay inflated ticket prices to hear live exactly what they have been hearing on their favorite radio stations (or on the full-length album being promoted by the concert).[79]

Another aspect to touring that threatens artistic independence is product promotions.[80] When a product manufacturer agrees with a recording company to sponsor one of its artist's tours, that artist not only becomes associated with the manufacturer and its product, but also may have contractual obligations –created by recording executives—to sponsor the manufacturer in return.[81] Record companies also typically reserve the exclusive right to market their artist' publicity interests.[82] This control means that record companies effectively dictate the nature of the artists' promotional enterprises beyond touring.[83]

Of course, the Dead were first and foremost a live band. Until 1987's studio effort *In the Dark*, they neither pursued seriously nor achieved recording an album that was commercially successful by industry standards.[84] Although the Dead may have been better off releasing live performances, it was difficult to convince Warner Brothers to do so. Rock Scully, longtime friend and manager to the band, remarked:

> The stigma against live recordings is entirely a record company thing, and needless to say it comes down to the scaly business of money. Since the songs in live concerts are usually rerecordings of material for the most part already on studio albums, there isn't a new set of songs to scoop the publishing gravy off of. And because it doesn't go through the normal channels, the producers and A&R guys don't get a cut either.[85]

The Dead were masters at cutting out the middlemen that artists encounter in the music business.[86] However, they did not experience the same financial pressures that most other artists—especially those with a marginal live performance reputation—face in this situation. When the need arose, they could simply take to the road and generate massive revenue.[87] During the band's contract with Warner Brothers, they did not possess "industry clout" of the same manner or to nearly the same degree as many of their contemporaries, such as the Rolling Stones. So perhaps Warner allowed the group the amount of license they did because they understood that Grateful Dead albums would never sell in tremendous numbers, and that therefore the Warner Brothers label would not sacrifice a great deal of money by giving the band the control it wanted.

Whatever the case, Scully claims that the Dead managed to raise royalty rates for recording artists generally.[88] Because the Dead had a tendency (especially in concert) to play extended jams in the middle of their songs, or to segue one song to the next via lengthy improvisational experimentation, they stood to receive lesser royalties for only recording two or three songs per album side. The answer to their problem came from the jazz world, where longer improvisational pieces are far more common. For years, jazz musicians' royalties were computed *by the minute*, not per song. The Dead took heed and convinced Warner Brothers to agree.[89]

For most of the Grateful Dead's career, touring was their primary source of income.[90] What is remarkable is the fact that they did not advertise their arrival to a par-

ticular city, or at least in the normal fashion. They began their playing career as the house band for Ken Kesey's infamous acid test parties in La Honda and San Francisco.[91] For these gigs and similar ones in the Bay area, they usually distributed posters.[92] When they went on the road, they worked at obtaining local fan bases by self-promotion absent a large advertisement budget.[93] They received substantial airplay on late-night FM radio shows, which at the time was still a fledgling medium.[94] The night-time FM audience, partially comprised of college students who had come of age during the late '60s and who harbored many of that era's sentiments, were the Dead's targets. When the band would play the several East Coast venues it frequented in the late 1960s and early 1970s, they often would stage numerous free concerts at local college campuses or city parks.[95] In 1970, for instance, the band played around 70 shows on the East Coast.[96] Scully remarks on how the Dead managed to play a number of these concerts for free as a promotional strategy, writing, "Warner Brothers didn't know how to promote the band in earlier years. We convinced them to finance a series of free concerts in seven cities. They paid for the flatbed trucks and the sound system and we did the rest."[97] The organizational cost of this promotional strategy was marginal compared to a real concert promoted in the ordinary manner—there were no middleman promoter fees, advertisement amounted to announcing the free show the night before at a real gig, and permits were easy to come by.[98] Though both Warner Brothers and the band may have lost money by not charging admission, the Dead began to build a reputation of eschewing the greed that already had permeated the counterculture music scene.

People were drawn to them because of their apparent values, and then, for the most part, kept coming back for the music. Of particular significance is the length of an average Grateful Dead show. At the time (and still today), most artists would play for no longer than two hours, having written a performance limitation into their contracts with local promoters.[99] But the Dead insisted that they be given at least four hours of stage time (many of their shows extended well beyond five hours in length).[100] Furthermore, when major concert tour ticket prices began to skyrocket, the band refused to allow promoters to charge more than $30 a ticket.[101]

Their concerns over delivering quality are no better illustrated than in how they treated their road crews and managers, and their commitment to developing state-of-the-art sound equipment. Whereas most bands hire independent crews for each tour, the Grateful Dead kept their employees on the payroll year-round.[102] During the height of the band's success, crewmembers earned six-figure salaries, were entitled to profit sharing, health benefit and retirement plans, and even were provided backstage daycare for their families.[103] The loyalty that such treatment inspired undoubtedly resulted in high performance by their crew. But it may have been the Dead's legendary "Wall of Sound" that set the quality of their concerts apart from those of their competitors.[104] The Dead were notorious for their fascination with technology. In response to the acoustic problems presented by playing larger outdoor venues and drafty indoor sporting arenas, the band's personnel developed the Wall of Sound system (later mimicked by other bands), a configuration which could deliver their loudest jams or Garcia's most subtle notes to anyone in the audience.[105]

The band's unorthodox "communal" approach—unique in the industry—made for good business sense.[106] Mikal Gilmore documented the results of this philosophy some 20 years after the Dead formed:

> The Grateful Dead and their audience function—and thrive almost entirely outside the conventions of the mainstream pop world. Consequently, the Dead—a band rooted in the ferment and romanticism of the 1960s—somehow epitomize the two most prominently contradictory ideals of 1980s pop culture: they are not just a raging cult fave but also a smashing mass success.[107]

To call the Grateful Dead a "mass success" may obscure what it is they accomplished. They were not successful with a large audience so much as they were *extremely* successful with a particular core audience. As Sam Hill and Glenn Rifkin note in RADICAL MARKETING, "By never going mainstream, [the Dead] earned larger sales and profits than many groups that went big-time."[108] In other words, they did not saturate the airwaves, enter licensing contracts with large merchandisers, or engage in overpriced, low quality tours. Instead, the Dead created a strong relationship with a particular audience, and provided a product cheaply enough and of high enough quality to inspire reliance—and ultimately unheard of devotion—from that audience.[109]

Career Development in the Image and Likeness of Success

If an upcoming artist exhibits signs of potential com-

mercial success, record companies will be eager to sign that artist to a long-term recording contract. Such an arrangement is attractive to both parties, albeit for different reasons. The artist receives long-term financial security in the form of corporate patronage, and in many cases is ensured the prestige and publicity value of being signed to a major label.[110] Conversely, the record company binds a predicted moneymaker for a certain number of albums. Furthermore, the record company will have the opportunity to exploit that artist's growing popularity and even mold the musician's image and product in response to market trends.[111] A primary concern, at least for the recording artist, is the royalty percentages paid on later albums: success should yield higher percentages, improving on the "minimum wage" cuts normally offered for a young act's first album. A sliding royalty scale therefore is normally provided in the contract, which is fair to both parties since it rewards each partner's efforts.[112] Nevertheless, artists pay for the recording of their albums out of their future royalty earnings, in effect selling future bonds in their uncreated work.[113] A group whose music is not embraced by the public may simply end up in perpetual debt to its label while still under an exclusive contract.[114]

Sam Hill and Glenn Rifkin comment that, "As collective CEOs of the business, [the Dead] owned the marketing function themselves. They never handed it off to a publicity firm or pushed it down into layers of a bureaucratic organization."

Even for artists who are enormously successful, the pressure to maintain their level of success can put them at the mercy of a prominent label. The winning formula initially struck by an artist and a recording company often fades as time passes. In other words, the sound that caused one album to sell may not be well-received album after album. Nor may it represent the artist's evolving concept of what his or her identity should be. An exclusive contract arrangement can make it difficult to escape this quandary.

The highly publicized litigation brought by George Michael against Sony illustrates the predicament of long term exclusive contracts.[115] In 1984, Michael signed with CBS Records' British affiliate when he was a member of the teen-pop duo Wham![116] Four years later, his first solo effort for CBS, an album entitled *Faith*, sold more than 14 million copies worldwide.[117] *Faith* was the most popular album in the United States that year, establishing Michael as a commercial and musical force in the most important pop culture market.[118] That same year, Sony purchased CBS in what was part of a global consolidation trend in the music industry.[119] Many in the business were concerned that the concentration of the recording industry into a handful of mega-labels would homogenize the industry and sterilize it of variety.[120]

Michael apparently detested the teen image of Wham! and worried that his solo efforts would never receive serious consideration.[121] Beginning with *Faith*, and continuing with 1990's release, *Listen Without Prejudice Vol. 1*, Michael initiated an artistic metamorphosis.[122] But he became convinced that Sony had sabotaged his efforts to tap American audiences with *Listen Without Prejudice Vol. I* (whose style and content broke sharply from that of 14 million seller *Faith*) in apparent retaliation for his refusal to appear in promotional videos for the album. Thus, Michael sought release from his recording contract.[123] Claiming that his recording contract constituted an unreasonable restraint on trade,[124] he filed suit in England, where the law was more sympathetic to his profession.[125] He lost the suit and then settled with Sony after indicating his intention to appeal the case.[126] Michael's concerns, as unabashedly economic as they were artistically noble, are not uncommon for recording artists and songwriters. His litigation had two far-reaching results in the industry: it showed every artist rooting for Michael how costly such moves would be, and it effectively warned recording labels to be more careful in how they contracted with their talent.[127]

The Grateful Dead's initial recording contract with Warner Brothers was successful by all accounts. Nevertheless, friction existed from the start,[128] and their fundamental differences about how to succeed in the music business eventually led the band to seek alternative production and distribution channels.[129] They fulfilled their initial recording contract's obligations in November, 1972, with the release of *Europe '72*, an album

comprised mostly of live recordings from their European tour of the preceding spring and summer.[130] Since the album contained many songs that they had been playing but had not released on vinyl, it technically constituted "new" material, fulfilling their contract.[131] The following spring, the band launched their own recording company, Grateful Dead Records, and a satellite company called Round Records for producing individual band members' solo projects.[132] The notion to start up independent record labels had its genesis in the difficulty the band experienced in working with producers, studio technicians, and executives.[133] Though this project yielded some of their more memorable material, it folded after several albums.[134] One can only imagine the pressures self-management imposed upon a group of people who were diametrically opposed to getting up for work in the morning.[135]

Their later recording contract was with Arista. It mirrored the contract they had entered into with Warner Brothers, but was more relaxed in its demands. This flexibility may have been the result of several factors. For one, the band focused not so much on the production of new material, but instead on touring and solo projects. It would seem that Arista acknowledged that pushing industry norms upon the Dead simply would stifle the production process for everyone involved. The recording executives recognized the band's incredible drawing power, with or without new releases. In turn, the Dead understood the benefits of having *some* structure imposed upon them from an established organization in the industry. In effect, this loose imposition allowed them the breathing room to pursue many of the concepts surrounding independent promotion and distribution channels that they had envisioned while under contract with Warner Brothers, but were unable to develop on their own.[136]

The band incorporated in 1973, the same year they launched Grateful Dead Productions and Round Records (which in itself was a radical decision for the time).[137] Each band member became a CEO and obtained a seat on their board of directors, owning an equal share in profits and an equal vote in all decisions.[138] Sam Hill and Glenn Rifkin comment that, "As collective CEOs of the business, [the Dead] owned the marketing function themselves. They never handed it off to a publicity firm or pushed it down into layers of a bureaucratic organization."[139] In order to ensure that the band would continue to enjoy the benefits of artistic freedom and total control over its business direction and decisions, the Dead agreed that upon the death of any member, that person's shares would be reabsorbed by the organization and redistributed among the remaining CEOs.[140] This prescience has paid dividends in recent years, as Grateful Dead Productions conducts all licensing negotiations for Jerry Garcia's estate,[141] while ex-wives and acquaintances have emerged from the woodwork to feud over his personal estate.[142]

The Dead began this entire process of "own(ing) the marketing function themselves" in 1971, when the band inserted a notice in its *Grateful Dead* album, signed by Garcia and reading "DEAD FREAKS UNITE: Who are you? Where are you? How are you? Send us your name and address and we'll keep you informed."[143] What followed were thousands of responses, leading later that year to the publication of a fan newsletter providing information on tour dates and requesting feedback about various quality concerns.[144] In essence, the band adopted database marketing long before mainstream marketers took notice of this technique.[145] They further tapped the willingness of their fans to communicate directly with them by incorporating a promotion booth into their 1974 tour.[146] In the last 25 years, this grass roots style of self-promotion has blossomed into an enormous merchandising and distribution system, one that currently generates more than $60 million a year.[147]

THE ENIGMA OF OWNERSHIP AND PROTECTING ONE'S PUBLICITY

The law supplies artists with an extensive arsenal designed to prevent others from profiting from their labor. Through federal trademark and copyright laws, as well as an array of state common law doctrines, artists may attempt to secure royalties from the use of their work and maintain a high degree of control over how record companies market both their product and their image. Their concern is legitimate, especially in a society such as ours. But since many artists relinquish both publishing rights and copyright control over their work during its production stages,[148] the legal safeguards whose purpose it is to "protect" actually do more to protect *legal* ownership than artistic origin. Little sympathy exists either in the corporate music arena or in the courtroom for the many songwriters and musicians who seek to salvage their rights from corporate exploitation.

In recent years, several high profile artists have suc-

cessfully sued to reclaim rights they had previously signed away. In addition, artists (or their estates) have pushed forward state common law claims and remedies to obtain more comprehensive protection for themselves. Nevertheless, the problem remains that this area of the law traditionally has responded more favorably to the economic realities of the business. Thus, even when artists do obtain the industry clout to secure control over their material, reliance on legal remedies to do so often means that they will use these remedies as instruments for excluding other artists and fans from incorporating the material into their own work.[149] It is a vicious circle once entered, and in the end artistic integrity amounts to an amorphous legal term at best.

Because the Grateful Dead's primary focus always has been artistic integrity, they necessarily have avoided adopting such a policy of legal exclusion. They well understood that their success was intricately linked to their accessibility. As bassist Phil Lesh has remarked, "The relationship between the band and the Deadheads needs to be nurtured because they are us and we are them."[150] This is not to say that the Dead allowed others to trample their efforts; they vigorously enforced what policies they did erect. But even in their enforcement of policy, they adopted a philosophy of inclusion, something to the effect that the more people they had working for the propagation of their product, the more powerful a marketing mechanism they had at their fingertips. They simply required that others not take advantage of their generosity. In return, they never pushed the exploitation of themselves to the point where it became the exploitation of their audiences.

Intellectual property law in the United States purports to maintain a balance between the interests of authors and those of the public. Necessarily, this objective implies that there is a barrier between the two. But since intellectual property is by its nature intangible property, the legal barriers defining its parameters are shifty at best.[151] The Grateful Dead's philosophy was to eliminate many of these barriers, or at least to minimize their intrusiveness into the relationship the band shared with its fans. They accomplished this by first maintaining control over their legal rights in their property, and then by allowing near-complete access to it for those who wanted access. Although this decision ran contrary to the dogma materializing in the industry during the Dead's formative years, it made the band one of the most successful—and enigmatic—the business has seen.

Trademark Dilution Theory and the Lanham Act

Trademark law has two primary functions. The first is to protect the legal owner of a product or an idea from unfair competition in her efforts at marketing and selling the product or idea.[152] Its second function is to minimize consumer confusion.[153] Consumers frequently associate goods and services with certain symbols and words, often to the point where the trademark itself will serve as a primary quality assurance.[154] Trademark enforcement thus protects both the seller's economic advantage and her reputation, plus the buyer's reliance that he in fact is getting what he pays for. Although the traditional standard for trademark infringement is the "likelihood of confusion" analysis developed by the Second Circuit in Polaroid Corp. v. Polaroid Electronics Corp.,[155] courts have extended this area of the law. For example, in Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., the Fifth Circuit prohibited unauthorized trademark uses that created the illusion of endorsement or sponsorship.[156]

But, though seller and consumer protection is an important policy concern, fears that courts are unwilling to limit trademark law's scope are well founded.[157] Obviously, the greater control trademark law affords existing sellers over their markets' diversification, the harder it becomes for the sellers of new goods or services to gain entry into these markets. But these concerns tend to reflect trademark law's focus on market arenas for highly competitive products and services, where the function of a good of generic origin substitutes easily for that of a name brand commodity. Furthermore, trademark law and its critics often have failed to look beyond a market's immediate bottom line.

The Lanham Act,[158] designed to codify common law trademark doctrine (which, unlike patent and copyright law, has no explicit anchor in the United States Constitution[159]), became a prominent judicial tool for expanding trademark's reach.[160] Section 43(a) of the statute forbids any "false or misleading description of fact, or false or misleading representation of fact, which... 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."[161] Courts have interpreted this prohibition to protect against infringement of trademarks both registered[162] and unregistered,[163] patently false advertisement,[164] and even misleading statements that create false impressions.[165] Section 43(a) is thus a flexible weapon in defending one's economic or business

interests. Unfortunately, because strength of a plaintiff's trademark is the touchstone for determining whether infringement may have occurred, § 43(a) works far better for the established and the successful.[166]

Illustrative of this point is a recent case involving a musician's claim of false advertisement. In Waits v. Frito-Lay, Inc., singer-songwriter Tom Waits sued the makers of SalsaRio Doritos tortilla chips for both misappropriation of his voice and for "false endorsement under the Lanham Act."[167] After the Ninth Circuit found that the quality of one's voice can be sufficiently distinctive to constitute an unregistered commercial trademark,[168] it determined that Waits had standing to sue under § 43(a) because the "interest asserted . . . [was] a commercial interest protected by the Lanham Act."[169] The court declared, "Standing... does not require 'actual competition' in the traditional sense; it extends to a purported endorser who has an economic interest akin to that of a trademark holder in controlling the commercial exploitation of his or her identity."[170]

The difficulty with the Ninth Circuit's ruling in favor of Waits is that the opinion applies traditional trademark principles (the court invokes many of the same infringement factors listed in Polaroid Corp.)[171] in a situation where there is no competition between plaintiff's and defendant's products, direct or otherwise. The Ninth Circuit discusses two reasons for its holding. The first is obvious: it simply would be inequitable for a seller of a product to profit by associating a celebrity's identity with that product without consent.[172] But the court adds that Waits has an interest in not being injured *commercially*.[173] What the Ninth Circuit meant by this, since the opinion readily admits the absence of formal economic competition, is that Waits' commercial integrity as an artist stood to suffer. Tom Waits was really bringing suit—under the guise of § 43(a) of the Lanham Act—for injury to his reputation as an artist who, throughout his career, shunned commercial self-exploitation through product endorsement. Since his claim did not neatly fit into existing categories of tort law concerning damage to reputation, the Ninth Circuit read the Lanham Act broadly. The court hinted at the possibility that damage to Waits' reputation as an artist of high integrity and lofty, anti-establishment ideals could have translated into loss of future revenue by offending loyal fans.[174]

There certainly is merit to this rationale and to extending the Lanham Act's coverage to such claims where it is likely (in this case, actual) that consumers will mistakenly assume sponsorship by a celebrity.[175] But, even though the Ninth Circuit decided this case correctly, it is nonetheless problematic. Under the Ninth Circuit's substitutional analysis, courts may have difficulty distinguishing between meritorious claims and ones that are frivolous or belligerent. An artist could use this blind spot to block the development of alternative products. Such a prediction is not immediately evident when the litigation is between an artist and a food manufacturer. But substitute another musician for Frito-Lay, and established artists or corporate producers in the music industry have an effective means of stifling artistic developments that seek to incorporate aspects of other artists' identity or material.[176] Recent legislation and litigation in the area of digital sampling illustrates the depth of this concern.[177]

> The curious aspect to the Dead's trademarks is that they never have evoked just the band or their music. Images such as the "Dancing Bears," the "Skull and Roses," or "Steal Your Face," have come to identify the fans just as much as the band, and, ultimately, the ethos surrounding both. The Dead came to understand the value inherent in these images, and that it derived first from their music.

Roughly three months prior to the Ninth Circuit's decision in Waits v. Frito-Lay, Inc.,[178] the same court decided a case involving the teen group, "The New Kids On The Block."[179] The musical act brought ten trademark claims against the newspaper USA TODAY and THE STAR MAGAZINE.[180] The essence of these claims revolved around the fact that both publications had posted 900 number telephone hotlines whereby readers could participate in polls.[181] The group insisted that USA TODAY and

Consider the blues song "In the Pines," a traditional whose modern arrangement is attributed to Huddie Ledbetter (a.k.a., Lead Belly).[1] The song has been performed and recorded for decades by various artists whom Lead Belly has inspired, ranging from bluegrass to punk rock musicians. But when one listens to Nirvana's rendition[2] after hearing Lead Belly sing it, one realizes how songs mutate over time through the performances and interpretations of later artists drawing inspiration from the original recording. For the teenager who follows the angst-driven, hard-played sounds of early '90s grunge rock—an audience with probably little awareness or interest in early blues artists—Nirvana's recording actually may introduce them to an entirely new world of music. What they will find is a genre that quite frankly perfected guitar incantations of anger, sorrow, and isolation long before Kurt Cobain was born.

[1] LEAD BELLY, "In the Pines," *on Where Did You Sleep Last Night?* (TRO-Folkways Music, Inc., BMI, 1996).

[2] Id. perf'd. by NIRVANA *on MTV: UNPLUGGED IN NEW YORK* (Geffen Records, Inc., 1994).

THE STAR MAGAZINE were capitalizing on their popularity by associating their publications with The New Kids' trademarked name and by drawing young fans to the 900 number polls (and thus away from the group's own 900 number information hotline).[182] The Ninth Circuit found that neither publication was liable under the Act since the 900 number constituted a fair use[183] and consumer confusion was highly unlikely.[184] Although the court held that the publications did not create consumer confusion to the result of usurping The New Kids' potential fan revenues, the case raises several questions. The combined monetary intake for both polls was $1,900, $300 of which USA TODAY donated to the Berklee College of Music.[185] Furthermore, the polls, rather than robbing The New Kids of crucial income, indirectly heightened the group's exposure, and consequently their publicity value. Why, then, did the plaintiffs seek legal redress for something that actually may have served their ends, expending the resources necessary to push the litigation into the Court of Appeals for the Ninth Circuit?

The answer to this question may lie in the theory behind trademark dilution doctrine.[186] Consider The New Kids' fears in terms set forth in Allied Maintenance Corp. v. Allied Mechanical Trades, Inc.[187] In this case, a New York court said dilution is not "public confusion caused by similar products or services sold by competitors, but a cancer-like growth of dissimilar products or services which feeds upon the business reputation of an established distinctive trade-mark (sic) or name."[188] In an industry where publishing and production conglomerates normally own the rights to phonorecords, sound recordings and musical compositions, an artist's reputation—which is embodied in a trademarked name—is often the only marketable commodity he possesses in the long run.[189]

Trademark manipulation is therefore central to preventing others from siphoning off a musician's source of revenue. Thus, for artists, and for tribunals adjudicating these claims on a case-by-case basis, doctrines such as tarnishment and blurring are instrumental in protecting the artists' long term economic positions.[190] But it may be that these doctrines are *detrimental* to artists' interests, both economic and artistic ones.[191] When trademarks are incorporated into subsequent creative designs, the level of secondary meaning they take on further enriches the primary meaning assigned to them at their inception.[192] Moreover, this process often attracts consumer attention to the original work that otherwise may have channeled itself to other, more recent and more visible substitutes.[193]

The Grateful Dead understood this concept. Though various organizations seeking sponsorship or access to their fan databases often approached the band, the Dead were not a marketable sponsor in the same way most celebrities are. For one, their audience has never been a mainstream segment of the American populace, nor a coveted group of consumers. Furthermore, the band probably has had far too many associations with drug use or political subversiveness to appeal to corporate America. However, if ever there has been a rock group ripe for trademark infringement, they are it. No other band has been surrounded by such a wealth of trademarked images. And no other band's trademarks have the ability to summon such an array of metaphors.

The curious aspect to the Dead's trademarks is that they never have evoked just the band or their music.

During the band's formative years, when they resided at 710 Ashberry Street in San Francisco, local poster artists created a small array of imagery playing off of the band's name.[194] But instead of these early ciphers merely serving to announce an upcoming concert, fans of the group found that, by placing them in windows of houses or cars, they could identify each other.[195] They became the banners of an emerging community. Thus, what began as a confined group of symbols would later spawn a distinct genre of imagery that shaped the lexicon of thousands. Images such as the "Dancing Bears," the "Skull and Roses," or "Steal Your Face," have come to identify the fans just as much as the band, and ultimately, the ethos surrounding both. The band did establish trademark protection over these designs, though originally they had wanted all credit to be given to the graphic artists.[196] But they came to understand the value inherent in these images, and that it derived first from their music.[197]

The level of protection that the Dead traditionally has exerted over their trademarked images, however, differs greatly from standard trademark principle. Anyone familiar with a Grateful Dead concert has seen the spectacle that existed outside the venues they played. A virtual carnival of merchants, magicians, and acrobats would congregate in fields and parking lots, selling homemade T-shirts, stickers, and other items bearing the band's many logos. For years, the group paid little attention or concern to this subculture. After all, it indirectly supported them.[198] After realizing that they were "losing" over a quarter of a million dollars *a show* in licensing revenue, however, the band decided to take action.[199] But instead of excluding these merchants from producing band-oriented items—instead of suing them for trademark infringement, tarnishment or dilution—the Grateful Dead made such entrepreneurs licensing offers which in effect brought them into the band's fold. Ultimately, this decision resulted in further garnering fan respect. It also dispelled possible worries that the Grateful Dead were "selling out" to financial temptations (plus, they avoided a substantial amount in potential legal fees).[200] Despite how apparent the fan reaction became, the music industry and critics of the band simply dismissed it as a nostalgic attachment to '60s idealism.

Copyright Protection: Too Little, Or Too Much?

Copyright law in the United States borrows primarily from an economic cost-benefit analysis in assessing what protection to give intellectual property. It balances the more immediate economic potential the author should enjoy from his work, made possible through protective policy, and the long-term social benefits produced by public access to his work after he has had an appropriate opportunity to exploit it.[201] The Register of Copyrights announced:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.[202]

The result of this philosophy has been that copyright law conceives of the creative process—and thus its scope of protection—in terms of economic realization whose beneficiary is determined by the passage of time.

Moreover, copyright law tends to view creation or composition as a singular moment or an isolated process, whose result is a static representation of the completed process, fixed in a "tangible medium."[203] This notion of artistic creation ignores a musical artist's interest in sound recordings[204] and live renditions or performances,[205] as well as her interest in having others interpret her work *through performance*.[206] It also confines the notion of style to the composition or original phonorecording.[207] But for many performers, style is often the genius of the musician. After all, would Elvis Aaron Presley's songs have been the music of *Elvis* without pelvis gyrations and sequined capes and jumpsuits?

The Grateful Dead—whose musical roots lay in traditional American blues, R&B, folk, and bluegrass music—understood this concept. Their focus was thus always centered upon the evolution of what they played. Of course, they copyrighted every song they wrote, and they paid royalties for covers. But the fact remains that a song the Dead first wrote and played in 1968—"Saint Stephen," for example—had become a much different composition by the late '70s (furthermore, some of the songs they covered did not resemble their original renditions in the least, Noah Lewis' "Viola Lee Blues" for example[208]). Copyright law entertains this possibility by granting protection for revisions and subsequent reinterpretations of one's work.[209] But the Dead's manner of revision was to improvise before a live audience. This automatically threatens problems with the Copyright Act's fixation requirement. The Dead may have pre-

empted any such problems by recording their own concerts (though this was done, at least in their early years, for posterity's sake).

Nevertheless, audience members taped their shows from the start, and, until recently, copyright law has had little to say about bootleggers.[210] But while other artists sought to sue bootleggers out of business under causes such as unfair competition,[211] the Dead began to welcome them. Understanding that their bootleg albums were commanding a price on the market, the Dead opened their doors to every bootlegger who wanted to tape them, provided only that the tapes be bartered for other tapes.[212] Sam Hill and Glenn Rifkin comment that "those with the most extensive tape collections became masters of their universe, and thus the open-taping decision fueled ticket sales."[213] More than this, by flooding the market with their live product, the Dead eliminated the market in which for-profit bootleggers thrived. Furthermore, such an extension of trust magnified fan devotion, while the presence of countless bootlegs on the market created greater demand for touring.

The Grateful Dead's creed has always been, "When we are done with the music, [the fans] can have it."[214] The extreme of this philosophy was the fact that the Dead often broadcast their concerts. Contrary to popular industry wisdom, the Dead customarily sent their live shows over empty airwaves. On any given night, audiences ranging in size from the people in the parking lot who could not get tickets to 20 million northern Europeans could hear what they were not able to see.[215] The band's inclusion of their entire audience into the history of their performances, through both their taping policy and live broadcasting, merely amused the music industry. Ironically, the Dead's perspective on copyright law and bootlegging—which to an extent neglected both—has been adopted by other artists who have witnessed the success of their strategy.[216] They have begun to adopt it.

The States Play Catch-Up: Alternative Remedies, The Right of Publicity, and the Legacy of Elvis

Copyright law has always been highly protective of the more traditional economic aspects and results of artistic creativity, but indifferent to traditionally ignored aspects such as voice and public identity. In response, many states have developed alternative remedies through common law doctrine and legislation to patch Congressional gaps and oversights.[217]

The right of publicity first was recognized in a courtroom in 1953.[218] Another 24 years passed until the Supreme Court considered any claim under it.[219] After Elvis Presley died a pauper in 1977, his estate sought to recapture the impressive merchandising revenue his name commanded but which had been scattered among various private entrepreneurs through financial mismanagement during his lifetime.[220] His estate did much to advance the common law in the realm of publicity rights, culminating in a successful lobbying effort that prompted the Tennessee Legislature to pass The Personal Rights Protection Act in 1984. The statute provides that the right of publicity is descendible.[221] But critics have accused Presley's estate of being too aggressive in its quest to control its merchandising operations.[222] Two cases in particular illustrate the plausibility of this criticism.

In Estate of Presley v. Russen,[223] the United States District Court for the District of New Jersey entertained a suit for, among other things,[224] infringement on the right of publicity that the estate had inherited from Presley.[225] After Presley's death, the number of Elvis tribute shows increased more than tenfold, from 300 to over 3,000 nationwide.[226] The defendant Russen was a promoter of an Elvis impersonator (one Larry Seth) who would dress like Presley and sing covers of Elvis' songs in imitation of his style.[227] The performance toured primarily in New Jersey and Eastern Pennsylvania, selling memorabilia and records that depicted the impersonator's visage (a close resemblance to the King at the height of performing career).[228] Worried by the growth of the Elvis-impersonation business, the estate targeted Russen's operation (which grossed around $300,00 in 1978[229]) with an negative injunction against continued performance as the self-titled "Big El Show."[230] The court presented the right of publicity issue in these terms:

> In essence, we confront the question of whether the use of the likeness of a famous deceased entertainer in a performance mainly designed to imitate that famous entertainer's own past stage performances is to be considered primarily as a commercial appropriation by the imitator or show's producer of the famous entertainer's likeness or as a valuable contribution of information or culture.[231]

The district court found that the defendant's use of Presley's image was almost explicitly for his own financial benefit, potentially "appropriat[ing]" and "dimin-

ish[ing]" the commercial rewards that are under the legal auspice of Elvis' estate.[232]

The Presley Estate's fears and the district court's parallel findings are entirely justified—3,000 plus Elvis impersonation shows a year[233] would represent a substantial amount of concert attendance revenue. But the court was uneasy with the notion that this revenue necessarily would have returned to the estate if not for the imitators.[234] After all, Elvis had left the building for good four years prior; he was no longer competing for concert goers. The district court granted a preliminary injunction. But it added that, absent a showing of actual economic harm to Presley's heirs by Russen's promotion, the Big El Show would be allowed to continue.[235] This result, perhaps in part a reaction to the Presley Estate's aggressive attempts to run an independent promoter out of business (the Big El Show was the single source of income for both Russen and Seth)[235], indicates that the court held deeper reservations about elevating New Jersey's right of publicity to such a stature. Lurking throughout the opinion is the awareness that, despite the Presley Estate's interest in controlling the use of its personality rights in Elvis, there was no actual competition between it and Russen's enterprise.[236]

If anything, the Big El Show was merely part of the larger cultural phenomenon surrounding Elvis' legend. And it is entirely likely that the widespread existence of Elvis impersonators has simply added to that myth, attracting even more attention to the deceased artist from members of his own generation and subsequent ones.[238] By seeking to isolate the Elvis personality from the general public through protectionist measures, it is possible that the singer's heirs threatened to cut off the very lifeblood that supported the passion for the deceased star. It is also possible that the estate's increased revenue has resulted as much from the propagation of Presley's myth as from the their reclamation of merchandising revenue via publicity rights litigation.

Similarly, in Elvis Presley Enterprises, Inc. v. Capece,[239] the Fifth Circuit decided a lawsuit against the owner of a Houston nightclub called "The Velvet Elvis." The Velvet Elvis was a concept bar whose decor reflected the tawdry self-indulgence sometimes associated with the 1970s.[240] Soon after deciding to relocate the establishment in 1994, the club's owner, Barry Capece, received a cease and desist letter from the Presley Estate.[241] Capece ignored the threat and the Presley estate sued two years later.[242] In considering the plaintiff's claims (unfair competition, trademark infringement and trademark dilution under the Lanham Act; infringement of its right of publicity under Texas law[243]), the district court found that the Velvet Elvis did nothing to damage or infringe upon the estate's interests.[244] Relying on the Supreme Court's reasoning in Campbell v. Acuff-Rose Music,[245] the court declared that the nightclub's use of Elvis' name and likeness amounted to nothing more than parody or "societal commentary," which has the beneficial function of recoding social metaphors into new contexts.[246] This principle remains the foundation of intellectual property law.[247] The court found no likelihood of consumer confusion as to the purpose of the parody, or as to endorsement or sponsorship by the Presley Estate.[248] The prevailing analyses of both trademark dilution and infringement of the right of publicity compare a plaintiff's and a defendant's products and imagery to each other. Accordingly, the court made quick work of the Presley Estate's claims under these analyses. It observed that the name "the Velvet Elvis" and the display of various Presley memorabilia served not so much to attract customers via name and likeness appropriation, but rather to recreate the atmosphere of an era in American history.[249] On appeal, however, the Fifth Circuit reversed the district court's rulings. It found that Capece's use of Presley's name and likeness both competed unfairly with the financial and publicity interests of the estate, and that it constituted trademark infringement.[250]

It is remarkable that the Presley Estate decided to

By flooding the market with their live product, the Dead eliminated the market in which for-profit bootleggers thrived. Such an extension of trust magnified fan devotion, while the presence of countless bootlegs on the market created greater demand for touring.

take legal action against Capece. As in Estate of Presley v. Russen,[251] it is unlikely that the Velvet Elvis directly competed with the estate's interests, and, even if so, that it harmed the estate financially. And as in Russen, it is probable that the attention the nightclub brought to Elvis' name would have translated into merchandising revenue for the Estate.

Though the Dead certainly have not overlooked their publicity interests, their stance is as relaxed and open as it is in regard to copyright and trademark control. Again, they function within the paradox of being in control of their affairs, and yet allowing outsiders to determine to a great degree the course of these. The band members have allowed their pictures to grace everything from T-shirts to ice cream. Aside from negotiating a licensing agreement and retaining rights to quality approval, they have allowed their fans to conduct the bulk of their publicity work. Currently, they have begun appointing trustees to assume control over their stock, but with the notion being "business as usual."[252] The band plans to open an interactive museum in San Francisco during 2000 that will reconstruct various elements of their concert experience, provide a research facility for studying grass roots and world music, display live acts, and provide public access to their business and legal files.[253] Unlike Graceland—essentially a tourist attraction—the Dead's vision includes everyone in their continuing enterprise.

DEAD-ON

The Grateful Dead were a record company executive's nightmare. Though they followed few rules traditionally relied upon by artists in the music business, the vision they had of alternative strategies proved to be incredibly successful. By maintaining control over each element of their business, they were able to offer a superior product at a lower cost. Additionally, by erecting fewer legal barriers between themselves and their audience, they fostered a long-term relationship with their customers. Perhaps the greatest irony about their success is that they appeared to so many as the antithesis of what they really were: tremendous musicians, unique entertainers, astute and legal savvy business people. Most of America took little heed of these middle-aged hippies who seemed to keep coming around. But recently, other artists have begun to.[254] What they have realized is that, of all people, The Grateful Dead were redefining the business as it was defining itself. ◆

The author would like to thank Gretchen Victoria for the idea, "California's oldest juveniles" for their music, and The Villager for lessons on patience. Thanks also to Mark Plotkin for all the good advice.

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[1] THE GRATEFUL DEAD, "Cosmic Charley," *on Aozamazoa* (Warner Brothers Records, 1969).

[2] 17 U.S.C. § 101 *et seq.* (1976) (Supp. 1998).

[3] See SAM HILL AND GLENN RIFKIN, RADICAL MARKETING 44 (1999) [hereinafter RADICAL MARKETING] (discussing how the Dead adopted a taping-friendly policy toward their audiences during the 1980s, though the band had not previously opposed taping).

[4] See, e.g., David Schwartz, Note, *Strange Fixation: Bootleg Sound Recordings Enjoy the Benefits of Improving Technology*, 47 FED. COMM. L.J. 611 (1995); HOT WACKS BOOK XV: THE LAST WACKS (Bob Walker ed., 1992) (a comprehensive catalogue of circulating bootleg recordings designed to assist the collector). Statutory copyright protection for live performances (which were not both recorded and transmitted contemporaneously) did not exist at this time, so artists seeking to legal redress had to bring claims under state common law doctrines.

[5] Under prior Federal Copyright Law, protection did not manifest until the composition had been fixed in a visible (i.e., *readable*) medium, such as sheet music. Recording a song was a different matter entirely, though courts intuitively extended protection to cover sound recordings. 17 U.S.C. §§ 302-304 resolved this statutory inconsistency.

[6] "'Phonorecords' are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed." 17 U.S.C. § 101

[7] See ROCK SCULLY WITH DAVID DALTON, LIVING WITH THE DEAD 45 (1996) [hereinafter LIVING WITH THE DEAD].

[8] See id.

[9] Though the Dead's style of playing and the unique character of their songs certainly distinguished their work from every other rock band, and despite the fact that they recorded all of their own shows, the copyright law's statutory concept of "creation" and "fixation" does not easily lend itself to incorporating such a loose definition of an evolving work. It would seem that their notion of "songwriting" is not the same as a writer producing multiple drafts and revisions of a book. For one, their songs never reached a point of absolute completion to be considered "created" or "fixed" in the sense that a book is fixed by the time it is ready for publication. Though the many live recordings of their material may be analogous to an author's various drafts, arguing this point would require a stretch of the imagination. See 17 U.S.C. § 101 (for definitions of "fixation" and "sound recordings").

[10] See generally STAN SOOCHER, THEY FOUGHT THE LAW: ROCK MUSIC GOES TO COURT (Schirmer Books, 1999) [hereinafter THEY FOUGHT THE LAW].

[11] See Grateful Dead Productions v. Come 'N' Get It, 88 Civ. 4471 (S.D.N.Y. 1993); Grateful Dead Productions v. Auditory Odyssey, 76 F.3d 386 (Table), 1996 WL 19210 (9th Cir. (Cal.)). This is not to say that the Dead did not pursue profit-seeking bootleggers with legal threats. See RADICAL MARKETING, *supra* note 3, at 44.

[12] See generally DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES (3rd ed. 1996) [hereinafter LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES]

[13] See RADICAL MARKETING, *supra* note 3, at 34 ("Grateful Dead Productions created another business unit to sell its marketing services and expertise in concession sales, tour operations, and concert promotion to spin-off groups initiated by individual band members, as well to other artists like Bonnie Raitt, the Gypsy Kings, and Maxwell. The unit is even handling sports franchises, like the Oakland Raiders football team.").

[14] THE GRATEFUL DEAD, "Uncle John's Band," *on Workingman's Dead* (Warner Brothers Records, 1970). Robert Hunter clearly wrote this song with the Dead's leader, Jerome John Garcia, in mind. See CAROL BRIGHTMAN, SWEET CHAOS: THE GRATEFUL DEAD'S AMERICAN ADVENTURE at 188 (1998) [hereinafter SWEET CHAOS].

[15] See LIVING WITH THE DEAD, *supra* note 7, at 97-99 (1996) (discussing the advent of neighborhood tour buses to introduce the thousands of curious sightseers, flocking from across the globe to catch a glimpse of "the summer of love," and the arrival of national news media to bring it home to everyone who failed to make the trip); SWEET CHAOS *supra* note 14, at 105-106, 167-73 (detailing the evolution of Haight-Ashberry from a hippie community into one destroyed by the arrival of hard drugs).

[16] See SWEET CHAOS, *supra* note 14, at 3 ("[I]t was this former jug band from Palo Alto, alone among the collapsing stars of the '60s, that gathered unto itself the free-floating energy of a disenchanted generation, and carried it through three decades. Nobody else did it. No other bands; no communes, peace groups, political factions or tendencies, art movements or experimental film groups...").

[17] For a description of the band's need for perpetual touring. Because the Dead earned much of their revenue from live performances, touring became a self-perpetuating endeavor see *State of the Changes: How the Dragon Urobouros (Giga Exponentia) Makes Us Go Round and Round*, DEAD HEADS NEWSLETTER, Summer 1973, (last modified Dec. 15, 1998) <http://www.dead.net/cavenweb/deadfile/index.html>. Larger and more sophisticated equipment (800 pounds worth in 1965, as compared to fifteen tons by 1973) and a longer payroll demanded an ever-increasing influx of money, which in turn necessitated playing more often or at larger venues, which then required more and better equipment, and so on.

[18] See generally RADICAL MARKETING, *supra* note 3.

[19] See JERILYN LEE BRANDELIUS, GRATEFUL DEAD FAMILY ALBUM 234 (1989).

[20] Id.

[21] See generally LIVING WITH THE DEAD, *supra* note 7, for frequent comments by band members admitting, with humor, that their studio efforts usually fell flat on their faces.

[22] THE GRATEFUL DEAD, "A Touch Of Grey," *on In the Dark* (Arista Records 1987). Due to the song's popularity with non-Deadheads, the album went platinum, and the band's revenues skyrocketed. See Victoria Slind-Flor, *What A Long, Strange Trip*, THE NATIONAL LAW JOURNAL, July 19, 1999 at A1. Ironically, the band had been playing *A Touch Of Grey* in concert regularly for close to six years before its commercial release and subsequent discovery by the American public. See LIVING WITH THE DEAD, *supra* note 7, at 310.

[23] See SWEET CHAOS, *supra* note 14, at 253. Despite the ever-present financial impetus for the Dead's constant touring, the band members appear to have genuinely believed they were engaged in a sort of crusade, replete with its own gospel. Phil Lesh, the bassist, is known to reflect, "Every place we play is a church. When we play, we're prayin'....And then you have to hope that the dove descends." Id. at 8.

[24] Apparently, the band's first decision of legal import was resolved by an appeal to higher powers. After having decided that they would be called the Warlocks, they were told that they had to change their name due to the fact that another Bay area band had already adopted their choice and that they would be committing trademark infringement. The author does not know the extent to which the band debated the issue, but it is claimed that Jerry Garcia announced that he was going to open a copy of the Oxford English Dictionary to a random page and select the first word or phrase his eyes fell upon. "The Grateful Dead" is a term for an archetypal character out of British folklore, whose role it is to die without a proper burial. The hero of the story comes across the corpse during his journeys, and buries it. Sometime later, when the hero finds himself at an impasse, a stranger assists him. The stranger is the man the hero had buried, resurrected in order to return the favor out of gratitude for his burial. See *???! Dead Heads Unite !!??* DEAD HEADS NEWSLETTER, Fall 1971, (last modified Dec. 15, 1998) <http://www.dead.net/cavenweb/deadfile/index.html>; SWEET CHAOS, *supra* note 14, at 80-81.

[25] See generally RADICAL MARKETING, *supra* note 3.

[26] See id at 36.

[27] See generally LIVING WITH THE DEAD, *supra* note 7.

[28] Id.

[29] See *supra* note 22. "Touch of Grey's" unanticipated success attracted a sizeable, youthful audience and dramatically increased revenue. This realization is in opposition to the main thesis of this Note. However, the fact that the Dead achieved vast commercial success so late in the story by participating in industry practices which they always had shunned does not discredit the fact that they were already commercially successful, if only in the frame of their particular niche. Furthermore, their decision did little to alter the formula of success they had developed on their own, or their allegiance to it. Part III of this Note, *infra*, discusses this point in greater detail. See also MIKAL GILMORE, NIGHT BEAT: A SHADOW HISTORY OF ROCK & ROLL 368 (1998).

[30] See LIVING WITH THE DEAD, *supra* note 7, at 310-11.

[31] The industry wisdom seems to go something like this: a band records a new album, then saturates the airwaves with the tracks tailored to radio play. After substantial promotion in this manner, the band launches a tour to *support* the album. This is considered necessary; in order to convince people they are not going to see two hours of the same show they saw the last time the particular band came

through town, new material must be promised, and it must be well received. If done the other way around, the albums are not thought to be marketable because everyone has already seen what it is the musicians are asking them to buy. Because the Dead were the consummate live-performance rock band, their studio recordings were always separate entities from their live cuts. Moreover, because their commercial audience was small and cross-generational, they did not market themselves to traditional target groups (in fact, the Dead were compiling a consumer database about their particular type of customer long before this became an industry practice). The Dead remained isolated from evolutions in the music America was listening to, and they never produced one of the anthems of their own generation which could induce respect from newer audiences. New fans, it seems, normally were drawn into the fold by word of mouth.

[32] For an amusing description of how the Monterey Pop Festival materialized, and the Dead's participation in the event see LIVING WITH THE DEAD, *supra* note 7, at 99-111. The highlight of the festival —what made it legendary—was the band's response to the festival's promoters embezzling a portion of the proceeds. The Grateful Dead's equipment managers stole over one million dollars worth of sound equipment owned by Fender (CBS), moved it into San Francisco, and then proceeded to play a series of free concerts with other Monterey notables such as Eric Burdon and Jimi Hendrix. They returned the equipment in full a week later. Scully writes that the band's actions "[made] us out to be Robin Hoods, stealing from the rich to give our music away to the milling throngs. We [got] more press for stealing equipment that we actually return[ed] than the promoters [did] for stealing our money." Actions such as this are not infrequent occurrences in the 30-year history of the band. They are part of the reason why fans who despised the corporate side to the music industry remained so loyal to the Grateful Dead.

[33] See generally id.; ROBERT HUNTER, "Hooker's Ball," A BOX OF RAIN 100-101 (1993).

[34] Contrary to much popular opinion surrounding the band, they were not among the legions of restless anti-war and civil rights demonstrators who set up camp in the shadow of the University of California at Berkeley during the late '60s. Garcia's early song, "Cream Puff War," pokes fun at the Berkeley radicals on the other side of the San Francisco Bay from the Dead's crowd. See THE GRATEFUL DEAD, "Cream Puff War," *on The Grateful Dead* (Warner Brothers Records 1967).

[35] See RADICAL MARKETING, *supra* note 3, at 40.

[36] See id.

[37] See generally id.

[38] See SWEET CHAOS, *supra* note 14, at 4.

[39] See id. at 252-53.

[40] DIRE STRAITS, "Money For Nothing," *on Brothers In Arms* (Phonogram Ltd. (London), 1985).

[41] Id.

[42] See generally PETER MULLER, THE MUSIC BUSINESS –A LEGAL PERSPECTIVE (Quorum Books, 1994) [hereinafter THE MUSIC BUSINESS].

[43] See id.

[44] See 17 U.S.C. § 201(a).

[45] See THE MUSIC BUSINESS, *supra* note 42, at 28 (the rights included in copyright transfer generally include a song's title, lyrics and "the characters contained in the song").

[46] See id at 27 ("Very often, the songwriter transfers the copyright ownership of his or her created works to a publisher, [who has] the contacts with those parties that could successfully exploit the composition."); 28 ("In many cases, marketing is the key to successful promotion of any song or composition. The publisher may therefore negotiate to retain as much flexibility as possible over the manner in which the song is sold, licensed, or commercially exploited. Depending on the bargaining power of the publisher in relation to the songwriter, the publisher may also negotiate to retain the sole right and authority to set and establish the price to sell or license the composition, as well as to stipulate the terms and conditions of the sale or license agreement.").

[47] See id at 30-1.

[48] See id at 31.

[49] See id at 37-8.

[50] See id at 38 (publishers will often obtain the sole right to add or alter the lyrics and music of a composition, to translate it into foreign languages, or to rearrange it for use in a different medium, e.g., television advertising or theatre).

[51] See THEY FOUGHT THE LAW, *supra* note 10, at 85-108 (recounting the celebrated litigation the Beatles brought against EMI Music Worldwide over past royalties and exploitation rights).

[52] See THE MUSIC Business, *supra* note 42, at 32-38 (for an outline of what uses of a composition demand royalty payments).

[53] For a sad account of how a young and naive artist can be swindled out of rights whose market value amounted to a fortune see THEY FOUGHT THE LAW, *supra* note 10, at 1-20 (detailing how, through deceitful mismanagement, Elvis Presley died penniless).

[54] See THE MUSIC BUSINESS, *supra* note 42, at 42.

[55] See LIVING WITH THE DEAD, *supra* note 7, at 65 (recounting how the Dead insisted on retaining all their publishing rights from the time of their initial contract negotiations with Warner Brothers). They named their publishing company Ice Nine Publishing, which has operated under the umbrella corporation Grateful Dead Productions, formed in 1973. See *State of the Changes: How the Dragon Urobouros (Giga Exponentia) Makes Us Go Round and Round*, *supra* note 17.

[56] The majority of the songs that the band wrote were written and arranged by Jerry Garcia, working in tandem with lyricist Robert Hunter. Hunter also supplied lyrics to other band members. Likewise, many of the songs Bob Weir wrote and arranged received lyrical contributions from John Barlow. The lyricists, though not performing members of the Dead, received royalties like any other songwriter would, absent losses to publishers for finder's fees and administrative costs.

[57] See *supra* notes 52-53.

[58] See LIVING WITH THE DEAD, *supra* note 8, at 42.

[59] See id.

[60] Id.

[61] See RADICAL MARKETING, *supra* note 3, at 39, 42-44; LIVING WITH THE DEAD, *supra* note 7, at 65.

[62] See, e.g., LIVING WITH THE DEAD, *supra* note 7, at 65.

[63] See id. at 82-85, 101-102, 208-11.

[64] See id. at 64-65.

[65] See id.

[66] Interview with Steve Popovich, CEO, Cleveland International Records (April 3, 2000).

[67] Id. With the advent of the music video, however, the importance of radio play as a mode of promotion and advertisement has diminished. Now, the trends in radio play follow those in television play. Moreover, since only a handful of national conglomerates own the major stations across the country, receiving purely local radio play is difficult (this hurdle extends into the area of organizing a tour as well, since many of these conglomerates are gaining a hand in the business of concert promotion).

[68] Id. Record company executives follow what their demographics reports indicate, meaning that the primary money-making target audience for most new music is comprised of teenagers with few responsibilities and great spending power.

[69] A&R executives are responsible for interpreting the demographics and sales charts, and then finding artists whose sound and style are likely to appeal to the listening tastes of targeted audiences.

[70] THE MUSIC BUSINESS, *supra* note 42, at 79.

[71] Interview with Steve Popovich, *supra* note 66.

[72] Percentages of album receipts are not the sole method production companies have used to determine artist royalties, though this standard obviously influences what the artist writes for inclusion on an album. The practice also exists (perhaps to reflect the sale of singles and the former prominence of vinyl and tape, both of which are divided into two sides) of calculating royalties based on the number of songs included on the recording. See LIVING WITH THE DEAD, *supra* note 8, at 62 for a humorous description of inherent problems with this formula: "The standard song length... was three minutes. Most groups made three-minute songs so that there would be twelve songs on an album and the band would get royalties for each of those cuts. But what if you have only two tracks on the whole album? Or, in the case of Quicksilver Messenger Service, *one* track on the whole album? Side one of their first album consisted of one long, extended jam on Bo Diddley's 'Who Do You Love.' In order to get the royalties due they had to make up arbitrary divisions: Who Do You Love, and then, of course, Who Did You Love, Why Do You Love, When Do You Love, How Do You Love, Should You Love?..."

[73] See THE MUSIC BUSINESS, *supra* note 42, at 80-84.

[74] See *supra* note 72.

[75] See THE MUSIC BUSINESS, *supra* note 42, at 84-85.

[76] See generally id. at 298-318.

[77] Sean Piccoli, *Packing 'Em In; Concert Goers Are Being Lured with More (and Cheaper) Multiact Fests*, FORT LAUDERDALE SUN TIMES, June 24, 1998, at E3. Interview with Steve Popovich, *supra* note 66 (these tours, however, are nearly impossible to join if a new act's manager lacks the clout to sign her group to one).

[78] In the case where these audiences tend to ignore the airplay of popular radio stations, touring with "alternative" festivals is a more viable exposure strategy. Interview with Steve Popovich, *supra* note 66.

[79] See RADICAL MARKETING, *supra* note 3, at 48.

[80] Id. at 40.

[81] See THE MUSIC BUSINESS, *supra* note 42, at 298-306.

[82] See id. at 121.

[83] See id. at 94-96.

[84] See LIVING WITH THE DEAD, *supra* note 7, at 310; see generally Gilmore, *supra* note 30.

[85] See LIVING WITH THE DEAD, *supra* note 7, at 128.

[86] See RADICAL MARKETING, *supra* note 3, at 40-41.

[87] See generally LIVING WITH THE DEAD, *supra* note 8; RADICAL MARKETING, *supra* note 3.

[88] See LIVING WITH THE DEAD, *supra* note 7, at 65 (stating "Royalty rates since time immemorial have been carved in solid vinyl. The big boys are horrified by our demands...The issue is artistic control. The labels don't want to hear about it. We got Stanley Mouse and Alton Kelley, two San Francisco poster artists, to do the cover. The big boys never allow anyone to do that. Plus, we own the publishing, which the boys have never before given up, plus the mechanicals of the album...In the end we raise royalty rates for musicians probably 10 points in those years. It eventually goes from 5% to 15%, and some go to 18 and up. Publishing for groups used to be 12 cents a side, and basically you had to have 6 songs to get the 12 cents. The Dead, however, are doing seven-minute songs, eighteen-minute songs, one whole side of the album").

[89] See id. at 65-66; SWEET CHAOS, *supra* note 14, at 258.

[90] See generally RADICAL MARKETING, *supra* note 3.

[91] See, e.g., LIVING WITH THE DEAD, *supra* note 7; TOM WOLFE, THE ELECTRIC KOOL-AID ACID TEST (Bantam Books 1999) (1968).

[92] For a stunning pictorial documentation of the evolution into an underground art form of counterculture concert posters during the '60s and early '70s see GAYLE LEMKE ET AL., THE ART OF THE FILLMORE (Acid Test Productions 1997).

[93] See RADICAL MARKETING, *supra* note 3, at 35 ("The Grateful Dead represents the best of radical marketing because it focused on a simple value proposition that was built on a devotion to a unique but consistent style of music and a carefully established, long-term relationship with its customers. Unlike successful traditional marketers..., the Grateful Dead never used massive advertising or promotion; they

simply went deep into a niche market.").

94 See LIVING WITH THE DEAD, *supra* note 7, at 60.

95 See, e.g., Brandelius, *supra* note 19, at 70; LIVING WITH THE DEAD, *supra* note 7, at 93-96.

96 See Brandelius, *supra* note 19, at 70.

97 Id.

98 Id.

99 See RADICAL MARKETING, *supra* note 3, at 41.

100 See id. at 41-42.

101 See id. at 40.

102 See id.

103 See id. at 40-41.

104 Id. at 41.

105 See *The Wall of Sound*, GRATEFUL DEAD NEWSLETTER, Summer, 1973 (last modified Dec. 15, 1998) <http://www.dead.net/cavenweb/deadfile/index.html>.

106 See generally RADICAL MARKETING, *supra* note 3.

107 See GRATEFUL DEAD FAMILY ALBUM, *supra* note 19, at 232.

108 RADICAL MARKETING, *supra* note 3, at 36.

109 See generally id.

110 Interview with Steve Popovich, *supra* note 66.

111 Id. The trade-off in this situation is that artists will attempt to retain their publishing rights, if any, and their publicity rights.

112 See LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES, *supra* note 12, at 563-70.

113 The gist of this practice is that artists (generally established ones) will accept large money advances on the condition that repayment comes out of royalties earned from future album releases or touring. See Slind-For, *supra* note 22, at A1.

114 It is estimated that about 80 percent of existing commercial albums have caused their recording companies to take a loss on production costs. See LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES, *supra* note 12, at 265.

115 See generally THEY FOUGHT THE LAW, *supra* note 10, at 43-63.

116 See id. at 44.

117 See id.

118 See id.

119 See id.

120 See id.

121 See id. at 47.

122 See id. at 50.

123 See id. at 52-53.

124 See id at 54. Michael challenged his contract for, among other things, paying him royalties in percentages far below market value for an artist of his stature, for not factoring into his royalty cuts certain promotional activities, for giving Sony ownership of his master recordings (though the cost of making these had been credited against his royalty payments), and for Sony reserving the right to reject any recording as being non-commercial.

125 See id. at 45.

126 See id. at 61. Michael had spent a reported $4.5 million on the litigation. On top of this, he was required, as the loser in the litigation, to pay Sony's legal fees. But his settlement deal, made in conjunction with his signing onto Dreamworks Records and Virgin Records, more than made up for his expenses. More importantly, his new contracts promised him some of the artistic freedom he desired.

127 See id. at 63.

128 See LIVING WITH THE DEAD, *supra* note 7, at 62-63:

129 For a humorous anecdote on the collision of worlds that occurred when the Dead's eventual recording company sent representatives to meet them see GRATEFUL DEAD RECORDS MAILERS, September 4, 1973, (last modified Dec. 15, 1998) <http://www.dead.net/cavenweb/deadfile/index.html>.

130 See LIVING WITH THE DEAD, *supra* note 7, at 228.

131 Id.

132 See id. at 229.

133 See id.

134 See id. at 258-59.

135 See id. at 229-34. The band's general aversion to operating within, much less *as part of*, the corporate music world was only one problem. Around this time, the Dead's original keyboardist, Ron "Pigpen" McKernan, died of cirrhosis of the liver. Royalty disputes arose as well. Under their contract with Warner Brothers, they had split revenue ten ways equally among each band member, their two roadies and their two managers. The inception of Grateful Dead Records created a straightforward arrangement between the band and Grateful Dead Records "manager" Ron Rakow (whom they had hired to direct the project). There was also a separate agreement between Rakow and Garcia for Round Records projects. This, of course, introduced jealously to utopia. However, Garcia was doing virtually all of the songwriting and arranging, with others receiving royalty cuts as "arrangers." The understanding was that Grateful Dead songs really were arranged on stage, over the course of dozens of live performances. In this sense, including a drummer as an arranger may have been more than simply a political gesture, though Scully argues otherwise.

136 See generally RADICAL MARKETING, *supra* note 3.

137 See id. at 36.

138 See id.

139 Id. at 39.

140 Id at 36.

141 See id at 34.

142 See Todd Woody, *Divvying Up Garcia's Spoils*, THE AMERICAN LAWYER, April, 1996, at 22, Bar Talk.

143 *Reprinted in* SWEET CHAOS, *supra* note 14, at 252-53.

144 See generally *???! Dead Heads Unite !???*, GRATEFUL DEAD NEWSLETTER, *supra* note 24.

145 See RADICAL MARKETING, *supra* note 3, at 45-46.

146 See id at 46. This was the same year that the band self-released its first album. Their original plan had been to ignore traditional distributing techniques and sell their new record from ice cream trucks outside the venues they played. Instead, they set up the promotion booths. See GRATEFUL DEAD RECORDS MAILERS, September 4, 1974, *supra* note 107.

147 See id at 45.

148 See THE MUSIC BUSINESS, *supra* note 42, at 27-28.

149 See generally THEY FOUGHT THE LAW, *supra* note 10; *supra* text accompanying note 193.

150 See RADICAL MARKETING, *supra* note 3, at 39.

151 See J. H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 796-805 (1989).

152 See United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 98 (1918).

153 See id.

154 See William M. Landes & Richard Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265 (1987). This article argues that consumer identification of trademarks facilitates commerce by saving the buyer from investing time researching a product or service's quality and reliability. In other words, a vast amount of information concerning a commodity's reputation is communicated or signified by a familiar symbol or catchphrase.

155 See Polaroid Corp. v. Polaroid Elecs. Corp., 287 F.2d 492 (2nd Cir. 1961). The court lists nine factors whose consideration aids in determining whether consumer confusion was likely to have occurred: (1) the recognizeability or social resonance of the plaintiff's trademark; (2) the similarity between this mark and the defendant's trademark; (3) how each trademark is used as a representation; (4) the similarity between the goods or services that the plaintiff and defendant sell; (5) overlap in the markets targeted by the plaintiff and the defendant; (6) the extent to which each party's customers are commercially savvy; (7) the likelihood that the parties will expand the distribution of their products or services beyond the markets they currently target; (8) evidence that consumer confusion actually has occurred; and (9) the defendant's good faith in employing a similar trademark.

156 See Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368 (5th Cir. 1977).

157 See generally Ethan Horowitz & Benjamin Levi, *Fifty Years of the Lanham Act: A Retrospective of Section 43(a)*,7 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 59 (1996); Tara J. Goldsmith, Note, *What's Wrong with this Picture? When the Lanham Act Clashes with Artistic Expression*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 821 (1997).

158 15 U.S.C.A. §§1051-1150 (1946)(West 1998 & Supp. 1998).

159 U.S. CONST. Art. I, § 8, cl. 8.

160 See generally Ethan Horowitz & Benjamin Levi, *Fifty Years of the Lanham Act: A Retrospective of Section 43(a)*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 59 (1996) (describing the inception of the Lanham Act and the evolution in scope of Section 43(a)).

161 15 U.S.C.A. § 1125(a)(1).

162 See Guess? v. Mai-Tai Boutique, 7 U.S.P.Q. 2d (BNA) 1387 (S.D.N.Y. 1988).

163 See Boston Prof'l Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004 (5th Cir. 1975).

164 See Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992).

165 See S.C. Johnson & Son, Inc. v. Clorox Co., 930 F. Supp. 753 (E.D.N.Y. 1996).

166 A crucial touchstone in determining whether trademark infringement has occurred is the evaluation of the strength of a plaintiff's trademark. See 15 U.S.C. § 1125(c)(1) (The infringement criteria in this section closely resemble those set out in Polaroid Corp. v Polaroid Electronic Corp., 287 F.2d 492 (2nd Cir. 1961); see *supra* text accompanying note 155).

167 Waits, 978 F.2d at 1098.

168 See id at 1006. The court here relied on the Second Circuit's rationale in the amusing case of Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200 (2nd Cir. 1979), in which the plaintiffs sued under the Lanham Act the producers of an adult film for portraying one of its "actresses" in a uniform whose appearance was similar enough to the Sunday garb worn by plaintiffs as to create consumer confusion about whether or not Dallas Cowboys Cheerleaders endorsed or sponsored the production. See also Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988), *cert. denied*, 503 U.S. 951 (1992) (where the Ninth Circuit had held that "voice" was a marketable commodity for purposes of misappropriation under California tort law).

169 Waits, 978 F.2d at 1108.

170 Id. at 1110.

171 See Polaroid Corp, 287 F.2d at 492.

172 Waits, 978 F.2d at 1110.

173 See id.

174 See generally id.

175 See generally id.

176 This is the issue that many advocates of the recoding theory have been debating over. See *infra* note 191.

177 See id.

178 Waits, 978 F.2d at 1093.

179 See New Kids On The Block v. News America Publ'g., Inc., 971 F.2d 302 (9th Cir. 1992).

180 See id. at 304-05.

181 See generally id.

182 See generally id.

183 See id. at 306 (*citing* 15 U.S.C. § 1115(b)(4) and Soweco, Inc. v. Shell Oil Co., 617 F.2d 1178, 1185 (5th Cir. 1980) (stating that "the 'fair-use' defense, in essence, forbids a trademark registrant to appropriate a descriptive term for his exclusive use and so prevent others from accurately describing a characteristic of their goods.")), 308 ("where the defendant uses a trademark to describe the plaintiff's product, rather than its own, we hold that a commercial user is entitled to a nominative fair use defense provided he meets the following three requirements: First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder").

184 See id at 308-309.

185 See id at 304 n.1.

186 Lanham Act, 15 U.S.C. § 1125(c)(1), *as amended* 1996. The section reads: "The owner of a famous mark shall be entitled... to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection." see generally, GINSBURG ET AL, TRADEMARK AND UNFAIR COMPETITION LAW: CASES AND MATERIALS, (2nd ed. 1996); Steven M. Cordero, Note, *Cocaine-Cola, The Velvet Elvis, And Anti-Barbie: Defending The Trademark And Publicity Rights To Cultural Icons*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599, 616 (1998) (defining trademark dilution as "the diminishment over of the capacity of a distinctive trademark to identify the source of goods bearing that mark. Dilution may occur even in the absence of consumer confusion, with damage manifesting itself in the harm to the mark. A weakening or reduction in the ability of a mark to effectively distinguish one source can arise either by 'blurring' or 'tarnishment.' Blurring occurs when a distinctive mark is associated with a plethora of different goods and services, diminishing the uniqueness and distinctiveness of the mark. Tarnishment occurs when the effect of the unauthorized use is to tarnish or degrade positive associations of the mark, thereby diluting its distinctive quality."); Eric A. Prager, *The Federal Trademark Dilution Act of 1995: Substantial Likelihood of Confusion*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 121 (1996).

187 Allied Maintenance Corp. v. Allied Mechanical Trades, Inc., 42 N.Y.2d 538, 198 U.S.P.Q. (BNA) 418 (1977).

188 Id. at 544.

189 The common law, of course, has allowed for alternative causes of action to develop (such as the right of publicity) which increase the artist's legal leverage in matters of protecting the economic benefits he may accrue from marketing or licensing his identity.

190 This sometimes-inconsistent method is necessary in situations involving trademark dilution and infringement claims because the legal issues are essentially determined by the facts of the case. For definitions of "blurring" and "tarnishment," see *supra* text accompanying note 186.

191 The primary concern felt by many theorists is that the widespread and hard-nosed application of trademark law will ultimately stifle from above artistic evolution in media. The argument goes something to the tune of: there is a complex public discourse which wends its way through the audio and the visual arts, using creative self-reference as a catalyst for its own evolution. This process was, at some point in the argument over its merits, dubbed "recoding." By curtailing the element of self-reference in the name of trademark infringement and other doctrines, the development of this public discourse will stall, eventually becoming stagnant and leaving a rather homogenous musical and visual landscape for people to survey. For poignant discussions of the recoding phenomenon see Justin Hughes, *"Recoding" Intellectual Property And Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999) (arguing that recoding is necessary for evolution in the media arts, but that the worries of many critical theorists are unfounded in that for recoding to occur at all, the status quo must be held stable enough by protectionist legal avenues so that frames of reference may exit long enough to actually be recoded, let alone to provide the necessary backdrop for the new creations to maintain a significant level of meaning in our culture); Edward T. Saadi, *Sound Recordings Need Sound Protection*, 5 TEX. INTELL. PROP. L.J. 333 (1997); Tara Goldsmith, Note *What's Wrong With This Picture? When The Lanham Act Clashes With Artistic Expression*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 821 (1997); Michael Madow, *Private Ownership Of Public Image: Popular Culture And Publicity Rights*, 81 CALIF. L. REV. 127 (1993); Christopher Pesce, Note *The Likeness Monster: Should The Right Of Publicity Protect Against Imitation?*, 65 N.Y.U. L. Rev. 782 (1990).

192 See generally id.

193 See generally id.

194 See generally THE ART OF THE FILLMORE, *supra* note 92.

195 See SWEET CHAOS, *supra* note 14, at 3.

196 See Slind-For, *supra* note 22.

197 See id.

198 See RADICAL MARKETING, *supra* note 3, at 49-50.

199 See id.

200 See id.

201 See, e.g., Sony Corp. v. Universal Studios, Inc., 464 U.S. 417, 428-29 (1984) (5-4 decision) (Blackmun, J., dissenting).

202 REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87TH CONG., IST SESS. 3 (Comm.

Print 1961).

203 See 17 U.S.C. § 102(a) (1996).

204 See 17 U.S.C. § 114(a) (1996) ("The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3), and (6) of section 106, and do not include any right of performance under section 106(4)."); EDWARD T. SAADI, SOUND RECORDINGS NEED SOUND PROTECTION, 5 Tex. Intell. Prop. L.J. 333 (1997).

205 Implicit in § 106(4) of the Copyright Act (17 U.S.C. § 106(4)) are the rules concerning performance licensing of one's work. But it does not comprehend that one artist's interpretation of another's song may constitute an entirely new—i.e., original—musical work.

206 See THE MUSIC BUSINESS, *supra* note 42, at 127-36 (discussing the licensing agreements purchased from musicians and songwriters by performing rights societies for establishing royalty extractions from the live performance of their work by other musicians).

207 See 17 U.S.C. § 101 (1996) ("'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds,... regardless of the nature of the material objects... in which they are embodied.").

208 See THE GRATEFUL DEAD, "Viola Lee Blues," *on The Grateful Dead* (Warner Brothers Records 1967).

209 See 17 U.S.C. § 101 (1996) ("Where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work").

210 In 1994—one year before the death of Jerry Garcia—Congress adopted the Uruguay Round Agreements Act, which now provides the copyright statute with an anti-bootlegging provision. See 17 U.S.C. § 1101, *codifying* Pub.L. 103-465, Title V, § 512(a), Dec. 8, 1994.

211 See generally David Schwartz, Note, *Strange Fixation: Bootleg Sound Recordings Enjoy the Benefits of Improving Technology*, 47 FED. COMM. L.J. 611 (1995).

212 See RADICAL MARKETING, *supra* note 3, at 44.

213 Id.

214 Randy Lewis, *Record Bootleggers Tap Niche in Music Market Recordings: What They Sell Are Not Counterfeits, but Usually Live Performances Picked Up on the Sly*, LOS ANGELES TIMES, November 9, 1990, Section F.

215 See *Second Newsletter*, DEAD HEADS NEWSLETTERS, August, 1972 (last modified Dec. 15, 1998) <http://www.dead.net/cavenweb/deadfile/index.html>. This practice also has important implications with the 1976 Copyright Act, § 101, which reads, "A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission."

216 See Guy Garcia, *If You Can't Beat 'Em...Music Rip-Off Artists Go Upscale with CDs, but the Stars Fight Back with Bootleg Albums of Their Own*, TIME, pg. 44, July 8, 1991.

217 The Copyright Act of 1976 contains a preemption clause which demands that "On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." See 17 U.S.C. § 301. Implicit in this clause are exceptions to it for state laws embodying rights or causes of action which are not equivalent to those listed. The original draft of the clause had included many of these causes of action, but their omission from the final draft of § 301 does not effect their relevance. See, e.g., H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess., reprinted in (1976) U.S.C.C.A.N. 5659, 5748: "The evolving common law rights of 'privacy,' 'publicity,' and trade secrets and the general laws of defamation and fraud, would remain unaffected as long as the cause of action contain (sic) elements such as invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement."

218 See Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866 (2nd Cir. 1953) (determining that the right of publicity, derived from privacy rights under sections 50 and 51 of New York Civil Rights Law, is assignable), *cert. denied*, 346 U.S. 816 (1953).

219 See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (upholding the Ohio Supreme Court's finding of a misappropriation of a "human cannonball's" right of publicity when a news station filmed his 15 second long cannonball act and then broadcast it in full, without authorization or compensation). Justice White remarked: "[T]he broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. Thus, in this case, Ohio has recognized what may be the strongest case for a 'right of publicity' — involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriateness of the very activity by which the entertainer acquired his reputation in the first place.... Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. *This same consideration underlies the patent and copyright laws long enforced by this Court.*" Id. at 576 (emphasis added).

220 See THEY FOUGHT THE LAW, *supra* note 10, at 1-20 (providing a concise account of how others have exploited Presley's image for nearly five decades, and the extent to which his heirs have gone to stymie this exploitation).

221 See TENN. CODE ANN. § 47-25-1101 (West Supp. 1999). At the time, only California, Texas, and Florida had similar statutes.

222 See, e.g., Steven M. Cordero, Note, *Cocaine-Cola, the Velvet Elvis, and Anti-Barbie: Defending the Trademark and Publicity Rights to Cultural Icons*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599 (1998).

223 Estate of Presley v. Russen, 513 F. Supp. 1339 (D. N.J. 1981) [hereinafter Russen].

224 See id. at 1344. The other causes of action in this litigation were

federal unfair competition under the false designation of origin cause as contained in § 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a), common law unfair competition, and common law trademark infringement.

225 See id.

226 See THEY FOUGHT THE LAW, *supra* note 10, at 11. It is not clear from the account whether these figures reflect the number of impersonators conducting such concerts, or the aggregate number of concerts, performed by a smaller number of impersonators.

227 Russen, 513 F. Supp. at 1348-49.

228 See id. at 1349-50.

229 THEY FOUGHT THE LAW, *supra* note 10, at 11.

230 See generally Russen, 513 F.Supp. at 1339.

231 Russen, 513 F. Supp. at 1359.

232 Russen at 1360-61.

233 See THEY FOUGHT THE LAW, *supra* note 10, at 11.

234 See generally Russen, 513 F. Supp. at 1339.

235 See id at 1378-79. The court merely demanded the abandonment of various catchphrases and images used in promoting the Big El Show which were likely to mislead consumers as to their origin, content or sponsorship: "The close relationship in this case between the right of publicity and the societal considerations of free expression supports the position that the plaintiff in seeking relief for an infringement of its rights of publicity should demonstrate an identifiable economic harm.... [T]he defendant's activity when viewed simply as a skilled, good faith imitation of an Elvis Presley performance, i.e., without the elements leading to a likelihood of confusion, is, in some measure, consistent with the goals of freedom of expression. Thus, before the harsh step of barring defendant's activity is undertaken, the plaintiff should have to make a showing of immediate, irreparable harm to the commercial value of the right of publicity and should not be able to rely on an intangible potentiality."

236 See id at 1381.

237 See generally id.

238 See, e.g., Eric Zorn, *Threat to Stop Elvis Show Puts Rocker in a Hard Place*, CHICAGO TRIBUNE, July 8, 1987, at C1.

239 Elvis Presley Enterprises, Inc. v. Capece, 141 F.3d 188 (5th Cir. 1998).

240 See id. at 192. Though the author never visited the nightclub, it apparently possessed not only a handful of Elvis "artifacts," but also lava lamps, beaded curtains, vinyl couches, and tasteless paintings of celebrities and female nudes.

241 See id.

242 Elvis Presley Enterprises, Inc. v. Capece, 950 F.Supp. 783 (S.D. Tex. 1996) [hereinafter Capece].

243 See generally id.

244 See generally id.

245 Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994).

246 See Capece, 950 F. Supp. at 792.

247 See 17 U.S.C. § 107 (1996) (discussing the nature and scope of the fair use doctrine in copyright law).

248 See Elvis Presley Enterprises, 950 F. Supp. at 796-97. The court, however, did enjoin Capece from using photographs of Presley or direct references to the musician in any advertisements for his nightclub. Id. at 803.

249 See id at 798-800, 802-03.

250 See generally Elvis Presley Enterprises, 141 F.3d 188.

251 See Russen, 513 F. Supp. at 1339.

252 See Neil Strauss, *Rock Group Lives on in Memory and Masterplan*, THE NEW YORK TIMES, January 6, 1998, Arts and Leisure section.

253 See id.; Gil Kaufman, *Grateful Dead Music Museum's Groundbreaking Planned for 2000*, May 20, 1999, (visited April 3, 2000) <http://www.sonicnet.com./news/search_res.jhtml?query=grateful+dead>.

254 See RADICAL MARKETING, *supra* note 3, at 34.