Taylor Swift to Trademarks: You Belong With Me—Does Intellectual Property Law Leave a Blank Space for the Protection of Short Phrases Taken from Song Lyrics?

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INTRODUCTION

“When a phrase becomes sufficiently popular that it has acquired marketing value, one naturally has to ask whether a particular person, or anyone for that matter, might have the right to control it as a trademark.”

I. TAYLOR SWIFT—WHAT DID SHE DO?

A. CATCHING THE MEDIA BY STORM

Americans who stay up to date on popular culture may either love or hate the music of a certain fearless popstar. Taylor Swift (“Swift”) may be loved by some for her music, loved by others for her style or image, or possibly hated by others for outrageous on screen moments (e.g., after the 2013 Golden Globe Awards, Swift, instead of just shaking it off, responded to lighthearted jabs at her love life from popular comedians, Tina Fey and Amy Poehler, by stating “there’s a special place in hell” for the two of you). Regardless of the public perception of Taylor Swift, whether it be a love story or bad blood, she caught the media’s attention at the beginning of 2015 for something other than a hit single.

When the media learned that Swift filed a series of trademark applications covering a range of phrases, mostly comprised of song lyrics from her 1989 album, the Internet exploded. More specifically, in October

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2014, Swift filed a series of intent-to-use trademark applications\(^4\) for the following lyrics, each representing a separate mark: “THIS SICK BEAT,” “NICE TO MEET YOU. WHERE YOU BEEN?,” “COULD SHOW YOU INCREDIBLE THINGS,” “CAUSE WE NEVER GO OUT OF STYLE,” “PARTY LIKE IT’S 1989,” and the stylized mark “T.S.”\(^5\) The applications for the trademarks covered a wide range of goods and services, including: home décor, handbags, stationary, musical instruments, entertainment services, retail services, Christmas stockings and ornaments, hair accessories, apparel, kitchen linens, dinnerware, jewelry, recordings, key chains, and non-medicated toiletries.\(^6\)

But Swift wasn’t \textit{out of the woods} yet; she again caught the media’s attention in January 2015 when her lawyers sent cease and desist letters to sellers on Etsy with Swift’s song lyrics printed on a variety of products.\(^7\) The letters alleged both trademark infringement and violations of the right of publicity.\(^8\) These letters furthered the opinion that Swift’s applications were an attempt to monopolize the English language by preventing anyone else from using the phrases.\(^9\)

However, from a legal perspective, Swift’s actions are not radical. Swift, attempting to gain federal registration for slogans or catchphrases in connection with certain goods and services, is merely trying to identify her brand, and to protect it. Perhaps her attempt to register song lyrics falls directly within the purpose of trademark protection. Furthermore, perhaps her attempt to register song lyrics falls within the scope of other intellectual property protections as well.

\(^4\) See 15 U.S.C. § 1051(a)-(b) (2002) (Trademark law in the United States is use-based, thus, applications may be filed based on actual use in commerce, or, based on a bona fide intention to use the mark in commerce.).


\(^6\) Id.

\(^7\) Patrick Smith, \textit{Taylor Swift’s Lawyers Threatened Etsy Sellers in Trademark Dispute}, BUZZFEED NEWS (Feb. 6, 2015, 12:37 AM), http://www.buzzfeed.com/patricksmith/taylor-swifts-lawyers-have-threatened-etsy-sellers (“One Etsy store owner, . . . . received a trademark infringement warning last month in relation to a T-shirt featuring a Swift lyric. . . . [L]awyers acting for Swift have been issuing takedown notices to Etsy sellers, via Etsy’s legal department, for some time.”). \textit{See also} Marah Eakin, \textit{Living Embodiment of Etsy Taylor Swift Beefing with Swift-loving Etsy Users}, A.V. CLUB (Feb. 6, 2015, 4:38 PM), http://www.avclub.com/article/living-embodiment-etsy-taylor-swift-beefing-swift--214930 (“Swift already owns a number of trademarks related to her songs and brand and is going after users who violate her holdings. In a legal notice sent by Etsy to one of the users, ‘certain material on Etsy “is a product never offered by the Trademark owner,” “violates a celebrity’s right of publicity,” and/or “contains unlawful comparison to trademark owner’s brand name.”’”).


Section II of this paper will explore the protections available to song lyrics, under three relevant areas of intellectual property law: copyright, trademark, and the right of publicity. Section III will explore whether or not protection should exist for Swift's song lyrics in cases where there is commercial value in her particular song lyrics.

II. PROTECTION UNDER EXISTING LAW

The relevant areas of intellectual property law that may offer protection for song lyrics are copyright law, trademark law, and the right of publicity. The following sections will discuss the scope of protection for each area of law, how that area of law treats short phrases, and finally, how song lyrics may be protected under these regimes.

A. COPYRIGHT LAW

1. What Is Protected?

The foundation for copyright law in the United States is established in the United States Constitution, which gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."\(^{10}\) The Copyright Act of 1976 extends protection to creative works and expression, namely "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."\(^{11}\) Therefore, in order to be eligible for copyright protection, the creative work or expression must fall under the purview of "works of authorship" and must possess sufficient originality.

The Act defines "works of authorship" as "literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works."\(^{12}\) Sufficient originality requires only "independent creation plus a modicum of creativity," which through case law, has proven to be a low standard.\(^{13}\)

However, copyright protection typically does not extend to "[w]ords and short phrases, such as names, titles, and slogans."\(^{14}\) This is typically due to the assertion that names, titles, and slogans do not possess sufficient creativity, despite the low bar courts have set.\(^{15}\) Even common short

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10 U. S. Const., art. I, § 8, cl. 8.
12 Id. § 102(a)(1)-(8).
15 See generally Rebecca Shaw, Show Me the Money: Movie Quotes as Intellectual Property, 4.
phrases, comprised of larger copyrightable material, are not individually protected; and therefore, are usually assumed to be in the public domain. So generally, short phrases are not protectable under copyright law.

2. Can Taylor Swift’s Lyrics Be Protected?

Under this general rule, Swift’s lyrics are unarguably short phrases and therefore, would not be eligible for copyright protection. However, there are cases that suggest Swift’s lyrics could be protected within the context of a copyright infringement claim. In order to prevail on a copyright infringement claim, a plaintiff must prove two elements: (1) the defendant copied the plaintiff’s copyrighted work, and (2) improper appropriation, including the evaluation of whether the works are substantially similar, as well as, an analysis of the significance and amount taken from the original copyrighted work. Two defenses that a defendant can raise in an infringement claim are: (1) _de minimus_ copying, or that there was not enough copying to amount to substantial similarity, and (2) fair use, or that although the copying was illegal, it falls under an exception.

One such case involves the protection of movie quotes. In _Universal City Studios, Inc., v. Kamar Industries, Inc._, Universal brought action against Kamar for infringement of popular quotes from the film “E.T.: The Extra-Terrestrial.” Kamar was not an authorized licensee of Universal when it manufactured and sold porcelain drinking mugs bearing the phrases “I love You, E.T.” and “E.T. Phone Home.” The court found that Universal was likely to prevail on its copyright infringement claim. First, the phrases were directly copied from Universal’s copyrighted motion...
picture.\textsuperscript{24} Next, there was a presumption of copying based on Kamar’s access to the film and the substantial similarity of the inscriptions on Kamar’s products to key lines of dialogue from the film.\textsuperscript{25} The court assessed whether an “‘average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work,’” finding that such a lay person would readily recognize the inscriptions on Kamar’s products as key lines of dialogue from the copyrighted film.\textsuperscript{26} The court concluded that Universal was likely to prevail on its claims “by reason of the defendant’s unauthorized appropriation and use of the ‘E.T.’ character and name.”\textsuperscript{27} The court seemed swayed by both the importance of the particular quotes to the film, in that they were important to the film and “readily recognizable,”\textsuperscript{28} and by the defendant’s misappropriation and free riding of the popularity of E.T.\textsuperscript{29}

The Supreme Court later echoed this reasoning in Harper \& Row, Publishers, Inc., v. Nation Enterprises, holding that the verbatim passages taken from a manuscript of former President Gerald Ford’s unpublished memoir were the “heart” of the work, and as such did not fall under the fair use exception.\textsuperscript{30} Thus, the passages taken from the manuscript gave rise to liability for copyright infringement.\textsuperscript{31} As with the Kamar court’s “readily recognizable” standard, the Supreme Court in Harper \& Row emphasized the importance of the passages to the overall work in its analysis. Although this trend seems inconsistent with the general rule that phrases and quotes, even when taken from a larger copyrighted work, do not gain copyright protection,\textsuperscript{32} these courts recognized that sometimes copying a portion that is essential to the overall work, even if only a very small portion, is wrong and constitutes infringement. While the quote or phrase on its own may not be subject to copyright protection, it is still worthy of protection in an infringement action if it is a “qualitatively important part of the copyrighted” work.\textsuperscript{33}

Furthermore, courts have found jokes to be in violation of copyright

\begin{itemize}
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id. (quoting Ideal Toy Corp. v. Fab-Lu, Ltd., 360 F.2d 1021, 1022 (2nd Cir. 1966)).
\item \textsuperscript{27} Id. at 4.
\item \textsuperscript{29} Universal City Studios, Inc., and Merch. Corp. of America, Inc. v. Kamar Indus., Inc., 1982 WL 1278 (S.D. Tex. 1982).
\item \textsuperscript{30} 471 U.S. 539, 565 (1985).
\item \textsuperscript{31} Id. at 569.
\end{itemize}
protection. In Foxworthy v. Custom Tees, Inc., comedian, Jeff Foxworthy, alleged copyright and trademark infringement claims against Custom Tees for selling t-shirts printed with quotes of Foxworthy’s famous “You might be a redneck if . . . ” jokes. Foxworthy claimed trademark protection in the setup “You might be a redneck if . . . ”, as well as, copyright protection in the joke and punch line that followed, such as “you’ve ever cut your grass and found a car.” In defense, the defendant tried to analogize the facts to Feist Publications, Inc., v. Rural Telephone Service Co., Inc., arguing that Foxworthy could not claim authorship since: (1) the jokes were part of a compilation book, and that the copyright did not extend to the individual jokes, and (2) the jokes were not original to Foxworthy, and were in the public domain; therefore, unavailable for copyright protection.

The Foxworthy court noted that copyright protection in a compilation does not extend only to the selection and arrangement of the material, but also to the author’s original contributions. The court reasoned that even though Foxworthy got the ideas for many of the jokes from other people, he took the ideas and gave them “the expression in the form it appears in his books,” and that when “an idea is written or otherwise fixed in tangible form, a copyright is earned if the expression is original.” Foxworthy, therefore showed the requisite ‘modicum of intellectual labor,’ and because the defendant copied that expression verbatim, the court found that Foxworthy was likely to succeed on his copyright claim. Although it was not part of the court’s analysis, perhaps the court was influenced, at least in part, by the defendant’s use of Foxworthy’s name and popularity.

As Kamar and Foxworthy show, courts are more likely to find infringement when another party blatantly copies a popular phrase for commercial exploitation (even though copyright infringement does not require that the infringer profit from the alleged infringement). These cases offer insight on how Swift could assert copyright protection in her song lyrics.

If analyzed under Kamar, an individual song lyric (like a movie

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35 Id. at 1209.
36 See 499 U.S. 340 (1991). (holding that the white pages of a phone book were not copyrightable because the subscribers’ names, towns, and telephone numbers were uncopyrightable facts, and the arrangement of these facts was not sufficiently original to warrant copyright protection).
38 Id.
39 Id. at 1218.
40 Id.
41 Id.
42 Id. at 1219. (quoting Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 346 (1991)).
quote), although not copyrightable alone, could gain protection in a
copyright infringement action if an average, lay observer recognized the
lyric as a key line from Swift’s copyrighted song. Swift’s lyrics would
surely fall under this standard.

In “Shake It Off,” the first single of the 1989 album, Swift speaks over
the interlude, “Just think, while you've been getting down and out about the
liars and the dirty, dirty cheats of the world, you could've been getting
down to this... sick... beat,” heavily emphasizing the last three words.
Swift’s next single, “Blank Space,” opens with the lines “Nice to meet you.
Where you been? I could show you incredible things.” The refrain of her
third single, “Style,” repeats the lines “Cause we never go out of style, we
never go out of style.” While these phrases may not be the “heart” of the
work,44 these lines are certainly “readily recognizable”45 as lyrics from their
respective songs. Perhaps this was Swift’s intent in seeking protection for
these particular lyrics; in selecting lines from the first three singles from
her new album, she ensured that the lines would be well known and
popular.

Swift may encounter trouble; however, if analyzed under
Foxworthy. Although Foxworthy was not the originator of the ideas for
many of his jokes, his expression of the ideas was original—he put them in
his own words in order to get maximum laughs.46 In Swift’s case though,
“This sick beat,” “Nice to meet you. Where you been?,” “could show you
incredible things,” and “cause we never go out of style,” are fairly common
phrases, and it would be difficult to argue that they are expressed in a
sufficiently original manner.

However, if there is commercial exploitation, a court could analyze
it as a factor. In both Kamar and Foxworthy, and even in Harper & Row,
the courts’ findings are consistent with an “anti-free rider” impulse.
Whether a coffee mug, a news story, or a t-shirt, each case presents a
situation in which a party intended to profit off another party’s investment.
When Swift sent cease and desist letters to Etsy sellers of Swift-inspired
merchandise (t-shirts, candles, prints, etc.),47 her motivation likely stemmed
from the desire to stop others from “endeavoring to reap where [they have]
not sown.”48 With a current net worth of $200 million,49 Swift invests in the

45 Rebecca Shaw, Show Me the Money: Movie Quotes as Intellectual Property, 4 AM. U.
INTELLECTUAL PROPERTY BRIEF 36, 44 n.3 (2013), available at http://www.ipbrief.net/wp-
content/uploads/2013/06/Shaw-Article.pdf.
strange thing. And probably to the public, they never realize this. But I have—with a comic, we all have
the same bowl of words to work with, and the whole trick is to take the smallest amount of words and
put them in the proper order. . . . I mean, it’s to get the maximum laugh from, you know, the shortest
amount of material.).
47 See Patrick Smith, Taylor Swift’s Lawyers Threatened Etsy Sellers in Trademark Dispute,
BUZZFEED NEWS (Feb. 6, 2015, 12:37 AM), http://www.buzzfeed.com/patricksmith/taylor-swifts-
lawyers-have-threatened-etsy-sellers.
development of her brand (and everything associated with her brand, lyrics included). Her desire to protect her brand is reasonable, and courts would likely agree with her.

B. TRADEMARK LAW

1. What is protected?

Trademarks are source or brand identifiers. U.S. trademark law is codified in the Lanham Act, which provides protection for any "word, name, symbol, or device, or any combination thereof—used by a person... to identify and distinguish his or her goods, ... from those manufactured or sold by others and to indicate the source of the goods, ..." It is important to note that trademarks are protected in connection with goods and/or services. A party cannot get a universal trademark to completely preclude another party from using the mark without the owner’s permission absent a connection with claimed goods and/or services, or to create a monopoly on language, as many of the media reports have accused Swift of doing.

Trademark law has two primary justifications. The first is to prevent consumer confusion as to a good or service’s source, sponsorship, or affiliation, or "to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get." A

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51 Zoeloe van der Linden, ‘Cause Trademarks Never Go Out of Style, NOVAGRAAF.COM (Feb. 9, 2015), http://www.novagraaf.com/en/news/newsopath=/Newsltems/en/cause-trademarks-never-go-out-of-style (“News that US pop juggernaut Taylor Swift has sought to trademark a series of song lyrics from her latest album ‘1989’ sent US media into hyperdrive last month. If the trademark applications are approved, she will obtain the exclusive right to use the phrases on her merchandise... Much of the media reaction to this news has been driven by the misconception that, if the trademarks were awarded, Swift would obtain a monopoly to use the phrases in songs... Of course, such an interpretation is legally incorrect, since the trademark registrations would only give Swift the exclusive right to use those phrases in the classes for which she has registered them; in this case, on merchandise.”).
See also Finn Houlihan, Taylor Swift is Trying to Trademark Common Lyrical Phrases for Her Own Exclusive Use, ACCLAIMMAG.COM (last visited Jan. 29, 2015), http://www.acclaimmag.com/music/taylor-swift-trying-trademark-common-lyrical-phrases-exclusive-use/ (“Just in case you thought that the ‘1989’ singer valued creativity and artistic diversity over monetary profit, here’s legal proof that’s bullshit... [T]his goes beyond the precautions she should sensibly make to avoid Urban Outfitters making crop tops with her pithy slogans or something. If Swift gets her way, you may not be able to title your albums with terminology that has been in music far better and far wider reaching than Swift’s. I’m going to have a hard time understanding how anyone could appreciate or support her music following this announcement given that it’s seemingly intended to litigiously stunt the self-expression of others in order to give her art exclusivity. Then again, I guess there’s not any other way she could pursue a sound that could be described as ‘unique’ besides using bureaucracy to trademark lyricism. Taylor Swift’s world tour kicks off in May. Maybe by then she’ll legally own the concept of a gig too and she can finally complete her commercial monopoly at the expense of anyone else trying to succeed at making music.”).
second justification is to protect goodwill, so that "where the owner of a trade--mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats." Trademark law is interesting in that it protects both consumers and mark owners; whereas, copyright law, the right of publicity, and patent law protect only one party—the creator or subject.

As discussed above, trademark law can protect a variety of marks, so long as, they are used in connection with goods and services. In order to have a valid trademark, the mark must be "distinctive of a person's goods or services." A mark can be inherently distinctive or it can acquire distinctiveness, which is also known as "secondary meaning." Distinctiveness for word marks are evaluated on what is known as the Abercrombie spectrum. A word mark can be classified as generic, descriptive, suggestive, arbitrary or fanciful. A generic mark "is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species." Using the word "table" for tables would be generic. Generic marks can never be distinctive, and thus, can never be a registered trademark. Descriptive marks describe the goods or services offered by identifying an ingredient, quality, or characteristic. Calling chocolate bars "Chocolatey Sweets" would be descriptive. Marks that are "merely descriptive" cannot be registered, and thus, require a showing of secondary meaning. If "Chocolatey Sweets" could show that enough people associated the name "Chocolatey Sweets" with that particular brand of chocolate candy bar, the evidence could be sufficient to show secondary meaning. A suggestive mark "requires imagination, thought and perception

56 Id.
57 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 (1995); See also 15 U.S.C. § 1127 (2012) (noting that trademarks must be capable of identifying and distinguishing one's goods from those manufactured or sold by others under the definition of the term "trademark").
58 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 13 (1995) ("A word, name, symbol, device, or other designation, or a combination of such designations, is "distinctive" . . . if: (a) the designation is "inherently distinctive," in that, because of the nature of the designation and the context in which it is used, prospective purchasers are likely to perceive it as a designation that, in the case of a trademark, identifies goods or services produced or sponsored by a particular person, whether known or anonymous, . . . ; or (b) the designation . . . has become distinctive, in that, as a result of its use, prospective purchasers have come to perceive it as a designation that identifies goods, services, businesses, or members in the manner described in Subsection (a). Such acquired distinctiveness is commonly referred to as "secondary meaning.").
60 Id.
61 Id.
62 Id.
63 Id. at 11.
64 Id. at 9.
to reach a conclusion as to the nature of goods,"65 such as Greyhound for buses. Suggestive marks are inherently distinctive and do not require a showing of secondary meaning.66 An arbitrary mark is a word that exists in the English language, but it’s use bears no relationship whatsoever to the product it describes.67 A popular example of an arbitrary mark is the word “Apple” for computers. A fanciful mark is a made-up or coined word that bears no relationship to the goods or services to which it is applied,68 for example, Kodak for film. As with suggestive marks, arbitrary and fanciful marks are inherently distinctive and do not require a showing of secondary meaning.69

2. Can Taylor Swift’s Lyrics Be Protected?

If Swift can show that her marks are distinctive in connection with her goods and services, and that they function as trademarks, then her lyrics could be protected.70 To help determine this, the marks will be subject to evaluation on the Abercrombie spectrum.71 It is likely that Swift’s lyrics would be classified as arbitrary in relation to the goods. “This sick beat,” “Nice to meet you. Where you been?,” “Could show you incredible things,” and “Cause we never go out of style” bear no relation to the vast range of goods for which Swift has applied (i.e. home décor, handbags, stationary, musical instruments, entertainment services, retail services, Christmas stockings and ornaments, hair accessories, apparel, kitchen linens, dinnerware, jewelry, recordings, key chains, and non-medicated toiletries72). Thus, there would be no secondary meaning.

However, trademarks are “source-identifiers.” Gaining trademark registration could turn on “whether consumers would recognize that the slogan [or phrase] is meant to be a trademark . . . [or] how the public is

65 Id. at 11.
66 Id.
67 U.S. PATENT AND TRADEMARK OFFICE, U.S. DEP’T OF COMMERCE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1209.01(a) (on Fanciful, Arbitrary and Suggestive Marks) (5th ed. 2007) [hereinafter T.M.E.P].
68 Id.
70 Other requirements are not mentioned as they are beyond the scope of this paper.
71 See Lee B. Burgunder, Opportunistic Trademarking of Slogans: It’s No Clown Issue, Bro, 31 CARDOZO ARTS & ENT. L.J. 769, 779 (2013) (“Except in the notable case of product designs, each trademark form is subject to a spectrum analysis similar to words, ranging from generic or common conceptions, which can never be protected, to fanciful or inherently distinctive notions, which can achieve immediate trademark status. In the middle are descriptive types of designations that can become trademarks only after secondary meaning has been established. According to this spectrum, slogans can be immediately registered as trademarks as long as they do not merely describe the nature or qualities of the product and function as a trademark.”), available at http://www.cardozoaelj.com/wp-content/uploads/2013/08/Burgunder-31.3.pdf.
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likely to perceive the use.\textsuperscript{73} Public perception is often shown through the specimen that must be submitted to and approved by, the U.S. Patent and Trademark Office ("U.S.P.T.O.") before registration of a mark is granted. If a proposed mark is determined to be ornamental, then it cannot be registered.\textsuperscript{74} The "size, location, and dominance of the proposed mark, as applied to the goods" will be taken into consideration in determining whether the proposed mark is merely ornamental or if it functions as a trademark.\textsuperscript{75} Marks that are "small, neat, and discrete" are more likely to create the commercial impression of a trademark, while larger marks plastered across a product are more likely to "be perceived merely as a decorative or ornamental feature of the goods."\textsuperscript{76} However, this is one consideration, and it is not determinative.\textsuperscript{77}

That being said, a lot rides on how Swift actually intends to use her lyrics on her products. If she merely prints the slogans on t-shirts, for example, then it is more likely that the lyric marks will be seen as being merely ornamental, rather than functioning as a trademark. So, in theory, Swift could have her lyrics protected under trademark law, but much will depend on how she actually uses the marks in relation to her goods. Further, if protection was granted, she would still have to show a likelihood of confusion between her goods and the allegedly infringing goods in order to prevail on a trademark infringement claim.\textsuperscript{78}

C. RIGHT OF PUBLICITY

1. What is protected?

The right of publicity is the "right to control the commercial use of one's identity."\textsuperscript{79} This is a creature of both state law\textsuperscript{80} and common law; it

\begin{footnotesize}
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\item BURGUNDER, supra note 72, at 782.
\item T.M.E.P. § 1202.03 (on Refusal on Basis of Ornamentation) (Jan. 2015 ed.) ("Subject matter that is merely a decorative feature does not identify and distinguish the applicant’s goods and, thus, does not function as a trademark. A decorative feature may include words, designs, slogans, or . . . . This matter should be refused registration because it is merely ornamentation and, therefore, does not function as a trademark . . . ."); See also T.M.E.P. § 1202.03(a) (on Commercial Impression) (5th ed. 2007) ("Matter that is purely ornamental or decorative does not function as a trademark and is unregistrable . . . . The significance of the proposed mark is a factor to consider when determining whether ornamental matter serves a trademark function. Common expressions and symbols [e.g., the peace symbol, 'smiley face,' or the phrase 'Have a Nice Day'] are normally not perceived as marks.").
\item T.M.E.P. § 1202.03(a) (on Commercial Impression) (5th ed. 2007).
\item Id.
\item Id.
\item Likelihood of confusion, which is evaluated using the Sleekcraft factors from AMF Inc. v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979) is beyond the scope of this paper.
\item See also Statutes & Interactive Map, RIGHTOFPUBLICITY.COM, http://rightofpublicity.com/statutes (listing the 22 states that have some form of right of publicity statutes) (last visited Mar. 22, 2016).
\end{enumerate}
\end{footnotesize}
is rooted in the right to privacy.81 Under California law, the right of publicity protects a person from having his or her "name, voice, signature, photograph, or likeness" used for a commercial purpose by another.82 Common law, however, extends the protection to any "indicia of identity."83 As such, courts have held that the right of publicity covers the following "indicia of identity": sound-alikes (referring to a car commercial that used one of Bette Midler's back-up singers to mimic Midler's voice in singing "Do You Want To Dance" when Midler herself declined to allow the use of her own voice),84 robots and animatronic figures (referring to both a commercial that depicted a robot dressed as, and acting like, Vanna White on the set of Wheel of Fortune, and to animatronic figures depicting the characters Norm and Cliff from Cheers in Cheers-themed airport bars),85 and phrases (referring to the phrase "Here's Johnny!" for portable toilets, and to phrases such as "Elvis has left the building" in ads for a bar, discussed below),86 among others.

81 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:23 (2d ed. 2016) ("This type of 'privacy' was the immediate historical antecedent to the 'right of publicity."). See also William L. Prosser, Privacy, 48 CALIF. L. REV. 383, 389 (1960), ("The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, . . . that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, 'to be let alone'. . . . [T]hese four torts may be described as follows: (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs. (2) Public disclosure of embarrassing private facts about the plaintiff. (3) Publicity which places the plaintiff in a false light in the public eye. (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."), available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3157&context=californialawreview.

82 Cal. Civ. Code § 3344(a) (West 2016) ("Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.").

83 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). See Midler v. Ford Motor Co., 849 F.2d 460, 463-64 (9th Cir. 1988) ("California will recognize an injury from 'an appropriation of the attributes of one's identity' . . . [T]he defendants here for their own profit in selling their product did appropriate part of [Midler's] identity.");

84 Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) ("The singer manifests herself in the song. To impersonate her voice is to pirate her identity."). See also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

85 White v. Samsung Electronics America, Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) ("Viewed separately, the individual aspects of the advertisement in the present case say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict. The female-shaped robot is wearing a long gown, blond wig, and large jewelry. Vanna White dresses exactly like this at times, but so do many other women. The robot is in the process of turning a block letter on a game-board. Vanna White dresses like this while turning letters on a game-board but perhaps similarly attired Scrabble-playing women do this as well. The robot is standing on what looks to be the Wheel of Fortune game show set. Vanna White dresses like this, turns letters, and does this on the Wheel of Fortune game show. She is the only one. Indeed, defendants themselves referred to their ad as the "Vanna White" ad. We are not surprised."). See also Wendt v. Host Int'l, Inc., 197 F.3d 1284, 1285 (9th Cir. 1999) ("The panel holds that licensed animatronic figures based on the copyrighted Cheers characters Norm and Cliff infringe on the rights of the actors who portrayed them.").

86 Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 837 (6th Cir. 1983) ("[T]he phrase 'Here's Johnny!' was an appropriations of Carson's identity without using his 'name'."); see also Elvis Presley Enterprises, Inc. v. Capece et al., 950 F. Supp. 783, 801 (S.D. Tex. 1996) ("The mention of Graceland or use of phrases in ads that are linked inextricably to the identity of Elvis as a celebrity, such as 'Elvis has left the building' is also violative of Plaintiff's publicity rights.").
2. Can Taylor Swift's lyrics be protected?

Under California state law, Swift's lyrics would not be protected under the right of publicity, because song lyrics are not a "name, voice, signature, photograph, or likeness," and courts have held strictly to this definition. However, common law could offer protection. As mentioned above, case law supports protection of phrases under the common law right of publicity. Most notably, in Carson v. Here's Johnny Portable Toilets, Inc., the court held that the defendant's use of the phrase "Here's Johnny!" violated entertainer Johnny Carson's right of publicity. The phrase was used to introduce Carson during his long tenure as the host of "The Tonight Show." Defendant used the phrase in the company's corporate name and coupled with another phrase, "The World's Foremost Commodian" to sell portable toilets. In overturning the district court, the Court of Appeals for the Sixth Circuit reasoned that:

[the right of publicity, as we have stated, is that a celebrity has a protected pecuniary interest in the commercial exploitation of his identity. If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his "name or likeness" is used. Carson's identity may be exploited even if his name, John W. Carson, or his picture is not used.]

The Carson court then turned to the question of "identifiability," emphasizing that the phrase was used for years to introduce Carson and that the name was selected solely because it identified Carson. Because the phrase had such a strong association with the entertainer, the court held "without question that appellee had appropriated Carson's identity in connection with its corporate name and its product."

The district court for the Southern District of Texas would later echo the Carson court in holding that phrases used in ads to promote The Velvet Elvis, a bar that parodied "an era remembered for its sensationalism and transient desire for flashiness," violated Elvis Presley's right of publicity:

Unquestionably, use of pictures or images of Elvis in "The Velvet Elvis" advertisements is an unlawful appropriation of the identity of Elvis Presley. Elvis is clearly identifiable and the only distinguishable purpose of the ads is to exploit the persona of Elvis for commercial advantage. . . . The mention of Graceland or use of phrases in ads that

88 698 F.2d 831 (6th Cir. 1983).
89 Id.
90 Id. at 833.
91 Id. at 835.
92 Id. at 836 ("Now, we've stipulated in this case that the public tends to associate the words "Johnny Carson", the words "Here's Johnny!" with plaintiff, John Carson and, Mr. Braxton, in his deposition, admitted that he knew that and probably absent that identification, he would not have chosen it.").
93 Id.
95 Id. at 801.
are linked inextricably to the identity of Elvis as a celebrity, such as “Elvis has left the building” is also violative of Plaintiff’s publicity rights. A celebrity’s identity can be appropriated unlawfully even without use of his name or likeness.96

The Carson court’s focus on the phrase’s strong association with Johnny Carson, along with the Elvis Presley Enterprises court’s emphasis on the phrases being “inextricably linked” to Elvis Presley’s identity, indicate that in order for a phrase to be protected under the common law right of publicity, there should be no question about who the phrase identifies. It seemingly must be synonymous with the person whom it identifies.

These cases are illustrative in determining whether Swift’s lyrics could be protected under a common law right of publicity. Carson and Elvis Presley Enterprises both allow for the possibility of a phrase, or phrases being sufficiently identifiable of a person, to be protected under the right of publicity. However, in both cases, the phrases at issue were used for many years in connection with the person. When “Here’s Johnny!” or “Elvis has left the building” or “Graceland” are mentioned, it is nearly impossible to think of anyone besides Johnny Carson97 or Elvis Presley. In both cases the particular phrases were used because of their association. In Swift’s case; however, it is not likely that her lyrics rise to this same level so as to be synonymous, or “inextricably linked,” with her identity. “Nice to meet you. Where you been?,” “Could show you incredible things,” and “Cause we never go out of style,” are fairly common expressions with “This sick beat” being barely more unique than the others. While the phrases certainly are all recognizable as Swift’s song lyrics, they are just as likely to conjure up many other thoughts, as well as, associations than Swift.98 This is not to say that Swift’s lyrics will never be protected under the common law right of publicity, they just would not be protectable now.

III. SHOULD TAYLOR SWIFT’S LYRICS BE PROTECTED?

The preceding analysis begs the question that, despite whether or not Swift’s lyrics gain protection under these three areas of law, should intellectual property law protect such phrases? Strong arguments exist for both sides.

96 Id.
97 Quotes from The Shining, IMDB.COM, http://www.imdb.com/title/tt0081505/trivia?tab=qt&ref_=tt_trv_qu (Arguably, if the Carson case were decided today, the outcome may have been different, as many people now associate the phrase with Jack Nicholson and his performance in The Shining, which came out less than three years after the time the case was decided, rather than with Johnny Carson.) (last visited April 26, 2015).
98 See Laura Schneider, Taylor Swift’s Trademark Rampage Puts the Kibash on Etsy Creatives, HYPEBOT.COM (Feb. 10, 2015) http://www.hypebot.com/hypebot/2015/02/taylor-swifts-trademark-tur-puts-the-kibash-on-etsy-creatives.html (discussing one clever response to Swift’s so-called trademark rampage – a cartoon of an anthropomorphic beet wearing sunglasses with a thermometer in its mouth with the caption “this sick beet”).
A. TAYLOR SWIFT'S LYRICS SHOULD BE PROTECTED

This Comment has opined that Swift, rather than simply ensuring protection for her lyrics for use on merchandise, may be motivated by the desire to prevent others from profiting off of her goodwill, a more valid motivation. Swift invested a lot of money, time, and labor in the creation of her valuable and lucrative brand. It is reasonable that Swift would want to protect her brand. The most basic justification comes from John Locke's "labor theory" of property. Locke's labor theory states that resources must in some way be appropriated before they can "be of any use, or at all beneficial," that is, before they can have any value. Then, by exerting labor and work upon these resources, a person gains a property right.

This idea is articulated further in the "'if value, then right' theory of creative property." Under this theory, if a party creates something "valuable, then [such party] should have the right to exploit that value by excluding others from using it." These theories align well with the doctrine of misappropriation, developed in *International News Service v. Associated Press*. The doctrine of misappropriation recognized a property right in "hot news" due to the value from "organization and the expenditure of labor, skill, and money." The United State Supreme Court did not like that the defendant was "endeavoring to reap where it ha[d] not sown."

Courts have applied these theories when evaluating property rights in movie quotes: "[p]roduction companies invest time and money in movie quotes when they pour money into bidding on and developing a script before a film is even made." But it goes a step further, acknowledging that value can also stem from its popularity:

Actors deliver them with the perfect inflection, gesture, and nuance so that viewers repeat them, sometimes incessantly, when they leave the theater. Thus, the value of movie quotes derives from both the movie itself and the cultural value that it acquires when viewers fold it into

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101 Id.

102 Id.


105 248 U.S. 215, 239 (1918).

106 Id.

107 Id.

108 SHAW, supra note 105, at 38.
their daily lives and, thus, into our culture.\textsuperscript{109} That value, regardless of its source, should give the creator the right to control how the quotes are used commercially.\textsuperscript{110}

Why should these theories not also apply to song lyrics? A singer or musician expends labor, skill, and money in writing, recording, and performing the songs, selling albums, filming music videos, making appearances, touring, and more. Songs gain popularity from such expenditure of labor, skill, and money. Audiences listen. They sing along. They repeat their favorite lyrics. And some try to exploit that popularity in order to “free ride” off of the goodwill that the musician has cultivated. For these reasons, Swift should be allowed to have a property right in her song lyrics.

B. TAYLOR SWIFT’S LYRICS SHOULD NOT BE PROTECTED

However, the arguments against such protection for Swift’s lyrics are also persuasive. One argument deals specifically with registering popular phrases or slogans for trademark protection. This argument is that the U.S.P.T.O. has been too permissive allowing trademark registration for popular phrases or slogans on “billboard products,” or “objects that are significantly used by owners to display information about their personalities, emotions, and tastes, including t-shirts, hats, mugs, and key chains” because these phrases or slogans do not typically function as trademarks.\textsuperscript{111} This argument urges that marks used on these billboard products should only be registered if the phrases or slogans actually identify a source, which typically such phrases or slogans do not.\textsuperscript{112} Swift seeks trademark protection for lyrics from her songs; such phrases do not function as source identifiers.

Another consideration is the effect that aggressive enforcement of rights could have on fans. Shortly after Swift’s cease and desist letters to Etsy sellers, one shop owner and fan said:

\begin{quote}
We originally made the item for fun, we love Taylor . . . When we got the e-mail that the trademark infringement occurred, we were pretty shocked because while our item was popular we didn’t feel as if it had become popular enough to cause harm to Taylor Swift’s empire. We were shocked. And we were scared. We didn’t even make enough money for a lawyer and this had seemed like such a harmless and fun idea. That same day, we saw that Taylor was attempting to trademark a variety of phrases and trying to get them blocked from being sold. After seeing that, we grew a little angry and felt targeted by her camp . . . Fans like to see themselves as part of the artist’s story, however small.
\end{quote}

\textsuperscript{109} See supra text accompanying note 109.
\textsuperscript{110} See supra text accompanying note 109.
\textsuperscript{112} See id. at 773.
They want to contribute and be creative and have fun. These free, loving, creative minds are being stopped by the very artists who have inspired them. Obviously an artist has a right to their art and people should respect that. But at the same time most people, like us, are trying to be respectful and contribute to the excitement that the artist brings into our lives. When that is taken away, it leaves us with a bitter taste in our mouths. It feels as though we don’t matter.\textsuperscript{113}

Swift could assert rights in her lyrics, but at what cost, her fans? Causing fans anger, alienation, or annoyance is certainly not something that Swift would desire. She needs to balance the importance of protecting her brand against losing her fans because without her fans, her brand loses value, and ultimately, will mean nothing. Perhaps, regardless of what rights do exist, the best course of action might be to just let it go.

IV. CONCLUSION

This Comment demonstrates the complexities involved with protecting small phrases taken from song lyrics. Swift would likely be most successful in a copyright infringement claim. Protection under trademark law may be difficult because even if her marks were registered, she would still need to show a likelihood of confusion in order to prevail on an infringement claim. The right of publicity is likely not appropriate in Swift’s case. Even though in past cases, short phrases or slogans were considered an “indicia of identity,” those phrases were synonymous in association with the person, and Swift’s lyrics do not rise to that level.

As to whether Swift’s lyrics should even be protectable, Swift should retain some rights or protection as reward for her labor, work, skill, and money invested in her music to build her empire. However, she needs to be careful; perhaps she should’ve said no to her zealous attorneys so that she didn’t seem so mean, because aggressive enforcement of these rights could negatively affect her fans, and ultimately damage her own goodwill. That certainly would not be one of Swift’s wildest dreams.
