

# Attribution and Human Capital in the Twentieth Century: How Professional Reputation Became the New Intellectual Property

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Today we are told that the economy is characterized by massively distributed innovation, and lively debates in intellectual property law attempt to discern the optimal legal protections for these networks of distributed innovation in science, technology, and the arts. Distributed innovation includes sampling in music and film and open source software, among many others. Commentary on networks and innovation tends to be utopian in tone, and usually emphasizes the benefits to creators, to consumers, and to society at large of free or affordable access to information.<sup>1</sup> When commentators emphasize the benefits of free access to information, they often note approvingly that many innovators care more about attribution than about intellectual property rights.<sup>2</sup> Attribution became, by the end of the century, the one form of exclusive right – a quasi-intellectual property -- that even the zealous advocates of the public domain would defend. When people or businesses make information available for free and encourage its modification – even when it is information that could be protected by copyright and could be sold for money – it is often assumed that the motivation must be to enhance the donor's reputation or celebrity; thus, for example, bands make their music available on MP3 blogs in the belief that the reputation benefit of wider dissemination is more valuable than the foregone royalties from CD sales.<sup>3</sup>

Technological and cultural changes in the first half of the twentieth century enabled a vast expansion of the ways that people were credited for their work, thus creating an economy of reputation and a notion of human capital that transformed how people thought of the relationship between labor and property. In essence – but,

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<sup>1</sup> Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, 2006).

<sup>2</sup> For example, all of the Creative Commons default licenses provide for attribution. <http://creativecommons.org/about/license/>. According to Creative Commons founder Jamie Boyle, originally attribution was a feature that users could select for a license, but since the overwhelming majority of people chose attribution, it was changed to a default term.

<sup>3</sup> <http://rorimkcalb.com/arcadefire.html> is an example. Another example is the Radiohead 2007 release of its album *In Rainbows* on the Internet; listeners were allowed to download the music for free but were encouraged to make a voluntary payment for it. See Jon Pareles, Pay What You Want for This Article, *New York Times* (Dec. 9, 2007). The album was later released commercially as a CD and is no longer available for download. [www.inrainbows.com](http://www.inrainbows.com).

significantly, not in law – attribution became a new form of property. The legal and cultural status of attribution was very much in flux throughout the twentieth century, and remains so even now. Everyone involved in claims about workplace attribution -- creative employees, corporations, judges, lawyers, celebrities – tended to reach for intellectual property concepts in articulating the value of attribution. The legal fictions and cultural constructs of intellectual property – the author as proprietor, the trademark brand as corporate property, workplace knowledge as a trade secret – were recycled into an all-purpose notion that knowledge, human capital, and a persona could be regarded in law and in life as an investment vehicle and an asset to be managed. In economic terms, an innovation or talent or bit of knowledge could produce two separate revenue streams: one from the intellectual property itself (the patent, the copyright, the trade secret) and one from the attribution of the intellectual property to a person (the labor market or other value of a marquee name like John Grisham or Sean Combs, wholly apart from the value of the books or fashion designs they generate). The right of publicity and trademark law, which emerged in the early part of the century as separate legal categories, began at the end of the century to merge into a property right in the manufactured or imagined self.

It is often said that people are what they do, and that their sense of self is determined, in part, by what they know how to do and by whether they are recognized for it. This is a very old way of understanding the idea of a self and of the meaning of a life. In the nineteenth century, the “art” of a worker was the particular skill and learning that defined respectable occupations (shoe-making, carpentry, machine building) and the people who performed them. Possessing an “art” conferred worth on the people who labored in those tasks, made them independent and useful, and, therefore, valuable members of American society.<sup>4</sup> In the twentieth century, what had formerly been the “art” of the skilled worker became the human capital of the workforce, and, simultaneously, the human assets of the firm. In previous work, I have shown how legal change in the late nineteenth and very early twentieth century transferred ownership of copyrights, patents, and trade secrets from the worker to the firm, thus creating a new category of property called corporate intellectual property.<sup>5</sup> Here I want to focus not on the legal ownership of the intangible things (patents, copyrights or intellectual property generally), nor even on the knowledge reflected in them (which also became corporate intellectual property), but on the knowledge *about* them and the knowledge about those who are reputed to have made them, what I call human capital and attribution. Attribution is a process of claiming or obscuring authenticity, of giving meaning to objects, of asserting the nature or quality of people and objects, and of valorizing human effort.<sup>6</sup> This essay will show how a social institution of surpassing importance nevertheless evolved with surprisingly little intervention from formal law, and even within the context of shifting and uncertain norms.

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<sup>4</sup> Sean Wilentz, *Chants Democratic*; David Montgomery, *Fall of the House of Labor*;

<sup>5</sup> Catherine L. Fisk, *Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property, 1800-1930* (under contract with University of North Carolina Press).

<sup>6</sup> I tried to explain and theorize the role of attribution in work relationships in Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 *Georgetown L.J.* 49 (2006). That article contained brief description of attribution practices and essayed a theory of legal regulation; this paper is a first effort at a much longer description of attribution practices over the course of a longer span of time.

This essay is divided into four parts. First, I briefly consider how attribution of work to individuals affects the value of the things that are attributed. From the arts and crafts movement at the turn of the twentieth century through mid-century advertising campaigns attempting to sell mass-produced items by humanizing the corporation that made them, attribution of work to individual workers remained an important feature of a firm's relationship to its customers and to its workers.

Second, the essay probes the connection between attribution, human capital, and the value of people. Attribution of work is essential to the idea of human capital, which is one of the most significant twentieth century concepts about creative labor. By the end of the century, people commonly described the economy as one in which the development of knowledge was more important than the development of things. The emergence of human capital as a branch of economics in the 1960s changed how firms thought about employee knowledge, and encouraged thinking of knowledge as a capital asset, as property. Technological change in the twentieth century made human knowledge even more valuable than it had been in the nineteenth century. The commodification of knowledge led eventually to the commodification of having a reputation for knowledge, which prompted lawyers to think about it like any other form of property, as something that must be owned and managed.

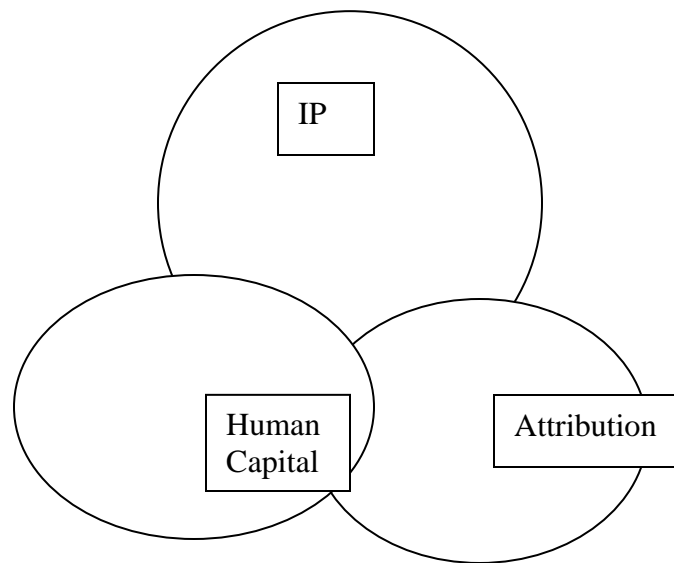
Third, the paper considers two of the dominant technologies of attribution within and among firms: the resume and the career. I examine how claims about the work we have done in our lives – what today we call a resume and think of as a career – shapes our sense of ourselves. That is, I look at the relationship between people and the products of their work not from the perspective of the value of the product (say, a Tiffany lamp), but from the perspective of the value we attach to the worker who made it (it turns out that a woman named Clara Driscoll designed many Tiffany lamps). Here, through the lens of a short history of the resume, I argue that twentieth century technologies transformed the relationship between workers, their identity, the narrative of their life's work (their career), and the congealed products of their life's work.

Fourth, I examine technologies of attribution between firms and consumers, focusing on the most extreme way that people communicated to society about themselves -- the "celebrated self," or celebrity. Technology, along with the rise of trademark and the rise of celebrity, also changed how firms communicated to consumers the relationship between workers and their work. A corporate "brand" in some cases communicates to consumers and to competitors a narrative about the work of the people within the corporation (and in some cases it does not). Tiffany distinguished the products of his studio from the leaded glass products produced by others by attaching to them his name, and his name alone. The branding of Tiffany glass added value not only to the objects but also to him. Over the course of the twentieth century, technological change facilitated not only the branding of a huge number of products with corporate names and associations, but also a branding of people themselves.

## **I. Attribution and the Value of Things**

Historians of art and literature have long realized that the same old object can gain or lose value and social significance based on whether it is attributed to someone we today regard as a master. And of course corporations, advertisers, and consumers know that the new object – jeans, sneakers, or a handbag -- is more valuable if it has one label attached to it rather than another. That is why today trademarks are regarded as an extremely important form of intellectual property. Scientific research has greater credibility if it is published under the name of a respected university scientist than if it published by a high school student. A byline on a newspaper article gives the article credibility and sometimes distinguishes news from propaganda. Some judges say that the most important words in a brief are the names of the lawyers who sign or file it. A novel sells better if it has John Grisham's name on it rather than mine. A movie will do better at the box office if the director and leading actors are popular or respected.

To understand the idea, consider a Venn diagram of three overlapping circles. One circle is what has recently come to be known collectively as intellectual property: patents, copyrights, trade secrets, trademarks. A second circle that overlaps slightly is human capital. That includes some of the knowledge that is within the scope of the patent or copyright or trade secret, but some knowledge that is related to it but not within the legal definition of IP. That might include, for example, all the research that led up to the device that was ultimately patented, or the parts of the text or film or music that were cut out of the final copyrighted version, or, in the case of trade secrets, knowledge that is not sufficiently secret to qualify for legal protection but is nevertheless valuable because it is acquired through extensive research or study. The third circle is attribution or professional reputation: being known as one of the team of people named as inventors on patent, who developed the iPod, or whose leader won a Nobel prize. Another example is screen credit in Hollywood. This paper is about the third circle, but to understand that circle it is necessary to study the IP circle and, especially, the human capital circle.



It's not merely what you know how to do, it's that you are known to know it.

Over the course of the twentieth century, Americans came to regard the cultural practice of attaching a name to the product of someone's labor as a form of property. But it was property with no legal status. I do so not from the usual perspective of trademark law, which focuses on consumer relations, and creates a property interest in the relationship between the name, the object, and the consumer of the object. Rather, I want to examine attribution from the perspective of labor relations, focusing on the creation of property rights in the relationship between the name and the person who does the labor. Technological change led to the development of a new form of property rights in the attribution of work to people. The technologies that created the mass marketing of mass-produced goods to consumers paved the way for the creation of trademarks (which attribute goods to corporations) as a type of property. Similar technologies paved the way for work, knowledge, or creativity to be attributed to people in the form of human capital, professional reputation, or, at the most extreme, celebrity.

As the connection between workers and the products of their work was first challenged by the mass production of consumer goods in the early twentieth century, the Arts & Crafts movement insisted that the connection between the creator and the consumer/user of an item must be apparent and immediate. Arts & Crafts was a rebellion not only against mass production, and the dehumanizing labor relations of factory labor, but also against the anonymity of mass production.<sup>7</sup> Yet histories of Arts & Crafts workshops, studios, and factories show that although the work process aimed to avoid the sweating and alienation of labor typical of industrial factories and mass production, the works were often sold under the name of the founder or the organization. The craftsman

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<sup>7</sup> Eileen Boris, *Art and Labor: Ruskin, Morris and the Craftsman Ideal in America* (Philadelphia: Temple University Press, 1986).

ideal persisted with respect to an expectation of high quality and pride in the work, but even these organizations were acutely conscious of the value of the “brand” under which Tiffany glass, Rockwood pottery, or Stickley furniture were sold.<sup>8</sup>

Over the course of the century, advertising and the law of trademark shaped how companies presented their products to consumers. Companies spent fortunes creating corporate brands and sparking a desire for their brands through advertising. In many cases, branding and advertising involved telling a story to consumers about the relationship between companies and their workers and the story often rested on a legal right of firms to market their products by marketing a story about the company and its people. DuPont’s “better living through chemistry” and many other ad campaigns emphasized a “from us to you” narrative. The corporate brand sometimes obscured the role of employees in creating products and sometimes publicized a fictionalized version of it for purposes of convincing consumers of the authenticity of the product and the humanity of the firm. Twentieth century technologies that are foundational to consumer culture – photography, movies, radio, TV, and print journalism – combined with the pervasiveness of advertising and consumerism, effected a merger between advertising products and advertising the self. Technology, advertising, and labor market conditions spurred the creation and modification of attribution norms, yet it was the very rare case in which attribution became a legally protected kind of property.

## **II. Attribution, Human Capital, and the Value of People**

Professional reputation has long been a defining feature of workers’ sense of self. What was new in the twentieth century is not that professional reputation mattered, but that it was the only aspect of workplace knowledge that workers could still claim to “own.” By the first or second decade of the twentieth century, intellectual property law and techniques of modern management allocated to corporate employers all legal rights in the objects workers made (the Tiffany lamp) and the intellectual property rights reflected in the objects (whatever patents, copyrights, or trademarks might exist in the products of a worker’s labor). Moreover, the law of trade secrets and noncompete agreements enabled firms to control the know-how reflected in creative work even when that know-how was not patented or copyrighted.<sup>9</sup> Over the course of the twentieth century, firms sought through employment agreements and management practices to control the human capital as well. While human capital was not recognized in the law as corporate property, or even as property at all, employment contracts largely allocated control of human capital to the firm. Eventually, the only legal rights creative workers had left were the rights to their reputation for being creative. Professional reputation loomed as large in the industrial and information economies of the twentieth century as it

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<sup>8</sup> *Id.*

<sup>9</sup> For a summary of the legal rules and their evolution, see Catherine L. Fisk, Authors at Work: The Origins of the Work-for-Hire Doctrine, 15 *Yale J. L. & Humanities* 1 (2003); Catherine L. Fisk, Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920, 52 *Hastings L.J.* 441 (2001); Catherine L. Fisk, Removing the ‘Fuel of Interest’ from the ‘Fire of Genius’: Law and the Employee-Inventor, 1830-1930, 65 *U. Chicago L. Rev.* 1127 (1998).

had in the small workshops and artisan community of centuries past, but the social and legal claims that could be made about reputation became inflected with intellectual property concepts that were quite different from what had existed in the past.

Changing practices of attribution were the product both of changing technology and the development of new ways of thinking about the value of human talents. Obviously, neither pride in one's work nor the desire to be recognized for it was new in the twentieth century.<sup>10</sup> Nor was it new to think about how to gain fame through deliberate efforts to court publicity.<sup>11</sup> But new communications technologies changed the possibilities for marketing people's talent, as it changed the possibilities for marketing everything. Knowledge and talent became ever more marketable as commodities.

### ***A. Knowledge, Reputation, and the Influence of Human Capital Economics***

Human capital as a field of inquiry first emerged in economics in the nineteenth century, but came into its own as an economics discipline in the mid-twentieth century. Economists routinely cite as a precursor Adam Smith's observation in the *Wealth of Nations* that "the annual labour of every nation is the fund which originally supplies it with all the necessaries and conveniences of life which it annually consumes," and that labor includes "the acquired and useful abilities of all the inhabitants or members of the society," including "the state of the skill, dexterity, and judgement with which labour is applied."<sup>12</sup> Both Karl Marx and John Stuart Mill talked about labor power in terms of capital, but in Marx's case it was referring to the Russian nobility's ownership of serfs, and Mill did so only briefly, noting that although a human could not be classed as wealth,

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<sup>10</sup> Consider an example: I found three articles published in scientific journals in the first decade of the twentieth century proposing objective measures of fame, all of which involved counting up published references to someone. One such article, published in 1910, urged the use of a form of what today is known in academic circles as a citation count. C.A. Browne, A Comparison of Methods for Estimating Fame, Discussion and Correspondence, 32 *Science* 464 (Oct. 7, 1910) (referring also to an alternative method proposed by Liming in 32 *Science* 157 (1910), and another proposed by Cattell in *Popular Science Monthly* 359 (1903)). In Browne's argument, he uses various forms of citation count to determine whether Euripedes or Sophocles is the more famous or eminent dramatist (Euripedes), and which of Shakespeare's plays is the most famous (Hamlet).

<sup>11</sup> Paul Johnson traced the connection between work reputation and celebrity in his history of an early nineteenth century celebrity, *Sam Patch, the Famous Jumper*. Patch, who in the 1820s proclaimed that his skill in jumping over waterfalls was an "art," made a novel connection between performing a daring stunt for entertainment and the artisan tradition. Johnson's telling of the rise and many falls of Sam Patch (punning about him began long before he died) links the nineteenth-century origins of celebrity (a persona created by the person and by "the apparatus of publicity" such as newspapers, popular theater, democratic literature "that shaped stories for an emerging mass audience") to nineteenth-century working-class community. Paul E. Johnson, *Sam Patch, the Famous Jumper* 53-56, 164 (New York: Hill and Wang, 2003). On labor and celebrity in the early nineteenth century, see also Michael Newberry, *Eaten Alive: Slavery and Celebrity in Antebellum America*, 61 *ELH* 159 (1994).

<sup>12</sup> Scott R. Sweetland, *Human Capital Theory: Foundations of a Field of Inquiry*, 66 *Review of Educational Research* 341, 343 (1996); Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776)

“his acquired capacities, which exist only as a means, and have been called into existence by labor, fall rightly, as it seems to me, within that designation.”<sup>13</sup>

The twentieth century innovation was to institutionalize the thinking of someone’s “art” (or talent or know-how) as a form of “capital,” specifically, “human capital.” The date usually given for the founding of the study of human capital as a branch of neoclassical economics is 1960, which was the year Theodore W. Schultz delivered the presidential address at the American Economic Association entitled “Investment in Human Capital,” and Gary Becker published an article in the *American Economic Review* entitled “Underinvestment in College Education.”<sup>14</sup> Economists produced a mountain of influential articles on the topic throughout the 1960s, and after a lull in the 1970s, again turned to the task of analyzing the value of knowledge in the 1980s and 1990s.<sup>15</sup>

The decision to treat labor generally, or knowledge and training specifically, as capital was quibbled with on a variety of technical grounds by other neoclassical economists, but received a fundamental challenge in the pages of the *American Economic Review* in 1975 from two eminent Marxist economists, Samuel Bowles and Herbert Gintis.<sup>16</sup> As Bowles and Gintis observed, in economics (they said capitalism), which long treated labor as a commodity and “strip[ped] the social process of work of its nonexchange characteristics, ... the shift toward treating the worker more precisely as a capital good seems, at least in hindsight, to have been virtually inevitable.”<sup>17</sup> The success of human capital theory, Bowles and Gintis lamented, meant that “the only specific attributes which ‘labor’ retains in the human capital formulation derives from the fact ... that labor is embodied in human beings.”<sup>18</sup>

In a critique that proved to be prescient of subsequent developments in economics, Bowles and Gintis criticized “the neoclassical notion of the firm as a black box whose inner workings are of interest, perhaps to the organization theorist, but not to the economist. The firm has socio-political dimensions which the economist may abstract from only at the cost of significant error.”<sup>19</sup> Moreover, Bowles and Gintis

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<sup>13</sup> Karl Marx, *The Emancipation Question*, (written in Dec. 1858, first published in the *New York Daily Tribune*, Jan. 17 and 22, 1859); John Stuart Mill, *Principles of Political Economy* [check p. 47].

<sup>14</sup> Theodore W. Schultz, *Investment in Human Capital*, 51 *Am. Econ. Rev.* 1 (1961); Gary S. Becker, *Underinvestment in College Education?* 50 *Am. Econ. Rev.* 346 (1960). Other works widely regarded as foundational appeared shortly before and after, including Jacob Mincer, *Investment in Human Capital and Personal Income Distribution*, 66 *J. Pol. Econ.* 281 (1958); Gary Becker, *Human Capital: A Theoretical and Empirical Analysis with Special Reference to Education* (1964); and Theodore W. Schultz, *Investment in Human Capital: The Role of Education and Research* (New York: Free Press, 1971).

<sup>15</sup> Summaries of the history of the field as a field, charting its ups and downs and linking it to policy debates about investment in education and job training, include, besides Sweetland, *supra*: B.F. Kiker, *The Historical Roots of the Concept of Human Capital*, 74 *J. Pol. Econ.* 481 (1966), Irvin Sobel, *The Human Capital Revolution in Economic Development: Its Current History and Status*, 22 *Comparative Education Rev.* 278 (1978); Mark Blaug, *The Empirical Status of Human Capital Theory: A Slightly Jaundiced Survey*, 14 *J. Econ. Lit.* 827 (1976).

<sup>16</sup> Samuel Bowles & Herbert Gintis, *The Problem with Human Capital Theory – A Marxian Critique*, 65 *Am. Econ. Rev.* 74 (1975).

<sup>17</sup> *Id.* at 74.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 75.

criticized the excessively narrow definition of what constitutes human capital: “The worker attributes, which are valued by employers and which therefore constitute ‘human capital,’ are not limited to technical skills and abstract productive capacities. In particular, such ascriptive attributes as race, sex, age, ethnicity, and formal credentials, often held to be irrelevant in the logic of capitalist production, are used to fragment the work force and reduce the potential formation of coalitions within the firm.” Finally, in a move that was a harbinger of later developments in sociology and law, Bowles and Gintis invoked Erving Goffman’s idea that “modes of self-presentation ... such as manner of dress, speech, personal demeanor and life-style, self-concept, and status identity, can serve the same ends, while in addition insuring relatively undistorted transmission of directives down and information up the ladder of hierarchical authority of the enterprise.”<sup>20</sup>

The conception of worker skill, knowledge, and attributes as “capital” proved to be hugely influential in popular thinking in the mid-twentieth century, and especially in thinking about management of employees. It made its way from the pages of economics and management journals into legal rules, as large companies sought to reap larger returns on what they regarded as their “investment” in developing human capital by training employees. Once labor was called capital, and in particular once worker knowledge, skill, and training was called capital, it became much easier for lawyers to argue that this form of capital should be treated as a species of property, just like land and money had long been, and copyrights and patents had recently come to be.

Companies tried to operationalize the insights of human capital analysis in their management of personnel.<sup>21</sup> By the 1970s it was said that the stock of “intangible capital” (that devoted to “knowledge creation and human capital”) began to outweigh the stock of “tangible capital (physical infrastructure and equipment, inventories, natural resources)”.<sup>22</sup> A theory of management known as “intellectual capital management” emerged, focusing on how to manage what were referred to as the firm’s “intellectual assets.” A brief biography of one advocate of this management approach may serve as an example: A trained architect who joined the Dow Corporation in 1986 as “development manager for construction materials” was later asked to “create an intellectual asset management function to identify innovations or ideas that might have been overlooked by the corporation and bring them to commercialization.” In that capacity, the architect-cum-“Director of Intellectual Capital/Knowledge Management” developed “an intellectual asset vision and implementation model, including approaches and tools to enable the company to maximize the value of its existing portfolio of intellectual assets.”<sup>23</sup>

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<sup>20</sup> *Id.* at 76-77.

<sup>21</sup> An early example of mid-century thinking about management of “the whole worker” is Peter F. Drucker’s influential early book, *The Practice of Management* (New York: Harper, 1954). The end of century perspective is illustrated by Ronald J. Burke & Cary L. Cooper, *The Human Resources Revolution: Why Putting People First Matters* (New York: Elsevier 2006).

<sup>22</sup> Paul A. David & Dominique Foray, *An Introduction to the Economy of the Knowledge Society*, [UNESCO 2002, published by Blackwell] at p. 10.

<sup>23</sup> Patrick H. Sullivan, “A Brief History of the ICM Movement,” in *Value-Driven Intellectual Capital: How to Convert Intangible Corporate Assets into Market Value* 238-244 (Wiley, 2000)

As companies adopted and developed strategies of “intellectual capital management” in the last three decades of the century, work relations and labor markets changed rapidly and dramatically. In particular, the rapid and profound changes associated with computers and information technology changed skill requirements for jobs and rendered certain knowledge obsolete and other knowledge essential. In essence, driven by rapid technological change, managers demanded greater flexibility in work. Flexibility means volatility in the demand for work, rapid skill changes, and the ability of workers to examine their own work processes and products and adapt and change quickly to new needs.<sup>24</sup> Long-term attachments between employees and firms no longer enjoyed even the limited legal protection that they had been given in the mid-century manufacturing and managerial economy. Instead, by the end of the century, rapid innovation in technology was thought to demand labor market flexibility. In the new regime, employees were expected to ensure their own employability by developing appropriate skills and knowledge and, importantly, they had to market their abilities and accomplishments themselves.<sup>25</sup>

Business press coverage of human capital after 1970 often portrayed human capital in terms of technological change and innovation, and frequently invoked a narrative about the challenges facing managers of adapting to new technology to capture worker productivity gains as higher profits; in other words, how to get the most out of workers and new technology. As *Business Week* explained in the typically breathless prose of a cover story, “U.S. companies are now taking investment in their human capital – their workforces – more seriously. When mass production ruled, competitive advantage lay in fragmenting work, highly specializing tasks, and managing via hierarchical bureaucracy. What’s different today is that productivity gains, in an era of computers and communications technology, increasingly rely on delegating authority and organizing workers into self-managing teams.”<sup>26</sup>

The melding of sociological theories like Goffman’s with neoclassical economic theories of human capital continued, as scholars mined the work of Pierre Bourdieu for insights on the social and economic power of knowledge.<sup>27</sup> The idea that knowledge is power and knowledge power is profit became a dominant trope in a wide array of literatures in the mid-twentieth century, ranging from social theorists following Bourdieu, to the pages of the *Wall Street Journal*, to self-help books on how to manage one’s career. The concept of knowledge as human capital proved so fertile that it prompted

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<sup>24</sup> Chris Brener, *Work in the New Economy: Flexible Labor Markets in Silicon Valley* 24-29 (Malden, MA: Blackwell, 2002).

<sup>25</sup> Katherine Van Wezel Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (New York: Cambridge University Press, 2004); Catherine L. Fisk, Knowledge Work: New Metaphors for the New Economy, 80 *Chicago-Kent L. Rev.* 839 (2005);

<sup>26</sup> Christopher Farrell, et al., Riding High: Corporate America Now Has an Edge Over its Global Rivals, *Business Week* (October 9, 1995), p. 134 [Contrast this with coverage of technology in the 1960s and 1970s, and ideally in the 1940s and 50s]

<sup>27</sup> Alejandro Portes, The Two Meanings of Social Capital, 15 *Sociological Forum* 1 (2000); Gunnar Lind Haase Svendsen & Gert Tinggaard Svendsen, On the Wealth of Nations: Bourdieconomics and Social Capital, 32 *Theory and Society* 607 (2003).

thinking of other aspects of social life as capital. James Coleman, a sociologist at Chicago who acknowledged the influence Chicago economists Becker and Shultz on his own thinking, posited that many aspects of social relations, including knowing one's neighbors and business community, trust, and social acceptance can be thought of as "social capital."<sup>28</sup> Even belonging to a bowling league could be described as capital.<sup>29</sup> Gary Becker expanded his ideas about economic analysis of human capital into a book-length normative defense of gendered labor specialization within the family.<sup>30</sup> Eventually, it seemed there was no limit to which human attributes and social phenomena could be described as capital.<sup>31</sup>

That economists, management theorists, and some sociologists or anthropologists described knowledge and social status as capital does not dictate how lawyers and judges would describe it.<sup>32</sup> The question I consider is this: when and why did lawyers, judges and legal scholars adopt property concepts to resolve disputes or address claims about reputation, and when and why did they not do so?

[Here I will trace how legal scholars and judges adopted ideas of human capital as bases for legal rules. The idea will be to show how property concepts were repurposed to fit human capital. I will emphasize the agency of legal actors in using intellectual property concepts like artists use found objects to transform cultural ideas about knowledge as capital into legal rules treating reputation as property. There is nothing particularly new in this style of legal reasoning; this is just a form of the reasoning by analogy and the common law method that Oliver Wendell Holmes described in *The Common Law*.<sup>33</sup> ]

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<sup>28</sup> James S. Coleman, Social Capital in the Creation of Human Capital, 94 *Am. J. Sociology* S95 (1988).

<sup>29</sup> Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000).

<sup>30</sup> Becker argued that economic efficiency dictated that women should stay home to raise children contributing to the human capital of children and husbands and men should generate market capital. Gary S. Becker, *A Treatise on the Family* 23 (1981).

<sup>31</sup> Even happiness was described as a form of capital in an education journal. The author claimed that education contributes to "the quest for happiness ... through capital development." In particular: "The durable and relatively fixed elements of an individual's psychological infrastructure combined with learning produces individual investment in psychological capital." Individual happiness, the article insisted, "is substantially determined by the effects of psychological, social, economic and political capital in the ability of an individual to sustain a predominance of positive hedonic experiences." Ron Hosen, Dina Solovey-Hosen & Louis Stern, Education and Capital Development: Capital as Durable Personal, Social, Economic and Political Influences on the Happiness of Individuals, 123 *Education* 496 (2003).

<sup>32</sup> I also should be clear that, at the moment, I wish to remain agnostic on the normative question of whether it is good or bad to describe knowledge as capital, or as a commodity. Commodification is not necessarily corruption.

<sup>33</sup> A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

## ***B. Law and the Ownership of Reputation***

The invention of telephone, computers and the internet vastly simplified both the task of recording new knowledge and the process of sharing it among a community of potential users. For much of human history, the transmission of knowledge was slow, laborious, and, therefore, necessarily limited. It was relatively difficult for an innovator to convey newly developed knowledge to a wide circle of other potential users. It was slow and physically demanding to codify new knowledge as text or diagrams done by hand and disseminating it via personal letter, or transfer it to type and print it. Improved communications, we all know, enabled the creation and the vast expansion networks of innovation (as Eric Von Hippel calls them<sup>34</sup>) and of widely distributed shared creativity (e.g., Open Source software, Wikipedia, or NASA's recent effort to use amateur inventors to address major technological problems such as the space glove<sup>35</sup>). Knowledge communities could easily expand from a small group of people working in close physical proximity to anyone in the world with access to a computer and the training to understand the new knowledge.<sup>36</sup>

What these technologies *also* made possible, which has been studied less than the sharing of knowledge, is wider, flatter, and more accurate *attribution*. As compared to the nineteenth century, we might expect to see more widely disseminated attribution of creativity and inventions. In the late twentieth century, as workplace hierarchies flattened because of improved communications technology (internet, better phones, improved computers, cheap fax machines), one might expect to see that the people who actually originated ideas or innovations would communicate more directly with either the top people in their own firm, or with customers, or with their peers at competing firms. Technology enabled distributed attribution to a degree unimaginable in the early century. All the devices that enable easier transmission of knowledge and innovation, also enable transmission of attribution (or misattribution) of the creator or innovator. The scientist who invents a new robot and posts drawings, specifications, and computer code on the Internet also, usually, posts her name along with it. Even the obscure inventor, thus, can become her own publisher.

Yet, widespread attribution did not appear to happen. Everyone has an iPod but it is not widely known who invented it (a number of inventors are identified by Wikipedia,

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Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little Brown & Co., 1946), 5.

<sup>34</sup> Eric Von Hippel, *Networks of Innovation* (MIT Press)

<sup>35</sup> Jack Hitt, The Amateur Future of Space Travel: How NASA turned to America's Basement Brainstormers, Workbench Concoctors, and Garage Tinkerers to Revive the Space Program, *New York Times Magazine* (July 1, 2007), p. 40.

<sup>36</sup> Paul A. David & Dominique Foray, An Introduction to the Economy of the Knowledge Society, UNESCO 2002 [get cite]; Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006).

though I have no idea whether Wikipedia's attributions are accurate).<sup>37</sup> Everyone knows (or thinks they know) who invented telephone, radio, telegraph, and record player. But it's not generally known who invented the photocopier, the cell phone, or the GPS. Why? One reason is the prevalence of collective invention of complex technologies. Another may be the decline of the heroic inventor school of scholarship and journalism (although Bill Gates and Steve Jobs still receive abundant individual credit for innovations associated with Microsoft and Apple). It is my surmise, that a significant factor explaining the state of late twentieth century attribution practice is the employment contract, which operates not only as a technology of authorship, but also as a technology of nonattribution.

Between 1895 and 1925, the employment contract was interpreted to confer upon the employer the rights to all employee ideas and inventions. As a consequence, most employees had no legal right to their ideas, or even to receiving credit for initiating them. Technology is complex and builds upon innovations of others; invention is more likely to be a product of group rather than individual effort. Even where an invention could be created by a single person, it is extremely expensive to bring it to market, and one might say that developing the technology is no more important than the product design, advertising, and marketing necessary to introduce a new technology to the world at large. In addition, in the traditional corporation that mastered the modern management techniques of the early- to mid-twentieth century, creative products worked their way up in a hierarchy, and the creators who made them often were not credited for their work, at least not outside the firm or the work group. Moreover, corporations insisted that new technologies be branded with their own name, not the name of the individual inventor (the Xerox machine). Thus, even an invention patented by an individual might still be attributed to a firm, if the inventor sold or licensed the patent to a corporation to bring it to market. The exceptions to the anonymity of invention are when an individual or a small group of collaborators are able to form a company around the invention and maintain control of the company (the de Lorean motor car, Bill Gates and Microsoft), or when in the case of scientific publishing or scientific awards, the innovator is credited individually (the Salk polio vaccine).

Generally, the corporate attribution of hired creativity seemed to have been acceptable to most employees who were compensated for their work. But there were some cases in which employees felt wronged by the rules of the employment relationship. Where the employment contract failed to subsume all issues of ownership of innovation, labor, and credit is where we can gain a window into the process of attribution and human capital formation. Take the case of Keith Gibby, an IBM employee from 1984 to 1994, who filed an unsuccessful lawsuit and also created a web page to challenge IBM's

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<sup>37</sup> Wikipedia attributes the development of the iPod to "Apple's hardware engineering chief, Jon Rubinstein," and "a team of engineers ..., including Tony Fadell, hardware engineer Michael Dhuey, and design engineer Jonathan Ive, with Stan Ng as the marketing manager." [www.wikipedia.org](http://www.wikipedia.org) (last visited July 5, 2007). Credit is given to Steve Jobs too, who was personally involved at various points in the development of the iPod in other sources, along with others. <http://www.wired.com/gadgets/mac/news/2004/07/64286> (last visited July 5, 2007) (a participant on the iPod development team, Ben Knauss, is quoted describing his own involvement in the project and on the significance of Jobs' involvement).

failure to compensate or credit him for several ideas that he claimed the company appropriated from him. The disjunction between the result in the *Gibby* case and the insistence of Gibby's efforts to publicize his claims for credit for, and ownership of, his ideas suggests the distance between the law of attribution, workplace norms, and the urgency with which workers claim the value of credit for their work.

The International Business Machines company instituted an employee suggestion program in 1928.<sup>38</sup> At IBM, as at many large companies in the middle half of the century, managers sought to encourage innovation not only in the areas in which employees were paid to improve the company's business, but throughout the business by harnessing employee creativity about all aspects of the company's operations, even those having nothing to do with the employee's official job description or responsibilities.<sup>39</sup> Disputes over credit (and compensation) for suggestions that improved a company's business bubbled into the public view only rarely, but when they did, they represented one of the few instances in which individual attribution is publicly demanded in the face of both laws and corporate practices that insisted on corporate ownership of everything.

Just as mid-century law allocated inventions to firms, the law also made clear that a firm that took care in drafting the terms of its employee suggestion program retained sole discretion whether to credit or compensate employees for suggestions.<sup>40</sup> In law, credit and compensation for employee ideas were deemed a gratuity that the firm might bestow upon employees as it saw fit. As one court said in overturning a trial court award of damages to employees who submitted ideas, "by his submission he seeks only to obtain a gratuity. He does not seek to create a binding contract. If the company declines to recognize his suggestion with an award, he may be disappointed, but cannot legitimately complain that a promise has been broken."<sup>41</sup>

Keith Gibby submitted several ideas to the company for possible development. According to Gibby, the IBM corporate documents describing the Employee Suggestion Plan and encouraging employees to use it promised that the company would compensate employees for any idea that met the criteria described the documents. Gibby focused his arguments on the pages and pages from the various plan documents, employee manuals, managers manuals, and idea submission evaluators' guides that appeared to make rights under the plan nondiscretionary and promises on which employees and managers could rely. Initially, all went well between Gibby and IBM: "Over the course of several years, IBM paid me over \$90,000 for my ideas; ideas which had saved them a LOT more money than \$90K (you can read the Suggestion Plan to see how suggestion awards were calculated - basically a percentage of the total savings). ... It was a great Plan...I submitted valuable ideas, IBM implemented those ideas and rewarded me handsomely for them." But then things began to change. "I had submitted a great many suggestions and was patiently awaiting their approval (the Plan was good, but it REALLY took a long

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<sup>39</sup> Fisk, *Working Knowledge* (describing DuPont suggestion program).

<sup>40</sup> See sources cited *infra* note \_\_\_\_.

<sup>41</sup> *Lisec v. United Air Lines, Inc.*, 85 Cal. App. 3d 969, 978 (1978).

time for the system to churn through its processes) when things started to change.” Gibby said that he had no idea that the company would renege on what he considered its legally binding promises: “As set forth in the IBM Suggestion Plan “Your Ideas Have Value” brochure, ‘Since the Plan was established in 1928, it has been good for both the company and the employees who submitted useful ideas. For example, from 1975 to 1984, employees’ suggestions had saved the company over \$300 million – and earned nearly \$60 million in awards for IBMers.’ . . . And I had absolutely no reason to think it would ever be otherwise. If I had, I certainly wouldn’t have continued to send in suggestions (my OWN ideas, my OWN property).<sup>42</sup>

In a long narrative that accompanied the documents, Gibby consistently referred to ideas as “property.” But that is not how the United States Court of Appeals for the Fourth Circuit read the documents. As it explained in rejecting Gibby’s contentions that he was entitled as a matter of contract or unjust enrichment to compensation for his ideas, “the Plan made it clear in unequivocal language and in several different sections of the Plan that whether IBM used the idea and whether cash would be awarded were within the sole discretion of the company.” Given that, the court explained, Gibby could have no legally enforceable expectation of credit or compensation, regardless of his allegations about other language of the plan, the company’s longstanding practice of rewarding and crediting employee suggestions, and a variety of documents encouraging employees to submit ideas and managers to review and compensate them fairly.<sup>43</sup> Thus, Gibby’s contract with IBM operated as a device that enabled IBM to claim all credit for any idea Gibby had during the term of his employment, and the court thought the contract was so luminously clear in giving IBM all rights to his ideas that the court did not even bother to state the facts of the case, to explain much of its reasoning, or to publish its opinion so that others could learn what happened and see why IBM owned everything and Gibby got nothing. The court read the employment contract, along with the suggestion plan documents, as operating as a technology of nonattribution.

Confronted by the court’s and the company’s legal position, which Gibby considered to be outrageously contrary to the “real” contract between him and IBM, Gibby used the Internet to open a new window into their relationship and to seek credit for his efforts in the court of public opinion. Technology enabled him to tell his version of the story. The court of appeals’ decision did not tell the story of IBM’s plan and why Gibby believed, based on a ream of written company policy statements, employee manuals, manuals for managers administering the suggestion plan, that the suggestion plan did in fact obligate the company to pay for any suggestions that it implemented. And the trial court’s decision was not reported in any of the official legal databases or case reports at all. But Gibby was able, with the cheap, easily used, and widely available technology of a scanner and the Internet, to post all the relevant IBM documents on the Internet for all to see.<sup>44</sup>

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<sup>42</sup> [www.geocities.com/~keithgibby](http://www.geocities.com/~keithgibby) (emphasis in original) (last visited July 5, 2007).

<sup>43</sup> Gibby v. International Business Machines Corp., No. 97-2051, 1998 U.S. App. LEXIS 17163 (4<sup>th</sup> Cir. 1998) (unpublished).

<sup>44</sup> <http://www.geocities.com/~keithgibby/briefs.htm> (last visited July 5, 2007).

In his view, IBM's legal arguments, which were accepted in full by the Fourth Circuit, amounted essentially to this: "After all these years of claiming that it had come up with all of these ideas all by itself, IBM was actually saying, IN WRITING, that it had taken my ideas, implemented and significantly benefited from them and that THIS WAS OK, BECAUSE IBM HAD THE DISCRETION AS TO WHETHER OR NOT IT WOULD COMPENSATE AN EMPLOYEE FOR "APPROPRIATING" HIS IDEAS and, therefore, the Suggestion Plan brochures and other company communications were meaningless!" He then described what he imagined as the consequences if "us poor working slob" could condition what appeared to be promises in the same way: "I can only assume that, on the day they evaluated my suggestions they just didn't "FEEL" LIKE PAYING FOR THEM. Don't you wish that we ALL could take such liberties? That we could simply go out to some store, buy something, decide to keep and use it, and then decide later on that we just didn't "feel" like paying for it?"<sup>45</sup>

Other courts in the middle decades of the twentieth century reached similar results as in *Gibby* using similar reasoning. One case, involving an employee suggestion plan established by United Air Lines in 1938, explicitly stated that credit and compensation were entirely discretionary, and therefore gratuitous.<sup>46</sup> Another, involving the Ford Motor Company suggestion plan, acknowledged that although employees would believe that the plan conferred rights on employees and would be motivated to work harder and more creatively because of it, the company must nevertheless be protected against employees acquiring any property rights in their ideas: "the clauses in the employment contract and the proposal plan documents must be upheld in order to protect the company's interests. Companies such as the Ford Motor Company must be allowed to protect themselves from situations in which employees use the company's technology, time, equipment and money to develop inventions only to market them either for themselves or to the employer's competitors." The court emphasized that the language of the suggestion plan documents and what the court described as the "employment agreement" "conveyed ownership of any invention, discovery or improvement made, conceived or developed by appellant to the company. Each time appellant submitted his idea through the suggestion plan he signed documents with similar clauses."<sup>47</sup> In most of the cases, the courts insist that neither employee expectations generated by the elaborate processes established for submitting and evaluating ideas, nor the company's general practice of compensating suggestions, nor even language of plan documents suggesting the right to credit or compensation, were sufficient to trump language insisting that all ideas are the property of the firm and that the company is under no obligation to credit or

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<sup>45</sup> [www.geocities.com/~keithgibby](http://www.geocities.com/~keithgibby) (emphasis in original) (last visited July 5, 2007).

<sup>46</sup> *Lisec*, 85 Cal. App. 3d at 978.

<sup>47</sup> *Fish v. Ford Motor Co.*, 534 N.E.2d 911, 912-913 (Ohio App. 1987) (the clause stated: "I agree that any decision made by my employer regarding eligibility, adoption, rejection, award or commendation with reference to my idea shall be final and binding, and that my employer shall have the right to withdraw or change the program at any time."). Summaries of the law regarding employee suggestion plans may be found in Donna Domagala, Note, Employee Suggestion Plans: Building a Better Mousetrap or Misappropriation of Ideas, 31 *Suffolk U. L. Rev.* 391 (1997); Paula Houchins, Rights and Obligations Under Employer-Employee Suggestion Plans, 40 *A.L.R.3d* 1416 (2007, first published 1971). On bonus disputes, J.H. Cooper, Rights and Liabilities as Between Employer and Employee With Respect to General Bonus or Profit-Sharing Plans, 81 *A.L.R.2d* 1066 (2007, originally published 1962).

compensate employees for them. The goal of the disclaimers contained in such contracts is to prevent norms created by bureaucratic management practices from becoming any sort of legally enforceable property rights.

*Gibby v. IBM* represents a collision between the various forms of business and legal thinking about human capital in the twentieth century. On the one hand, the IBM Suggestion Plan sought to make the most of the corporation's human assets by encouraging creativity and initiative among employees. The early twentieth century conceptualization of ideas as valuable deeply influenced how Gibby thought of the story. But IBM lawyers took care to ensure that ideas were the property of the firm, not of the employees who suggested them, and that there arose no contractual or other obligation of the company to credit or compensate Gibby for the company's use of his ideas. The legal resolution of the case thus showed the importance firms placed on ensuring that the products of the firm's human capital belonged to the firm. Yet the internet enabled Gibby to do something that Clara Driscoll could not have done nearly as effectively: to announce to the world that although the company and the law regarded the products of employee human capital as firm property, Gibby insisted on an extralegal view in which his ideas should be regarded as his. He was counting on a community of like-minded thinkers made possible by the technology of the internet to make his claims about his own human capital credible and meaningful.

[A second line of cases and a possible source of future archival work may be idea submissions, particularly although not exclusively in Hollywood. Idea submission in Hollywood typically occurs outside an employment relationship; a would-be writer submits an idea for a film to a studio. A law of idea submissions developed.<sup>48</sup> Contrasting the law of idea submissions inside and outside an employment relationship might clarify what role lawyers at least give to the employment contract in allocating the ownership and value of knowledge.]

### **III. The Resume and the Career: Technologies of Attribution Within and Among Firms**

As we have seen, twentieth century courts generally interpreted the employment contract to rest all property rights to the products of creativity, and in some cases even to credit for creativity (e.g., authorship under copyright law), in the firm. The expansion of corporate intellectual property, coupled with the rise of human capital economics and management theory, placed ever greater social significance on the emergence of some new device by which workers could market themselves in the labor market. The resume was that new device.

The resume emerged in the twentieth century as a technology of professional reputation. This chronological listing of educational institutions attended and jobs held, along with its customary bullet-point listing of responsibilities, accomplishments, and skills, was one place where employees could claim credit for the work they did,

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<sup>48</sup> Melville Nimmer, *The Law of Ideas*, 27 *S. Cal. L. Rev.* 119 (1954).

regardless of company intellectual property policies and the terms of the employment contract. As economists theorized about the economic value of employee training and knowledge, and as firms invested in it, workers used the resume as the device by which they could advertise their economic value in the market place.

For those employees who worked in large firms and expected a lifetime employment relationship, the career in the firm – imagined as a progression of annual raises and occasional promotions to higher position -- emerged as the form of worker entrepreneurship that replaced the nineteenth century pattern of inventing a new thing or process and starting a company to market it. For those who moved among firms, the career was imagined as the right to claim a series of skills developed, knowledge gained, and accomplishments attained. In the absence of legal rights to job security, the ability to market oneself within or among firms became the device by which employees could act as entrepreneurs based on their human capital. The resume emerged in the 1950s as a technology of attribution and an advertisement of human capital.<sup>49</sup>

Yet, although the resume gained in social and economic significance over the twentieth century, its growth in importance was not accompanied by developments in law. Usually, a new technology sparks change in law (the law of torts, for example, grew and changed dramatically with the invention of trains and automobiles). Advertising sparked legal change. Telegraphs and telephones grew whole bodies of law. The resume, however, did not. There were very few legal disputes over the ability of people to claim contributions to corporate products on their resume. Under what circumstances do corporations or other employees object to individuals claiming to be inventors of products? What norms govern false claims? Is there a tacit exchange of very strong corporate IP and trademark protection and little job security on the one hand for employee “rights” to claim private or labor market credit on the other? Although there grew up a whole array of publications offering employees and job seekers advice about how to write a resume, none discussed the law of what could be claimed, and precious few even discussed the norms or ethics of it.<sup>50</sup>

Why did there emerge no “law” of the resume? A law of false advertising grew up as advertising expanded.<sup>51</sup> A law of product defamation grew as courts gained

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<sup>49</sup> Sam Hoffman DeKay, *The Historical Evolution of a Written Genre: The Employment Resume in the United States, 1950-1999* (Ph.D. diss. Fordham University 2003).

<sup>50</sup> U.S. Dept of Labor, *Merchandising Your Job Talents* (U.S. Govt Printing Office, rev eds 1986, 1983); U.S. Dept of Labor, *Merchandising Your Job Talents* (U.S. Govt Printing Office, 1978) (notes that the material contained was in the public domain but that “source credit is requested but not required”); Juvenal L. Angel, *Why and How to Prepare an Effective Job Resume* (New York: World Trade Academy Press, 4<sup>th</sup> ed. 1965) (the author is described as the “Director of the Modern Vocational Trends Bureau”). There was little even in the management literature on the law and ethics of resumes. See, e.g., Lee R. Duffus, Comparative Assessment of the Resume and the Personal Strategic Plan: perspectives of Undergraduate Business Students, Human Resource Professionals and Business Executives, 2 *Journal of American Academy of Business* 123 (2002); Alexei Marcoux, A Counterintuitive Argument for Resume Embellishing, 63 *Journal of Business Ethics* 183 (2006); John Douglas Bishop, Moral Intuitions versus Game Theory: A Response to Marcoux on Resume Embellishing, 67 *Journal of Business Ethics* 181 (2006).

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awareness of the value of company brands and the power of false and defamatory statements to damage a brand.<sup>52</sup> A number of cases attempted to determine whether a negative job reference about an employee would constitute defamation.<sup>53</sup> But there was no law of false advertising that applied to the resume. Rather, here it appeared that all agreed that whoever had information about an employee's accomplishments in past work could use the information and it was in no one's interest to claim exclusive rights in that compilation of facts.

#### **IV. Attribution and Property in the Self: Corporate Brands, the Right of Publicity, and Selling the Self as a Consumer Good**

Technologies of attribution changed not only the operation of labor markets within and among firms, as illustrated by the rise of the resume and the dominance of the idea of the career, they also changed the way that people thought about the marketability of the self. Communication technologies of the twentieth century amplified the ability of people to project their accomplishments to the audience they wanted to reach, and to create personal wealth out of the desire of newspapers, magazines, radio, and TV to do so. That is, technology enhanced the ability to translate what we know, and our reputation for knowing, into an ever more valuable asset, whether as a form of public celebrity, or throughout a corporate hierarchy, or in a community of fellow workers. Technology made information more easily available and made a reputation for knowing or doing more marketable within a workplace and to the public at large.

The marketing of products through the corporate brand and the law of trademark that grew up around corporate brands represent the dominant legal trope of attribution in a consumer society. What has not been extensively studied is the way that advertising narratives about companies and their workers, in particular the fictionalized vision of the company and its employees, shaped the way that employees became (in the eyes of the law and in their own eyes) part of the company brand.<sup>54</sup> Trademark law turned the human capital of employees into company property. It did so, in part, because the expansion of celebrity by film and TV made every aspect of a person a potential source of revenue. Celebrity is the extreme case of attribution – a celebrity is a person whose very self has become economically valuable through some mix of talent and marketing. If the desire for attribution or credit for work done is the desire to see yourself realized in the world, and to be acknowledged for it, the desire for celebrity is to be seen for just being.<sup>55</sup>

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<sup>54</sup> On employees being “branded” (literally and figuratively) through company appearance requirements and other management policies, see Dianne Avery & Marion Crain, Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism, 14 *Duke J. Gender L. & Pol’y* 13 (2007).

<sup>55</sup> Richard Schickel, *Intimate Strangers: The Culture of Celebrity in America* (New York: Doubleday/Gideon 1985);

Perhaps do something on the line between reality and fantasy and the aid of technology with photo alterations? The story of the flap about the cover of *Men’s Fitness* magazine (June 2007) portraying Andy Roddick with arms that were digitally enhanced. Particularly interesting because Andy Roddick is famous

Many new legal claims about the right to market one's *self* and the negotiation over corporate and individual presentations of images of people emerged. One that kept percolating as information technology kept changing and as a consumer culture spawned ever more intense interest in celebrity was the right of publicity and its close cousin, the right of privacy. Samuel Warren and Louis Brandeis, it is often remarked, turned their own personal aggravation with the newspaper interest in their Boston Brahmin celebrity – they complained “[t]he press is overstepping in every direction the obvious bounds of propriety and of decency” -- into a famous article in the *Harvard Law Review* calling for recognition of a “right of privacy,” including a right to “inviolate personality” that would encompass the privacy of “thoughts, emotions, and sensations.”<sup>56</sup> Warren and Brandeis justified their argument in favor of such a right in terms of technological innovation and social change: “Recent inventions and business methods call attention to the next step which must be taken for the protection of the person,” they said. “Instantaneous photographs and newspaper enterprise” and “numerous mechanical devices” threatened “the sacred precincts of private and domestic life,” including the home and self. “Gossip ... has become a trade which is pursued with industry as well as effrontery.”<sup>57</sup> From Warren and Brandeis in 1890 onward, lawyers, judges, and scholars commonly observed that new technology – improved photography, radio, television, motion picture, and publishing – transformed celebrity and the ability of paparazzi, news media, and advertisers to make money off celebrity. They struggled to figure out whether or how law should protect the desire of people whose images are valuable to commercialize them or to refrain from it, and the desire of new media to provide information about celebrities to an eager consumer public. From the beginning of the century to the end, the debate was often framed in terms of challenges posed to privacy by the latest technologies that enabled invasions of privacy.<sup>58</sup>

One of the most significant social constructs of the twentieth century was the idea of a self and its relationship to society at large. From Freud at the beginning of the

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for his record-breaking 154-mile-an-hour serve, so his arms are already pretty strong, so why make them big? And the interesting debate that ensued about what kinds of digital alterations to celebrity photos are acceptable (to the public, to journalists, and to the celebrities) and which are not. “When Seeing is No Longer Believing: Some Celebrities are Fighting Back Against Photo Editing,” <http://abcnews.go.com/GMA/story?id=3217331&page=1> (last visited July 17, 2007). The New York Post reported that a number of *Men's Fitness* employees resigned after the flap, including the editor-in-chief, who approved the cover, and a staff designer who objected to the practice. Keith J. Kelly, Mags Arms Race: Jolie, Roddick Peck Pics Touched Up for Cover, *New York Post* (May 25, 2007), available at [http://www.nypost.com/seven/05252007/business/mags\\_arms\\_race\\_business\\_keith\\_j\\_kelly.htm](http://www.nypost.com/seven/05252007/business/mags_arms_race_business_keith_j_kelly.htm) (last visited July 17, 2007).

<sup>56</sup> Samuel Warren & Louis Brandeis, The Right of Privacy, 4 *Harvard L. Rev.* 193, 196, 205-06 (1890). See also The Right to Privacy – The Schuyler Injunction, 9 *Harv. L. Rev.* 354 (1895) (noting Schuyler v. Curtis, (N.Y. 1895)).

<sup>57</sup> The Right of Privacy, 4 *Harv. L. Rev.* at 195-96.

<sup>58</sup> E.g., Lisa Austin, Privacy and the Question of Technology, 22 *Law & Philosophy* 119 (2003); Helen Nissenbaum, Protecting Privacy in an Information Age: The Problem of Privacy in Public, *Law & Philosophy* 559 (1998). Robert E. Mensel, “Kodakers Lying in Wait”: Amateur Photography and the Right of Privacy in New York, 1885-1915, 43 *American Quarterly* 24, 25 (1991), argues that “amateur photographers played an important role in provoking the outrage among editorial commentators, judges, and legislators which eventually helped lead to the recognition of the right of privacy in New York.”

century through late century inquiries into the effect of the simulated world of the Internet, the nature and legal significance of the psychological self was a constant object and subject of academic and popular inquiry.<sup>59</sup> The rights of privacy and publicity tended to fence out boundaries around the self as it was imagined by the psychology of the day and treated it as something between an asset and a creature in need of legal protection.

The legal categories available to deal with the revelation of information about people clustered around notions of property, notions of fair business practices, as well as notions of autonomy.<sup>60</sup> In the first few decades of the twentieth century, courts struggled to decide whether rights to make photographic or motion picture recordings of newsworthy public acts or feats of bravery could be sold by those performing them, and if so whether the sales could be exclusive so as to secure larger profits for some.<sup>61</sup> But by mid-century it was common to see the right of publicity branch of the tort of invasion of privacy described in property terms as recognizing “the tremendous monetary value of the personae of well-known figures” and as granting the right “to proscribe the unauthorized use of these potentially valuable assets.”<sup>62</sup> Similarly, the tort of defamation led to the creation of a tort for presenting private but true information that cast the victim in a false light, thus recognizing a right to control one’s reputation not only from falsity but also from the revelation of truthful but unauthorized and unflattering facts.<sup>63</sup> The

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<sup>59</sup> Charles H. Cooley, *Human Nature and Social Order* (New York: Scribners 1902); George Herbert Mead, *Mind, Self and Society* (Chicago: University of Chicago Press 1934); C. Wright Mills, *The Power Elite* (New York: 1956); Erving Goffman, *The Presentation of Self in Everyday Life* (New York: Anchor Doubleday, 1959); Orrin E. Klapp, *Heroes, Villains, and Fools* (Englewood Cliffs, NJ: Prentice-Hall, 1962); Patricia A. Adler, Peter Adler, The Gloried Self: The Aggrandizement and the Constriction of Self, 52 *Social Psychology Q.* 299 (1989) (study of college basketball stars); Jake Halpern, *Fame Junkies: The Hidden Truths Behind America’s Favorite Addiction* (New York: Houghton Mifflin, 2007) (a journalist writes about institutions and social interactions through which children seek to become TV and movie stars, about the phenomenon of the celebrity entourage, and about the celebrity publication *Us Weekly*, and also about the author’s own “fame survey” and social psychologists studying interest in fame among monkeys); Sherry Turkle, *Life on the Screen: Identity in the Age of the Internet* (New York: Simon & Schuster, 1995) (discussing the relationship between individual identity and the rapidly expanding simulated worlds available on the Internet, in which people could create avatars to live an alternate life, seek psychological counseling from online computerized psychologists, and have extended online conversations with computer programs that conversed in a fashion indistinguishable from a living person).

<sup>60</sup> E.g., *Unfair Trade – Right of Privacy – Right of Manufacturer Who Has Contracted for Use of Celebrity’s Name to Injunction Against Competitor Using Such Name*, 34 *Mich. L. Rev.* 588 (1936). In the first case to recognize a right of publicity distinct from a right of privacy, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953), Judge Frank said: “Whether [the right of publicity] be labeled a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.”

<sup>61</sup> *Torts—Public Interest as a Limitation Upon the Right of Privacy and the Property Right in News*, 27 *Mich. L. Rev.* 353 (1929), discussed *Smith v. Suratt*, 7 Alaska 416 (1926), and said that a polar expedition was “a heroic adventure of public interest, and as such it could not claim any right of privacy” so that no exclusive right to sell photographs or films of it could be sold. The note suggested that “[i]f the enterprise had been sponsored solely by the Pathe News Service for the purpose of taking motion pictures, the plaintiff’s claim would have been much stronger.”

<sup>62</sup> Note, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity*, 96 *Harv. L. Rev.* 1703 (1983).

<sup>63</sup> More on false light privacy and its distinction from defamation and from publicity.

transformation of the notion of privacy articulated by Warren and Brandeis and early cases involving unauthorized use of celebrity photos for commercial gain into a property right to profit from one's cultivated persona was argued to be necessary because the "publicity value of a prominent person's name and portrait is greatly restricted if this value cannot be assigned to others."<sup>64</sup> As recognized in the pathbreaking case on the right of publicity, it was the cash value of being able to license your persona for commercial purposes that gave the right its meaning, and made it necessary to protect it.<sup>65</sup>

By mid-century, it also became common to understand the rights of privacy and of publicity as being akin to, if not exactly a species of, intellectual property, and by the end of the century, to intellectual property.<sup>66</sup> Analogies were drawn to trademarks,<sup>67</sup> to copyright,<sup>68</sup> and to property generally.<sup>69</sup> Celebrity endorsements of products, images of any person whom someone thinks ought to be in the public eye, evocations of a particular celebrity's style, features, clothes, or smile, became assets that could be monetized and studied rigorously in economic terms just like any other asset.<sup>70</sup> The many twentieth century legal doctrines that defined the ability of people to profit from their image, to limit who profits from it, and to control whether and when images of and information about them will be gathered or will appear became one of the defining ways of thinking about how law defines the boundary of the self.<sup>71</sup> A variety of communications technologies expanded the ways that people could be projected into the public consciousness and in which profit could be made by doing so. The right of publicity was one among many legal claims that recognized the value of the public use of images and

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<sup>64</sup> Melville Nimmer, *The Right of Publicity*, 19 *Law & Contemp. Probs.* 203, 209 (1954).

<sup>65</sup> *Haelan Laboratories v. Topps Chewing Gum Co.*, 202 F.2d 866 (2d Cir. 1953). The *Haelan* case produced quite a bit of commentary. See, e.g., Joseph R. Grodin, Note, *The Right of Publicity: A Doctrinal Innovation*, 62 *Yale L.J.* 1123 (1953). See also, Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 *Northwestern U. L. Rev.* 553 (1960).

<sup>66</sup> Pamela Samuelson, *Privacy as Intellectual Property?* 52 *Stan. L. Rev.* 1125 (2000).

<sup>67</sup> Alison P. Howard, *A Fistful of Lawsuits: The Press, the First Amendment, and Section 43(a) of the Lanham Act*, 88 *Cal. L. Rev.* 127 (2000).

<sup>68</sup> Note, *An Assessment of the Commercial Exploitation Requirement*, *supra*, 96 *Harv. L. Rev.* at 1721 (drawing a copyright analogy in arguing that the right of publicity ought to be inheritable by heirs of deceased celebrity but, like copyright, ought to terminate after a term of years following death of celebrity); Note, *An Assessment of the Copyright Model in Right of Publicity Cases*, 70 *Cal. L. Rev.* 786 (1982) (same); *Lugosi v. Universal Pictures Co.*, 25 Cal. 3d 813, 844-49, 603 P.2d 425, 444-47 (1979) (Bird, C.J., dissenting) (using analogy to federal copyright law).

<sup>69</sup> *Right of Privacy – Nature and Extent – Baseball Players' Right to Prevent Commercial Use of Photographs Held Transferred to Promisee by Contract for Exclusive Advertising*, 66 *Harv. L. Rev.* 1536 (1953), *but see* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *Cal. L. Rev.* 125 (1993) (expressing significant skepticism about the desirability of the right of publicity).

<sup>70</sup> Jagdish Agrawal & Wagner A. Kamakura, *The Economic Worth of Celebrity Endorsers: An Event Study Analysis*, 59 *J. Marketing* 56 (1995); Carolyn Tripp, Thomas D. Jensen & Les Carlson, *The Effects of Multiple Product Endorsements by Celebrities on Consumers' Attitudes and Intentions*, 20 *J. Consumer Research* 535 (1994); Grant McCracken, *Who is the Celebrity Endorser? Cultural Foundations of the Endorsement Process*, 16 *J. Consumer Research* 310 (1989); W. Jeffrey Burroughs & Richard A. Feinberg, *Using Response Latency to Assess Spokesperson Effectiveness*, 14 *J. Consumer Research* 295 (1987).

<sup>71</sup> See David Dante Troutt, *A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification, and Redescription*, 38 *UC Davis L. Rev.* 1141 (2004).

thus defined part of the boundary of the new property in commercialization of celebrity and the mass marketing of personality.

In law as in culture, those who talked about the nature of creativity in the twentieth century imagined the relationship between a person and a creative work in two ways that existed in tension. First, there is the ideal of Romantic authorship: to be an author of a work (whether a text, a visual image, an invention, or an idea) is to conjure it out of imagination and to exercise comprehensive compositional control over it. The work reflects the uniqueness and the individuality of its author, and the individuality of the author is proven by the uniqueness of the work. This is the vision of High Modernism – James Joyce is the author of *Ulysses* and *Ulysses* is proof of the individual genius of Joyce. The author’s creative vision transforms the world’s perception: Ansel Adams forever changed the way people see the geology of Yosemite; cubist painters Picasso and Braque among others changed the way people see visual representation. The author’s unique vision and genius became the basis in law for protecting property rights in the work (this is the common justification for copyright) but also for respecting legal rights in the self. When the Ford Motor Company commissioned an advertisement with a soundtrack featuring a song made famous by Bette Midler sung by a woman who sounded like Bette Midler, the court allowed Midler to sue for misappropriation: “The human voice is one of the most palpable ways identity is manifested. ... The singer manifests herself in the song. To impersonate her voice is to pirate her identity.”<sup>72</sup>

This Romantic and High Modernist conception of individuality and creativity existed, as it continues to exist, alongside another. This second version emphasizes not the essential, sometimes God-given or miraculous uniqueness of the individual and the genius of his creations, but instead the mixture of hard work and fortuity that enables works and those who create them to come into existence and to capture the public eye. This is where Lockean labor theories of value merge with the postmodern playful skepticism; all that is real is a matter of surfaces, interpretations, and signifiers. The claim to authorship is not the essential relationship between the creator and the creation, it is the perception of the relation, and the perception is created by the investment of time and resources. To be an author or inventor involves a mix of labor, money, cleverness, and luck that enables a person and her work to seize fifteen minutes of fame. The genius of the author cannot be divorced from the canniness of the publicist. The law protects the investment in creation and promotion. So Vanna White, a TV game show assistant, was permitted to sue a company that commissioned an ad showing a robot in a blond wig and sparkly jewelry turning over letters on a board: “Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrity’s sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof.”<sup>73</sup> There may be no essential genius, no author’s transformative vision, but there is a brand, a trademark wig, gown, smile, and gesture in manipulating the letters on the Wheel of Fortune game board, and law protects those too.

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<sup>72</sup> Midler v. Ford Motor Co., 849 F.2d 460, 463 (9<sup>th</sup> Cir. 1988).

<sup>73</sup> White v. Samsung Electronics America, Inc., 971 F.2d 1395, 1399 (9<sup>th</sup> Cir. 1992).

The relationship between the self and the public that technology created in the form of modern celebrity became a subject of twentieth century “high” culture as well as commercial and pop culture. Indeed, high culture began to probe the question whether the boundary between commercial celebrity and art existed at all. Andy Warhol’s famous silkscreens merged the genres of advertising, celebrity photographs, and “high art.”<sup>74</sup> The literature on photography (both movies and stills) as an art form, and of course the photographs themselves, probed the ways in which the technology of capturing images on film and exhibiting or reproducing them changed the way people think about themselves and the boundaries between self and society. The technology of journalism and celebrity influenced as well how authors’ private lives influenced readings of their texts, and the question of the relationship between the private and the revealed in photography, poetry, literature, music, and other arts.<sup>75</sup>

Just as “property” rights in the self cycled or ricocheted between “high” and “low” visual culture, questions pervaded scholarly and popular writing about the relationship between celebrity as artifice and privacy as authenticity in a world in which everything could be sold. A wave of semi-scholarly and popular works bemoaned the obsession with celebrity,<sup>76</sup> and eventually, there were how-to manuals to inform both aspiring celebrities and students of business about the ins and outs of managing press agents and “personal branding.”<sup>77</sup> The emergence of the movie star and the mass marketing of them infected the way everyone talked about the marketable aspects of the presentation of self. The technologies of cinema, photography, magazines, and TV create the hugely lucrative market for selling a glamorized self that endlessly circles between the authentic private self (photos of movie stars at home, the interview with the celebrity) and the public self.<sup>78</sup>

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<sup>74</sup> Cecile Whiting, Andy Warhol, the Public Star and the Private Self, 10 *Oxford Art J.* 58 (1987).

<sup>75</sup> David Haven Blake, Public Dreams: Berryman, Celebrity, and the Culture of Confession, 13 *American Literary Hist.* 716 (2001) (“in an age that was marked by a dramatic increase in popular culture, confessional poets [including Anne Sexton, John Berryman, Sylvia Plath, and Robert Lowell] attracted an extensive audience, and bolstered by their notorious behavior, they drew significant media attention as well. With its intense concern for tragedy, pathology, and the unconscious, confessional poetry developed into an unusually participatory form of verse, one in which readers became fans and writers became stars”).

<sup>76</sup> Daniel J. Boorstin, *The Image: A Guide to Pseudo-Events in America* (repr. ed. New York: Athanaeum 1973) (originally published 1961).

<sup>77</sup> Irving Rein, et al., *High Visibility: Transforming Your Personal and Professional Brand* (New York: McGraw Hill, 3d ed. 2006), first published in 1997, offered advice for the business-minded person interested in how to create, market, and manage what it termed both a corporate or a personal brand.

<sup>78</sup> Simon Dixon, Ambiguous Ecologies: Stardom’s Domestic Mise-en-Scene, 42 *Cinema J.* 81 (2003) (photos of Tom Mix and Errol Flynn at home); Nina Miller, Femininity, Publicity, and the Class Division of Cultural Labor: Jessie Redmon Fauset’s *There is Confusion*, 30 *African American Rev.* 205 (1996) (performativity of a public self as an essential attribute of bourgeois femininity in Harlem Renaissance literature by women). There emerged a whole new occupation of celebrity journalist, whose job it was to discover or translate the “true” self of the celebrity for the public. The occupation existed because of the porous boundary between public and private, between the commercialized image of the celebrity and the private or “real” person. A constant willingness to reveal a bit of the private person became necessary to keep the public persona and its products marketable.

The manufacture and maintenance of celebrity that became so pervasive in the twentieth century opened a whole new front in the struggle between workers and employers over control of the worker's time, energy, ideas, and his or her very image. The same technologies of advertising and communication, image creation and management, and human relations management that create value in a celebrity's image and in a trademark like the Nike swoosh also create the ability to understand the image, reputation, or name of a person as a property right in the employer of a person as well as in the person him- or herself. Bela Lugosi became, in the eyes of many (including his heirs) the image of Count Dracula, and Lugosi's Dracula became Lugosi's property. In a landmark case on ownership of the commercial rights to Lugosi's famous portrayal of Count Dracula, one justice of the California Supreme Court insisted that the employer owned the image, not Lugosi or his heirs, because Lugosi had created the image while employed by a movie studio.<sup>79</sup> An employee's image or visibility became an important company asset, which led to contractual requirements of mandatory media exposure, or restrictions on media exposure. The NBA, for example, began to require athletes to be available for post-game interviews. Movie studios and their valuable stars hired publicists whose job it was to keep the star in the public eye in the right way. Employment agreements could be revoked if a star exposed him or herself in the wrong way. Thus, even the private or "authentic" person became a brand that could be managed and controlled to maximize corporate profit.<sup>80</sup>

Technology expanded the possibilities for projecting one's self into the public consciousness. Technology alone, of course, did not make a change -- commerce and culture seemed to demand that every possibility be exploited. It was commonly remarked that the line between newsworthiness (which limits the ability of someone to prevent their photo being published, even if the photo is being used to sell newspapers) and use of a person's likeness for commercial purposes (which gives the person the right to prevent the use of their image) is not clear, and became less so as the line between news and celebrity gossip became ever thinner.<sup>81</sup> The Supreme Court, for example, rejected the effort of Hugo Zacchini, "the human cannonball," to prevent a local TV station from broadcasting film footage of his act (being shot from a cannon into a net 200 feet away), which he considered misappropriation of his professional property. The Court did, however, suggest that a film of the entire act would be protectable property, as a film of an entire sporting event is considered property.<sup>82</sup> Doctrinal distinctions that made

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<sup>79</sup> 25 Cal. 3d 813, 824-28, 603 P.2d 431-34 (Mosk, J., concurring).

<sup>80</sup> Allison Samuels, *Off the Record: A Reporter Unveils the Celebrity Worlds of Hollywood, Hip-Hop and Sports* (New York: HarperCollins/Amistad, 2007), is an account of how a reporter for *Newsweek* and the *Los Angeles Times* interviewed leading African American celebrities. She explores the challenges of getting access to some celebrities, of getting them to speak honestly to her, and the choices she made about what to reveal of what she learned from or about them. The blurbs on the cover are revealing: "No one digs deeper for the real story," says Denzel Washington, or "Allison is one of the most respected journalists out there and one of the few I trust to talk to when something goes down. I know I'm going to get fair coverage when we deal," says Sean P. Diddy Combs.

<sup>81</sup> John P. Elwood, Note, Outing, Privacy and the First Amendment, 102 *Yale L.J.* 747 (1992); Gregory S. Donat, Note, Fixing Fixation: A Copyright with Teeth for Improvisational Performers, 97 *Columbia L. Rev.* 1363 (1997)

<sup>82</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). See Phyllis Glass, Note, State "Copyright" Protection for Performers: The First Amendment Question, 1978 *Duke L.J.* 1198; Douglas G.

intuitive sense in the mid-century – between media portrayals of people that were primarily informative (generally not actionable) and those that are primarily entertaining (sometimes not actionable) and those that are intended simply to sell a product (generally actionable)<sup>83</sup> – began to collapse by the end of the century when the categories of news, entertainment, and salesmanship became harder to distinguish.

The capacity of law to turn the attribution of works into valuable commodities, and a consumer culture that was willing to pay a premium for attributed works, shaped the ways in which creative influence was understood by the end of the century. Once someone's art, persona, or reputation became a species of marketable property, how people thought about the significance of influence changed. The question of artistic influence – including the influential conceptualization of influence as a source of anxiety<sup>84</sup> -- was an important subject of artistic criticism and a subject of artistic expression in the twentieth century. Studies of the economics of artistic labor markets identify the crucial importance of reputation in determining the value of creative labor, or at least compensation paid for labor.<sup>85</sup> Law both facilitated and reacted to a modern conceptualization of talent as not merely inhering in a person, nor even being the product of the talented person's effort, but as reflecting the investment of the promoter and the impresario, the TV hosts, the DJs, and even the social and serendipitous relation between the artist and the crowd. As the social theorist Pierre-Michel Menger observed, one should understand the value of artistic labor as a matter of reputation as much as talent. "[T]he appraisal of art and artists varies with the organizational traits of each art world, since it reflects the cooperative and competitive activities of the various members. ... Rather than being a causal factor, talent becomes a dependent variable, socially determined by the behavior of employers on one side of the market and consumers on the other side. This is why talent may be conceived as embodying not only artistic abilities and technical skills, but also behavioral and relational ones."<sup>86</sup> As intellectual property concepts of authorship permeated legal conceptions of attribution, law recycled copyright law's established equation of unoriginality and copyright infringement into new a new equation between the persona as property and unauthorized representation as theft.

Others have remarked how the late-century expansion of intellectual property copyright, changed the nature of artistic creativity, as it became more difficult to engage in acts of creative appropriation or transformation of copyrighted works.<sup>87</sup> Threat of copyright infringement litigation prompted musicians to abandon the longstanding musical tradition of borrowing and riffing on melodies, rhythms, and passages from

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Baird, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 *Stan. L. Rev.* 1185 (1978).

<sup>83</sup> Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 *Yale L.J.* 1577 (1979).

<sup>84</sup> Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* (New York: Oxford University Press, 1973).

<sup>85</sup> Pierre-Michel Menger, *Artistic Labor Markets and Careers*, 25 *Ann. Rev. Sociology* 541 (1999).

<sup>86</sup> *Id.* at 557-558 (citation omitted).

<sup>87</sup> Lessig; Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *Yale L.J.* 535 (2004).

existing music,<sup>88</sup> and also squelched certain forms of satire and parody.<sup>89</sup> Musicologists and literary scholars have noted, usually with regret or alarm, that the expansive copyright protection enables authors and musicians, their heirs, and their recording or publishing companies, to control the uses to which creative works are put. Litigation and other dogged legal efforts of James Joyce's heir to prevent certain uses of Joyce's works and revelation of his correspondence because it would portray the Joyce family and the great author himself in a light not favored by his survivor exists at the intersection between the rights of the author as proprietor in copyright and the persona as property.<sup>90</sup> It represents an effort to harness the power of law to disprove Barthes' postmodernist or poststructuralist insight that it is the reader, not the author, who gives all meaning to any work.<sup>91</sup>

We can see most clearly in the case of music how intellectual property rights affect the evolution of persona and musical reputation. The most well-known example is the musical sampling made famous by hip-hop DJs and producers. Even those who dislike the music know that hip-hop artists use bits of recordings to create new songs. The process can be quite labor-intensive, and indeed it is the *labor* in searching for records and in isolating snippets of them, the accumulated *knowledge* about the sounds on thousands of records, and *virtuoso speed* and *cleverness* in combining and playing them on turntables that gave hip-hop music its allure to audiences, fellow musicians, and critics.<sup>92</sup> The conventional wisdom about artistic influence and about celebrity would suggest that creators and those who profit from their success relish almost anything that would get the artist and his or her work before a new audience. On the face of it, therefore, one might think that a musician would be pleased to see his or her work sampled, as it would enhance or perpetuate the sampled artist's reputation. Sampling can be a measure of influence, homage, a nod to genius, or perhaps just a re-birth of an old song in a new form.<sup>93</sup> Studies of sampling in hip-hop suggest that those who sample choose the works in many cases as homage to the original songwriter or as an

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<sup>88</sup> James Boyle, [cite to forthcoming book on music]; Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity* (Athens: University of Georgia Press, 2006).

<sup>89</sup> [The dispute over *The Wind Done Gone* and others.]

<sup>90</sup> See, e.g., Samantha Brand, Note, Four Thousand Words on Finnegans Wake: The Misuse of Copyright Doctrine and the Controversy Surrounding the Estate of James Joyce, 25 *Cardozo Arts & Entertainment L.J.* 1229 (2008). The *Shloss v. Joyce Estate* litigation, which involves Joyce's heir's effort to prevent a scholar from including certain materials in a book, is chronicled at <http://cyberlaw.stanford.edu/case/shloss-v-estate-of-joyce>. The controversy is described in D.T. Max, The Injustice Collector: Is James Joyce's Grandson Suppressing Scholarship? *The New Yorker* (June 19, 2006).

<sup>91</sup> Roland Barthes, *The Death of the Author*

<sup>92</sup> The process of record collecting and sampling emphasizing the labor, knowledge, skill and creativity in hip-hop composition (also known as production) is described in a detailed ethnomusicology of the hip-hop artists of Seattle, Washington by Joseph G. Schloss, *Making Beats: The Art of Sample-Based Hip-Hop* (Middletown: Wesleyan University Press, 2004).

<sup>93</sup> See Demers, *Steal This Music* 140 (the *Grey Album* (2003) which sampled both Jay-Z's *Black Album* and the Beatles' *White Album*, "paid homage to both the Beatles and Jay-Z, and fans of both expressed admiration for the project"; Demers notes that Jay-Z and his record label did not object to the sampling and suggest that Jay-Z tacitly encouraged sampling by releasing an *a cappella* version of *Black Album* in order to encourage remixing).

acknowledgement of the influence and power of the songs.<sup>94</sup> And they also show that many hip-hop artists are committed believers in labor theories of value: they eschew the ease of sampling off CDs in favor of the difficulty of using vinyl, they disdain those who use compilations in favor of the bravado of finding records and isolating beats themselves, and they celebrate the occult and encyclopedic knowledge of collectors and the joy of hunting in obscure locations for obscure records.<sup>95</sup>

Yet the limited available evidence suggests that many musicians – or at least the record labels that own their songs -- regard sampling of their work with some element of distrust, or at least the desire to capitalize on sampling by seeking to profit from the licensing of the segments. The flattery of the homage and the prestige of influence seem to be subsidiary to the desire to be paid for the sample.<sup>96</sup> The creation of property rights in the work transforms the economy of reputation. While it is true that sampling relegates a song to “the worst fate in modernist or romantic thought: anonymity,”<sup>97</sup> sampling also promises a renaissance for old songs, at least in the minds of the hip-hop artist and the connoisseurs who know what they’re hearing. Ultimately, the possibility that copyright law gave to turn small excerpts of songs into individually saleable items of property led to the phenomenon of musical influence merging with the phenomenon of seller of musical commodities.

The consequences of the creation of legal rights in a reputation may be less dramatic or just different from the consequences of the law of copyright for music. Since the law of attribution is both more nebulous and less comprehensive in its coverage than the law of copyright, it is quite possible that effects may be more modest. Where, unlike employee idea submission like *Gibby v. IBM* and in the credit that could be claimed on resumes, credit is legally enforceable rules – as in performance and production agreements in Hollywood – we do know that credit is claimed and disclaimed strategically.<sup>98</sup> It is also the case that new forms of credit – such as real and pseudo-documentary films about the making of a movie or about a popular music band -- became an adjunct to a marketing campaign. Special features DVDs telling a story about the making of the film are now included with every film released on DVD, and the special features DVD shares little in common with the old documentary films about the creative process that were not controlled by studios and record companies. Unlike the documentaries made by fans or scholars who wanted to reveal a story about those creative contributors whose identities had been lost in a corporate production process, the special features DVD is, and is perceived to be, a corporate production lacking the authenticity and spontaneity of the older documentary.<sup>99</sup>

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<sup>94</sup> Joanna Teresa Demers, *Sampling as Lineage in Hip-Hop* 37-62(Ph.D. diss. Princeton University, 2002) (describing the biographies of James Brown, Isaac Hayes, and George Clinton to explain why they were three of the most frequently sampled artists, and noting the significance of them as father figures to contemporary African-American musical and pop culture).

<sup>95</sup> Schloss, *Making Beats*, *supra*.

<sup>96</sup> Demers, *Steal This Music*, *supra*.

<sup>97</sup> Demers, *Sampling as Lineage* at 133.

<sup>98</sup> See Fisk, Credit Where It’s Due: The Law and Norms of Attribution, 95 *Georgetown L.J.* 49 (2006).

<sup>99</sup> Professor Matthew Stahl offers the example of “Standing in the Shadows of Motown,” a documentary about the forgotten studio musicians of Motown in the 1950s and 1960s. A segment in that film shows an

## *Conclusion*

Technologies of science and technologies of society enabled the management of knowledge, the management of people, and the management of image to coalesce into a constellation of legal rights to profit from every aspect of a person, including knowledge, the products of knowledge, the reputation for possessing knowledge, and even a carefully cultivated image of the self. The social history of attribution of workplace effort is one in which the desire of both individual creators and most consumers for accurate attribution seems essential, natural, and the very antithesis of the socially constructed. Everyone wants credit where it is due. The legal history of attribution, by contrast, is one in which attribution is very much a socially constructed artifact of tremendous economic value. And the legal history shows that attribution, like anything that is valuable, was bought, sold, and managed as corporate property. Yet, the further that attribution-as-property strayed from attribution-as-fact, the less value the property had. Attribution managed as corporate intellectual property invites an expose in the way that official history invites revisionism. The friction between the real and the artificial that makes attribution valuable and interesting is also that which makes the history of the use of attribution a window into a defining feature of the twentieth century landscape of the law of work.

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interview with the guitarist who played the famous guitar hook that began the song “My Girl.” His identity had been lost to the public, as all credit for the song had been given either to the band, the credited songwriter, or the record label. See, e.g., Matt Stahl, Nonproprietary Authorship and the Uses of Autonomy: Artistic Labor in American Film Animation, 1900-2004, 2 *Labor: Studies in Working Class History of the Americas* 87 (2005); Matthew Stahl, *That Feeling of a Revolution: Power, Labor and Property in Popular Music* (unpublished paper).