

INTELLECTUAL PROPERTY'S NEED FOR A  
DISABILITY PERSPECTIVE

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INTRODUCTION

Most of us tend not to think about disability very often. We are perhaps even less likely to think about disability while working through everyday legal problems. We perceive the world with five senses and think about it with normal cognition. As a consequence, it is easy to approach legal questions with the assumption that everyone perceives and comprehends the world in roughly the same way. But this is not so. And there is a price to pay for this assumption. Our lack of a disability perspective can sometimes lead to errors in our legal analysis. Moreover, the lack of a disability perspective is a special problem when it comes to the law of intellectual property, since intellectual property has value and meaning only insofar as it is capable of being seen, heard, or otherwise understood.

This Article approaches intellectual property law from a critical-disability theory perspective. It argues that, in specific instances, courts have gotten the law wrong because of a failure to take into account the perspective of persons with disabilities.

Critical-disability theory challenges the assumption that differences in physical and mental abilities can be ignored.<sup>1</sup> To the contrary, critical-disability theory demands that such differences be confronted.<sup>2</sup> In the context of law, and intellectual property law in particular, confronting those differences means taking into account a disability perspective even where all the parties in a given case are not

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<sup>1</sup> Richard Devlin & Dianne Pothier, *Introduction: Toward a Critical Theory of Dis-Citizenship*, in *CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY AND LAW* 1, 12 (Richard Devlin & Dianne Pothier eds., 2006).

<sup>2</sup> *Id.*

disabled and where the dispute does not directly implicate issues of disability. This *sua sponte* accounting is necessary because intellectual property cases have the effect of defining rights that extend far beyond the lives of the parties to the dispute. The outcomes of intellectual property cases often change the availability of products and diminish the number of particular forms of expression that society can use to communicate. In fact, these disenfranchising effects can potentially be permanent, since some kinds of intellectual property monopolies, such as trademark, are capable of infinite duration. Thus, the lack of a disability perspective in intellectual property law can be insidious. As intellectual property doctrines evolve and become memorialized in written opinions without taking into account a disability perspective, the law proceeds to shape society in a way that denies people with disabilities the right to experience it as fully as people without disabilities. This course is wrong and should be reversed.

Part I of this Article sketches out the disability context, including the significance of disability in our society and the law's attempts to confront it. Part II considers the role of the fictional person in legal analysis and the importance this holds in the context of disability and intellectual property law. Part III examines a particular application for disability perspective in intellectual property law—non-word trademarks and the perspective of developmentally disabled persons. Part IV examines another application—three-dimensional works and the perspective of persons with visual impairments, the consideration of which carries implications for copyright, trademark, and the right of publicity.

In its final analysis, this Article argues that the courts, in shaping the law and defining the bounds of intellectual property entitlements, should conscientiously use a disability perspective where appropriate, even when not called for by the parties. Doing so will effect a broader and more perfect realization of justice.

## I. THE DISABILITY CONTEXT

“Disability is both a common personal experience and a global phenomenon.”<sup>3</sup> In the United States, the 2000 census counted nearly

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<sup>3</sup> Colin Barnes et al., *Introduction*, in *DISABILITY STUDIES TODAY* 1, 2 (Colin Barnes et al. eds., 2002).

fifty million individuals—nearly twenty percent of Americans over the age of five—with some type of long-lasting condition or disability.<sup>4</sup> Worldwide, there are approximately 500 million disabled persons—one-twelfth of the world population.<sup>5</sup> Yet, as the Supreme Court of Canada has acknowledged, we live “in a world relentlessly oriented to the able-bodied.”<sup>6</sup>

### A. *Disability Law*

The law has not proceeded with complete disregard for disability. For the most part, however, the law's development with regard to disability has been through statutory enactment rather than through the evolution of judge-made common law.<sup>7</sup> The most salient progression of the law with regard to disability has been the variety of statutory schemes enacted to prohibit discrimination against disabled persons and to provide reasonable accommodations for their disabilities.

In the United States, a key philosophical shift occurred with regard to disability in the late 1960s; segregation of persons with disabilities became disfavored, and inclusion became the dominant aspiration.<sup>8</sup> Federal legislation of the time tracked this shift. Congress passed laws that required the government to accommodate persons with disabilities in federal buildings and in federal transportation projects.<sup>9</sup> In 1973, Congress went further, passing the Rehabilitation Act, a groundbreaking law that provides protection against discrimination on the basis of disability status in contexts such as employment, schooling, and medical care.<sup>10</sup> The class of potential defendants, however, was limited to federal contractors and programs receiving federal funding.<sup>11</sup>

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<sup>4</sup> U.S. DEP'T OF COMMERCE, ECONOMICS & STATISTICS ADMIN., U.S. CENSUS BUREAU, *DISABILITY STATUS: 2000* 1 (2003), <http://www.census.gov/prod/2003pubs/c2kbr-17.pdf>.

<sup>5</sup> Barnes et al., *supra* note 3, at 2.

<sup>6</sup> Granovsky v. Canada, [2000] 1 S.C.R. 703, 2000 SCC 28 (Can.).

<sup>7</sup> See Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 843 (1966).

<sup>8</sup> See Laura Rothstein, *DISABILITY LAW: CASES, MATERIALS, PROBLEMS* 5-6 (4th ed. 2006).

<sup>9</sup> See, e.g., The Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157 (2006) (requiring new federal buildings to be accessible to persons with disabilities); The Federal Aid Highway Act of 1972, 23 U.S.C. § 142 (2006) (requiring accessibility in federally funded transportation projects).

<sup>10</sup> See 29 U.S.C. §§ 791-794 (1973) (amended 1978).

<sup>11</sup> *Id.* §§ 793-794.

Broad-spectrum legislation was finally enacted in 1990, when Congress passed the Americans with Disabilities Act of 1990 (ADA).<sup>12</sup> Reaching all private employers who affect commerce and have fifteen or more employees, the ADA prohibits employment discrimination and requires the provision of reasonable accommodations for persons with disabilities.<sup>13</sup> The ADA also dictates standards of accessibility for places of “public accommodation,” such as restaurants, stores, theaters, museums, and other privately operated sites that are open to the public.<sup>14</sup> The U.S. Supreme Court did not confront the ADA until 1998, when it took on five ADA cases in a four-year span.<sup>15</sup> The resulting decisions had the effect of significantly narrowing the ADA’s protections, mostly by constricting the definition of disability and, thus, the class of protected plaintiffs.<sup>16</sup> This judicial tightening of the ADA spurred Congress to substantially amend the law in 2008, overruling the Court’s constraining interpretations and expanding the ADA’s protections.<sup>17</sup>

A trend of developing and expanding disability law may be seen outside the United States as well. In 1995, the United Kingdom passed the Disability Discrimination Act.<sup>18</sup> This legislation, like the ADA, prohibits discrimination and affirmatively requires reasonable accommodation—a concept U.K. law refers to as “reasonable adjustment.”<sup>19</sup> Canada has placed rights for persons with disabilities in the Canadian Charter of Rights and Freedoms, a constitutional statute

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<sup>12</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

<sup>13</sup> 42 U.S.C. § 12111 (2006), *amended by* 42 U.S.C. §§ 12101-12213 (Supp. III 2009).

<sup>14</sup> *Id.* § 12181(7).

<sup>15</sup> See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999); *Bragdon v. Abbott*, 524 U.S. 624 (1998). See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 398-400 (2000), for a discussion regarding five of these Supreme Court cases.

<sup>16</sup> See *Toyota Motor Mfg., Ky., Inc.*, 534 U.S. at 198; *Sutton*, 527 U.S. at 492.

<sup>17</sup> See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553 (2008) (expressly overruling the Supreme Court’s holdings in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and *Sutton v. United Air Lines, Inc.*); see also *Fournier v. Payco Foods Corp.*, 611 F. Supp. 2d 120, 129 n.9 (2009). For a discussion of the legislation and its motivating circumstances, see Colloquy, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217 (2008); Lauren Siber, *ADA Amendments Act of 2008: New Hope for Individuals with Disabilities*, 33 RUTGERS L. REC. 65, 71-73 (2009).

<sup>18</sup> 1995 c. 50 (U.K.).

<sup>19</sup> See, e.g., *id.* §§ 5, 21.

enacted in 1982.<sup>20</sup> Under the Charter, “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”<sup>21</sup> Australia passed its omnibus Disability Discrimination Act in 1992, making illegal certain kinds of discrimination against persons with disabilities.<sup>22</sup>

Indeed, the movement to address disability issues is truly global. In 1993, the United Nations formally adopted “The Standard Rules on the Equalization of Opportunities for Persons with Disabilities.”<sup>23</sup> Rule 10, concerning “Culture,” touches on much of the subject matter of intellectual property. It states, in part:

States should promote the accessibility to and availability of places for cultural performances and services, such as theatres, museums, cinemas and libraries, to persons with disabilities.

States should initiate the development and use of special technical arrangements to make literature, films and theatre accessible to persons with disabilities.<sup>24</sup>

The substantial development of the law regarding disability in the form of code—statute, regulation, or charter—stands in contrast to the relative inaction of the courts working with the common law. Consideration of disability in such a mode has been sporadic. In the private-law sphere, scholars have called for a critical analysis of tort law from a disability perspective,<sup>25</sup> and, indeed, the objective reasonable person standard in negligence has long been adjusted to take into

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<sup>20</sup> Constitution Act, 1982, Part I (U.K.), as reprinted in Canada Act 1982, Ch. 11 (Schedule B), available at <http://laws.justice.gc.ca/en/charter/>.

<sup>21</sup> *Id.* § 15(1).

<sup>22</sup> Disability Discrimination Act, 1992, Act Number 135 (Austl.), available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/A29D2C1C5FC72184CA257609000386C0/\\$file/DisabilityDiscrimination1992\\_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/A29D2C1C5FC72184CA257609000386C0/$file/DisabilityDiscrimination1992_WD02.pdf).

<sup>23</sup> Standard Rules on the Equalization of Opportunities for Persons with Disabilities, G.A. Res. 48/96, U.N. GAOR, 48th Sess., (Dec. 20 1993), available at <http://www.un.org/esa/socdev/enable/dissre00.htm>.

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., Darcy L. MacPherson, *Damage Quantification in Tort and Pre-Existing Conditions: Arguments for a Reconceptualization*, in CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY AND LAW 248 (Dianne Pothier & Richard Devlin eds., 2006).

account physical limitations of disabled defendants.<sup>26</sup> In the context of criminal law, U.S. courts have considered whether persons with mental retardation should be subject to the death penalty.<sup>27</sup> A few examples aside, however, the conscious development of the law with reference to disability continues to be rare.

Concerning intellectual property law, whether statutory or judge-made, disability has rarely been on the radar screen. The chief exception is statutory: copyright law's accommodations for the blind. Under the Copyright Act of 1976,<sup>28</sup> making copies of a protected work, including making an audio recording of an oral recitation of a copyrighted work, ordinarily constitutes infringement.<sup>29</sup> Section 121 of the Copyright Act, however, provides safe harbor for copies that are produced and distributed in specialized formats, such as Braille, audio, or text in digital form, so long as the reproductions are exclusively for the use of the visually impaired.<sup>30</sup> Federal media regulations that bear on the exploitation of intellectual property are noteworthy in this context. FCC rules requiring closed-captioning of television programming have resulted in much greater accessibility to television programming for the deaf and hearing impaired.<sup>31</sup> But these few exceptions notwithstanding, it is fair to say that American intellectual property law has, as a general matter, proceeded in ignorance of disabilities.

## B. *Disability Theory and Politics*

The ideology of the contemporary disability rights movement can be viewed as a reaction to the idea that disability is a medical or path-

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<sup>26</sup> See, e.g., *Muse v. Page*, 4 A.2d 329, 331 (Conn. 1939); *Mem'l Hosp. of South Bend, Inc. v. Scott*, 300 N.E.2d 50, 56 (Ind. 1973); RESTATEMENT (SECOND) OF TORTS § 283C (1965) ("If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability."); DAN B. DOBBS, *THE LAW OF TORTS* 281-82 (2000).

<sup>27</sup> See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that executions of mentally retarded criminals were "cruel and unusual punishments" prohibited by the Eighth Amendment).

<sup>28</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended in scattered sections of 17 U.S.C.).

<sup>29</sup> See 17 U.S.C. § 106 (2006).

<sup>30</sup> See *id.* § 121.

<sup>31</sup> See 47 C.F.R. § 79.1 (2009).

ological condition.<sup>32</sup> Proponents of a disability-studies perspective “assert that the inability of people with impairments to undertake social activities is a consequence of the erection of barriers by the non-disabled majority.”<sup>33</sup> In short, “disablism” is “social oppression”<sup>34</sup> brought about by “mainstream society’s unwillingness to adapt, transform, and even abandon its ‘normal’ way of doing things.”<sup>35</sup>

Legal scholar Samuel R. Bagenstos contends that people with disabilities “have one crucial thing in common: a socially assigned group status that tends to result in systematic disadvantage and deprivation of opportunity.”<sup>36</sup> Women’s studies scholar Susan Wendell has observed that social construction of disability is variable: “The more a society regards disability as a private matter, and people with disabilities as belonging in the private sphere, the more disability it creates by failing to make the public sphere accessible to a wide range of people.”<sup>37</sup> Scholars have also developed a “minority-group model” for the study of disability that draws parallels between the treatment of disabled citizens and other minorities.<sup>38</sup>

Both the oppression model and the minority-group model have been recognized by Congress in the enactment of the ADA. The ADA’s original findings recount:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic

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<sup>32</sup> See Claire H. Liachowitz, *DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS* 11 (1988); see also Bagenstos, *supra* note 15, at 427.

<sup>33</sup> Carol Thomas, *Disability Theory: Key Ideas, Issues and Thinkers*, in *DISABILITY STUDIES TODAY* 38, 38 (Colin Barnes et al. eds., 2002).

<sup>34</sup> *Id.*

<sup>35</sup> Devlin & Pothier, *supra* note 1, at 13.

<sup>36</sup> Bagenstos, *supra* note 15, at 401.

<sup>37</sup> Susan Wendell, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* 40 (1996); see also Bagenstos, *supra* note 15, at 428.

<sup>38</sup> E.g., Harlan Hahn, *Academic Debates and Political Advocacy: The US Disability Movement*, in *DISABILITY STUDIES TODAY* 162, 171 (Colin Barnes et al. eds., 2002).

assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.<sup>39</sup>

This sort of awareness has gained less traction in the courts than in the legislatures. Harlan Hahn has expressed the concern that “most appellate courts continue to subscribe to a ‘functional limitations’ rather than a ‘minority group’ model of disability.”<sup>40</sup>

Concurrent with the development of critical-disability perspectives in academic circles, a political movement for disability rights has gained momentum in society. The central premise of the disabilities rights movement is the “assurance of equal access to all activities society offers, both work and leisure-related.”<sup>41</sup>

As notions have changed regarding what constitutes disability, notions have also changed about how the law ought to address disability. Legal scholar Jacobus tenBroek argued in 1966 that the law should heed a policy of integrationism—an ethic of enabling and encouraging disabled persons to participate fully in the life of the community.<sup>42</sup> The position of tenBroek is that judges should attend to an integrationist policy regardless of the extent to which they might regard integrationism as feasible or desirable.<sup>43</sup>

In later decades, tenBroek’s integrationist perspective has come to be regarded as too limiting. Legal scholar Ruth Colker has recently argued that the field of disability discrimination falters in conflating “separate” with “unequal.”<sup>44</sup> Colker argues that “[a]n absolutist integrationist perspective disserves the disability community by supporting an inappropriately high threshold for the development and retention of disability-only services and institutions.”<sup>45</sup> A paradigm of “anti-subordination,” according to Colker, should replace integrationism.<sup>46</sup> Under such a perspective, the goal is to eliminate power dispar-

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<sup>39</sup> 42 U.S.C. § 12101(a)(7) (2006), amended by 42 U.S.C. § 12101(a) (Supp. II 2008) (removing the above-quoted matter as part of a package of revisions under the ADA Amendments Act of 2008).

<sup>40</sup> Hahn, *supra* note 38, at 172.

<sup>41</sup> Yolanda Suarez De Balcazar et al., *Common Concerns of Disabled Americans: Issues and Options*, in PERSPECTIVES ON DISABILITY 5, 5 (Mark Nagler ed., 1993).

<sup>42</sup> tenBroek, *supra* note 7, at 843.

<sup>43</sup> *Id.*

<sup>44</sup> Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1415 (2007).

<sup>45</sup> *Id.* at 1417.

<sup>46</sup> *Id.*

ities between the disabled and the non-disabled.<sup>47</sup> Viewed through this rubric, differential treatment of people with disabilities might be segregationist but nonetheless preferred, because the effect may be non-invidious and the result functionally superior to that dictated by pure integrationism.<sup>48</sup>

## II. THE ANALYTICAL PRIMACY OF THE FICTIONAL PERSON

The common law has a special place of affection for fictional people. An imagined and hypothetical person is the centrum for a great deal of legal analysis. The preeminent example is the “reasonable person” in negligence law.<sup>49</sup> Another example, perhaps even more ingrained in its own sphere, is the “PHOSITA” of patent law—the “person having ordinary skill in the art.”<sup>50</sup>

In the fields of copyright, trademark, and the right of publicity, there is no well-developed fictional character as there is in patent or tort. But in the legal analysis of any field of intellectual property, some fictional, idealized person is always lurking in the shadows. The reason why stems from the nature of intellectual property. Like the forms of Plato’s cave,<sup>51</sup> items of intellectual property cannot be touched or measured directly. An intellectual property *res* is an abstract and idealized entity, capable of varied embodiments. The question of whether a real-world artifact is an embodiment of some item of intellectual property depends entirely on how we perceive, understand, and talk about that item. Thus, notions of perception,

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<sup>47</sup> See *id.* at 1417 n.3 (“[T]he anti-subordination perspective . . . seeks to eliminate . . . power disparities . . . through the development of laws and policies that directly redress those disparities.” (quoting Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986))).

<sup>48</sup> *Id.* at 1458 (“Evidence from three different education contexts can show how separate programming for individuals with disabilities can be considered superior rather than invidious . . .”).

<sup>49</sup> See, e.g., *Vaughan v. Menlove*, (1837) 3 Bing. (N. C.) 468, 475, 132 Eng. Rep. 490, 493 (C.P.); *Beaumaster v. Crandall*, 576 P.2d 988, 995 & n.12 (Alaska 1978); *Robinson v. Lindsay*, 98 P.2d 392, 393 (Wash. 1979).

<sup>50</sup> See 35 U.S.C. § 103(a) (2006) (“A patent may not be obtained . . . if the differences . . . are such that the subject matter as a whole would have been obvious at the time the invention was made to a *person having ordinary skill in the art* to which said subject matter pertains.”) (emphasis added); *Kimberly-Clark Corp. v. Johnson & Johnson*, 745 F.2d 1437, 1454 & n.5 (Fed. Cir. 1984) (noting that Cyril A. Soans first gave this statutory created hypothetical person the name of “Mr. Phosita, Person Having Ordinary Skill In The Art” (citing Cyril A. Soans, *Some Absurd Presumptions in Patent Cases*, 10 IDEA 433, 438 (1966))).

<sup>51</sup> See PLATO, *REPUBLIC*, Book VII.

cognition, and expression are absolutely necessary for marking out the metes and bounds of any intellectual property entitlement. For example, when faced with an allegedly infringing logo, screenplay, or mechanical device, the court must always inquire into, or make assumptions about, how things are perceived, understood, or expressed.

In trademark law, for instance, infringement turns on the question of likelihood of confusion.<sup>52</sup> But whose confusion? In both copyright and trademark law, fair use defenses turn on allowing people to receive the benefits of open expression.<sup>53</sup> But whose ability to receive that expression? Plainly, without taking deliberate care, judges without disabilities may fail to take into account the perspective of a person with disabilities.

Tort law offers an interesting counterpoint. In discussing tort law, tenBroek explained how juries will reach biased decisions regarding the “reasonable person” standard of care for negligence cases: “The abstraction they conceive is unavoidably in their image and, in any event, will be applied through the filter of their experiences and make-up.”<sup>54</sup> This inherent “abled-person” bias is arguably much more insidious in intellectual property law than in tort law. Why? Tort law lends itself more readily to ad hoc analysis tailored specifically to the parties to a lawsuit. For example, tort law has wrestled with the issues of whether and to what extent a court should consider the perspective of the hypothetical reasonable disabled person.<sup>55</sup> But there generally is no need for a court to engage in such a jurisprudential endeavor until a disabled defendant comes before the court.

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<sup>52</sup> See, e.g., *Jockey Club, Inc. v. Jockey Club of Las Vegas, Inc.*, 595 F.2d 1167, 1168 (9th Cir. 1979).

<sup>53</sup> See, e.g., *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792 (9th Cir. 2003) (appealing to values of free expression in upholding fair use defenses to claims of trademark and copyright infringement where artist produced photographs depicting Mattel’s Barbie doll imperiled by various vintage kitchen appliances).

<sup>54</sup> tenBroek, *supra* note 7, at 917.

<sup>55</sup> See generally Elizabeth J. Goldstein, *Asking the Impossible: The Negligence Liability of the Mentally Ill*, 12 J. CONTEMP. HEALTH L. & POL’Y 67, 67-68 (1995) (arguing that a subjective standard should be applied to mentally ill individuals who cannot avoid, ex ante, causing negligent harm due to their mental illness); Kristin Harlow, Note, *Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness*, 68 OHIO ST. L.J. 1733, 1734 (2007) (proposing a subjective standard to address the concerns of the courts, as well as provide a test for liability of mentally ill defendants that is more consistent with the fault-based tort system).

The same does not hold true for intellectual property cases. Although, as a general matter, negligence cases primarily affect only the instant litigants, intellectual property cases have effects that go beyond the courtroom, reaching the marketplace for creativity and expression. In IP cases, when a defendant loses, the marketplace effect is that some item is removed from commerce. Moreover, the precedent that is established will serve to close off some avenue of communication and creativity. These effects on non-parties are what give intellectual property cases the potential to be especially injurious to people with disabilities. Thus, the introduction of a disability perspective into intellectual property jurisprudence is an important project.

### III. NON-WORD TRADEMARKS AND DEVELOPMENTAL DISABILITY

Let me tell you about my brother, Ted Johnson. Teddy, as everyone calls him, is a developmentally disabled adult. He has been classified with severe mental retardation. His intellectual age is gauged as approximately that of a normally functioning three-year-old.

Teddy's passion is long-distance automobile travel and all the Americana that goes with it: hotel and restaurant chains, road maps, and, especially, service stations. When I travel to northern Indiana to visit Teddy, we spend most of our time taking long road trips. We drive at a leisurely pace and stop frequently for gas, filling up a little more often than really necessary. Our travels typify the idea that the journey is the destination.

Teddy cannot read words, and he is, in that sense, illiterate. But Teddy *can* read trademarks. In fact, he consistently and accurately identifies gas stations, eateries, and motels by their logos. Even where no logos are present, Teddy can sometimes make out a brand by spotting various elements of trade dress. One day when we were in a new town, Teddy surprised me by pointing out that a boarded-up gas station, all its signage and livery removed, was an Amoco. He apparently based his conclusion on a unique style of Amoco station architecture—a consistency in design that I was able to confirm as I saw additional examples throughout our trip.

Legally, a trademark is a word, name, symbol, device, or combination thereof that serves to indicate the source of a product and to identify and distinguish a seller's goods and services from those deliv-

ered by others.<sup>56</sup> Generally speaking, a trademark owner has a cause of action for trademark infringement if someone else uses the trademark in a way that is likely to cause confusion as to the source or sponsorship of the goods, services, or commercial activities of the defendant.<sup>57</sup> The purpose of trademark law is to encourage the production of quality products through indirect means: by helping consumers distinguish among the sources of products and by allowing producers to accumulate and benefit from a good reputation.<sup>58</sup> It is absolutely not the object of trademark law to allow businesses to monopolize certain words or phrases.<sup>59</sup> Quite to the contrary, the economic *raison d'être* for trademark law is competition.<sup>60</sup> Trademark law is the law of economic semiotics—the use of signs and symbols to communicate information in the marketplace about the sources of goods and services. A marketplace functions properly only when consumers have meaningful information, and trademark law assures the reliability of information about the sources of products. This concept of commercial source is the central idea of trademark law. The identification and communication of commercial source is the law's essence and unifying theory.

The centrality of communication to trademark law means that notions of perception and cognition are intrinsic to the field. Where trademark law does not take into account perceptual and cognitive impairments, it has the potential to develop in ways that discriminate against and subordinate people with disabilities.

An example of this bias is found in the judicial framing of the nominative fair use defense in trademark law. The idea of nominative fair use is that it is fair for anyone to use a trademark in a nominative way—that is, to make reference to the goods or services legitimately

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<sup>56</sup> See 15 U.S.C. § 1127 (2006).

<sup>57</sup> See, e.g., *id.* §§ 1114(1), 1125(a).

<sup>58</sup> See *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 164 (1995) and the sources cited therein; see also generally Posting of Eric E. Johnson to Pixelization, <http://www.pixelization.org/2008/05/did-hersheys-ju.html> (May 20, 2008, 01:01 CST) (noting the source identifying function of trademarks).

<sup>59</sup> See *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122 (2004) (citing *Canal Co. v. Clark*, 80 U.S. 311, 323-24, 327 (1871)).

<sup>60</sup> See, e.g., *Park 'n Fly v. Dollar Park & Fly*, 469 U.S. 189, 198 (1985) (citing S. REP. No. 1333, at 3-5 (1946) (“The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers . . . . National protection of trademarks is desirable, Congress concluded, because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.”)).

bearing that trademark. It is not trademark infringement, then, for a seller of vacuum bags to print on packages that the bags “work with Hoover-brand vacuums,” although it would be infringement for the seller to label the bags as “Hoover-brand bags.”

The leading case on nominative fair use is *New Kids on the Block v. News America Publishing, Inc.*, an influential 1992 Ninth Circuit opinion authored by Judge Alex Kozinski.<sup>61</sup> In the underlying dispute, teen-pop singing group New Kids on the Block sued the publishers of *USA Today* and *Star* over the newspapers’ promotion and operation of pay-to-call 1-900 number telephone polls.<sup>62</sup> The polls allowed fans of the New Kids to vote on which singer was their favorite or which was the sexiest.<sup>63</sup> The New Kids sued for trademark infringement.<sup>64</sup> The Ninth Circuit held that the uses by the newspapers were excused on the basis of the “nominative fair use defense.”<sup>65</sup>

According to the test laid out by Judge Kozinski, a commercial user is entitled to make a nominative fair use of a trademark so long as three elements are met: (1) The product or service in question is one not readily identifiable without use of the trademark; (2) Only so much of the trademark is used as is reasonably necessary to identify the product; and (3) The user must do nothing that would, in conjunction with the trademark, suggest sponsorship or endorsement by the trademark owner.<sup>66</sup>

Of particular interest here is Judge Kozinski’s second element: that no more of the trademark be used than is necessary to call into mind the identity of the thing being discussed. Immediately, we confront a crucial question: How are we to decide how much is necessary? Judge Kozinski doesn’t say exactly, but from the manner in which he applies the test, the implication is that a court is to conceive of a person with normal abilities, and then make the how-much-is-necessary determination using the non-disabled person as a model.

Using his newly minted test, Judge Kozinski writes that the newspapers referenced New Kids on the Block “only to the extent neces-

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<sup>61</sup> *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302 (9th Cir. 1992); *see also* *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 801 (9th Cir. 2002) (applying the *New Kids* nominative fair use test).

<sup>62</sup> *New Kids*, 971 F.2d at 304-05.

<sup>63</sup> *Id.* at 304.

<sup>64</sup> *Id.* at 304-05 (New Kids on the Block alleged ten causes of action in total).

<sup>65</sup> *Id.* at 308.

<sup>66</sup> *Id.*

sary to identify them as the subject of the polls.”<sup>67</sup> In particular, Judge Kozinski makes a favorable determination for the newspapers because “they do not use the New Kids’ distinctive logo or anything else that isn’t needed to make the announcements intelligible to readers.”<sup>68</sup> The analysis is attractively simple. Yet in using this reasoning, Judge Kozinski—probably entirely unaware of what he was doing—removes many developmentally disabled members of society from the class of persons who could benefit from the nominative fair use doctrine. By judging that it is not necessary to use a logo to communicate about a commercial entity, people like my brother are ignored.

One might argue that Judge Kozinski’s test is already capable of taking developmentally disabled persons into account, since the test simply talks in terms of how much use of a given trademark is “necessary.”<sup>69</sup> But such an argument ignores the fact that the test has been explained and employed without acknowledgement of the existence of developmentally disabled stakeholders. As Judge Kozinski teaches us to use it, the *New Kids* test for normative fair use clearly shows disability-status prejudice.

Another argument one might make in Judge Kozinski’s defense is that *USA Today*, as a newspaper, is intended to be read, and therefore, in considering whether there is infringement or nominative fair use in the context of *USA Today*, we need only worry about people who can read. But this is not accurate. People incapable of reading may derive much value out of newspapers by looking at photographs or by viewing non-verbal representations of information, logos included.

The upshot of the nominative fair use doctrine, as adopted by the Ninth Circuit, is that trademark law must yield to the needs of non-disabled people, but not to the expressive and communicative needs of the developmentally disabled.

It is important to point out that the damaging effects of the *New Kids* case are magnified by Judge Kozinski’s analytical deficiencies in failing to provide the newly crafted doctrine with the proper procedural context. The *New Kids* opinion characterizes nominative fair use as a “defense.”<sup>70</sup> Yet the opinion never acknowledges that a prima

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<sup>67</sup> *Id.*

<sup>68</sup> *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).

<sup>69</sup> *See id.*

<sup>70</sup> *Id.*

facie case for trademark infringement has been made out. Incredibly, Judge Kozinski seems to acknowledge that there actually is no prima facie case of trademark infringement in *New Kids*, writing, “Cases like these are best understood as involving a non-trademark use of a mark—a use to which the infringement laws simply do not apply[.]”<sup>71</sup> Taking Judge Kozinski at his word, the case should have been dismissed for failure to state a legally redressable claim, not for the defendant’s ability to prove elements of an affirmative defense.

Judge Kozinski’s failure to think through the procedural posture in *New Kids* has unfortunately bred a line of confused jurisprudence in later decisions. The Third Circuit, for instance, has adopted nominative fair use as an affirmative defense.<sup>72</sup> But the Ninth Circuit, in cases subsequent to *New Kids*, has treated the nominative fair use doctrine as a substitute for the standard analysis to determine whether there is a prima facie case of actionable infringement.<sup>73</sup>

The Ninth Circuit’s view in this regard is especially worrisome. The standard and time-honored analysis for determining whether there is infringement is the likelihood-of-confusion test.<sup>74</sup> This test asks whether the allegedly infringing use is likely to confuse customers about the source of the product.<sup>75</sup> When nominative fair use is treated as a replacement for likelihood-of-confusion analysis, the law is especially disenfranchising of people with disabilities. This is because the doctrine appears to approve of a cause of action where it would otherwise not exist: the nominative use of logos in cases where the product could be identified by normally abled persons with text alone, even where such use does not create confusion as to the source of any product.

The development of nominative fair use law, which never directly confronts the issue of people with developmental disabilities, has encouraged a legal climate where risk-averse actors refrain from

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<sup>71</sup> *Id.* at 307.

<sup>72</sup> See *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 223 (3d Cir. 2005) (Fisher, J., dissenting) (describing the majority’s adoption of the *New Kids* test as an affirmative defense as misguided).

<sup>73</sup> See *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 801 (9th Cir. 2002); see also *Century 21*, 425 F.3d at 233 (Fisher, J., dissenting) (noting that, contrary to Supreme Court precedent, the Ninth Circuit actually uses its normative fair use test as a substitute for the likelihood-of-confusion analysis in adjudging the plaintiff’s prima facie case).

<sup>74</sup> See *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979); see also *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 408 F.3d 596, 608 (9th Cir. 2005).

<sup>75</sup> *AMF*, 599 F.2d at 348-49; see also *KP Permanent Make-Up, Inc.*, 408 F.3d at 608.

modes of communication that would have been accessible to a population of disabled citizens. Thus, as the law evolves, our culture becomes increasingly disenfranchising of those with disabilities. And that is a shame.

#### IV. THREE-DIMENSIONAL WORKS AND VISUAL IMPAIRMENTS

A different example of how the lack of a disability perspective can harm the development of intellectual property law comes from consideration of visual disabilities and the law's differential treatment of two-dimensional representations, such as printed photographs, and three-dimensional representations, such as models and replicas.

As doctrinal subjects, trademark, copyright, and the right of publicity all draw a distinction between three-dimensional works and two-dimensional representations. Two-dimensional works are seen as more communicative, more expressive, and closer to fundamental concepts of constitutionally protected free expression. Three-dimensional works, on the other hand, tend to be viewed as more frivolous, less essential, less communicative, and further away from core First Amendment protection. Additionally, whereas two-dimensional works tend to be viewed as products of "the press," three-dimensional works tend to be viewed as products of the merchandising industry.

As a result, the public has retained greater freedoms with respect to creating and reproducing, and hence purchasing and accessing, two-dimensional works than three-dimensional works. The distinction is significant, and troubling, because blind persons cannot directly obtain information from a two-dimensional representation, yet may be able to do so readily from a three-dimensional representation through the sense of touch.

##### A. *The Right of Publicity and Sculpture*

Derived from tort law but increasingly thought of as a property doctrine, the right of publicity is a relatively recent product of the common law.<sup>76</sup> The right is recognized by more than half of the

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<sup>76</sup> The right of publicity is often traced back to *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953). See Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1201 n.2 (1986).

states.<sup>77</sup> But being of relatively recent origin, not all jurisdictions have yet produced an appellate opinion passing on whether or not the right of publicity exists in their jurisdictions.<sup>78</sup> Impatient for or unsatisfied with judge-made law, the legislatures in many jurisdictions have forged ahead to create a right of publicity by statute.<sup>79</sup>

Blackletter formulations vary, but a typical statement is that the right of publicity gives a person the exclusive right to appropriate the commercial value of his or her name, likeness, and other indicia of personal identity for purposes of trade.<sup>80</sup> The problem with this statement, as with other verbalizations of the doctrine, is that it is so broad, it obviously cannot mean what it says. Taken at face value, this enunciation of the right of publicity would be absurd. It would, for example, allow lawsuits against celebrity-gossip television shows, credit-reporting agencies, and writers of contemporary nonfiction. Yet in reality, the right of publicity is not nearly so overbearing. Various external doctrines serve to cut the right of publicity down to a tolerable size. The limiting means are: (1) state and federal constitutional guarantees of freedom of expression; (2) copyright pre-emption; and (3) judges' ad hoc selectivity with facts and legal analysis to reach results that are more comfortable and more in keeping with societal expectations.

As a new and poorly defined doctrine, the right of publicity is constantly evolving. One case that is part of that evolution is *American Heritage Products, Inc. v. Martin Luther King, Jr. Center for Social Change*, a 1982 opinion by the Supreme Court of Georgia.<sup>81</sup> The opinion, authored by Chief Justice Harold N. Hill, Jr., was the first by Georgia's highest court to recognize a right of publicity cause of action in that state.<sup>82</sup> Most importantly for present purposes, the case

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<sup>77</sup> See 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:16 (4th ed. 2009) (noting that eighteen states have recognized the right under the common law and another ten have created the right by statute).

<sup>78</sup> See, e.g., *Hougum v. Valley Mem'l Homes*, 574 N.W.2d 812, 816 (N.D. 1998); *Am. Mut. Life Ins. Co. v. Jordan*, 315 N.W.2d 290, 295-96 (N.D. 1982).

<sup>79</sup> CAL. CIV. CODE § 3344 (West 2009); 765 ILL. COMP. STAT. ANN. 1075/10 (West 2009); TENN. CODE ANN. §§ 47-25-1101 to -1108 (2009).

<sup>80</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (providing liability for the appropriation of another's identity for trade purposes where there is no consent).

<sup>81</sup> *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Products, Inc.*, 296 S.E.2d 697, 703 (Ga. 1982) (holding that the appropriation of another's name or likeness, for gain and without consent, was a tort in Georgia).

<sup>82</sup> See *id.* at 703.

illustrates how the courts can get the law demonstrably wrong when they unwittingly confine their analysis to an ableist mode.

In the case, defendant American Heritage Products sold a bust of Martin Luther King, Jr. via mail-order by advertising in *Ebony* magazine.<sup>83</sup> The King estate sued based on the right of publicity,<sup>84</sup> and the Georgia Supreme Court concluded that the sale of the bust constituted an actionable infringement.<sup>85</sup>

*American Heritage* likely would have come out differently had the court directly confronted the issues from the perspective of the visually impaired. It is apparent from the opinion that the court was comfortable with finding a right-of-publicity violation—thereby creating a monopoly on the manufacture of busts of King—because the court classified the bust as something akin to a toy or a souvenir rather than a communicative or expressive work.<sup>86</sup> For instance, the court cited precedent applying the right of publicity to a board game involving celebrity names and biographical information.<sup>87</sup> And in reviewing the facts, the court portrayed the bust as lacking worth. Specifically, the court noted that the bust was made from plastic and that the defendant “manufactures and sells various plastic products as funeral accessories.”<sup>88</sup>

Although never explicitly acknowledging a distinction between two-dimensional and three-dimensional works, the court pointed up the significance of the 2-D/3-D difference in its analysis of whether the First Amendment provided a viable defense. For example, the court explicitly and favorably acknowledged precedent rebuffing a cause of action over photographs of the body of a private individual who was

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<sup>83</sup> *See id.* at 698.

<sup>84</sup> *See id.* at 699.

<sup>85</sup> *See id.* at 703. The Georgia Supreme Court was writing pursuant to questions certified to it by the U.S. Court of Appeals for the Eleventh Circuit. *See id.* at 699. The certified questions were abstract, asking, in particular, whether Georgia recognized the right of publicity. *See id.* at 699. The question of whether the bust actually constituted an infringement was not technically before the Georgia court. *See id.* Nonetheless, the Georgia Court proceeded to analyze the case with specific reference to the facts. *See id.* Thus, while the procedural context is awkward, it is fair to characterize the opinion, as I have done here, as having concluded that there was a right-of-publicity violation on the facts presented.

<sup>86</sup> *See id.* at 701.

<sup>87</sup> *See* *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Products, Inc.*, 296 S.E.2d 697, 701-02 (Ga. 1982) (discussing *Palmer v. Schonhorn Enters.*, 232 A.2d 458 (N.J. Super. Ct. 1967)).

<sup>88</sup> *Id.* at 698.

the victim of murder.<sup>89</sup> The *American Heritage* court explained that where a photograph was individually reproduced and sold, there “could not be a violation of anyone’s right of privacy” because the photograph was “incident to a matter of public interest or a public investigation . . . .”<sup>90</sup> Yet the *American Heritage* court very noticeably declined to provide a similar analysis for the defendant’s three-dimensional depiction of King, despite the fact that the subject being depicted was a towering historical figure of unquestionable public interest.

In addition to paying attention to what the *American Heritage* court included in its opinion, it is important to notice what the *American Heritage* court left out. Facts external to the opinion indicate that the bust was highly suitable for serving as an expressive vehicle that provides information to a visually impaired person. The details are that the bust was set with an artificial floral arrangement, mounted on an ornate pedestal, and the assembled item measured twelve inches high, nine inches wide, and eight inches deep.<sup>91</sup> Thus, the bust was an appropriate size for manual investigation and for storage on a bookshelf.<sup>92</sup> Yet the court did not memorialize these facts.

Moreover, because the bust was suitable for placement on a bookshelf, the *American Heritage* case begs comparison to cases involving books. As it turns out, books, even unauthorized biographies, have been held constitutionally protected and, thus, not subject to a right-of-publicity action.<sup>93</sup> Despite the fact that unauthorized biographies clearly fulfill the prima facie requirements for a claim of infringement of the right of publicity, the informational and communicative value of books is not, of course, lost on anyone.

In a concurrence, Justice Charles L. Weltner, although not addressing a disability perspective, nonetheless perceived the lack of

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<sup>89</sup> See *id.* at 701 n.3 (discussing *Waters v. Fleetwood*, 91 S.E.2d 344 (Ga. 1956)).

<sup>90</sup> See *id.*

<sup>91</sup> See American Heritage Products Advertisement of Martin Luther King, Jr. Memorial, Museum of Intellectual Property, available at [http://www.museumofintellectualproperty.org/e/american\\_heritage.html](http://www.museumofintellectualproperty.org/e/american_heritage.html).

<sup>92</sup> Other facts found in the advertisement concern a booklet that was sold with the bust. *Id.* The booklet included more than fifty pages of historical account and dozens of photos. *Id.* The Georgia Supreme Court only mentioned it in passing. See *American Heritage*, 296 S.E.2d at 698. The book was not subjected to the Court’s right of publicity analysis, the implication being that it was protected by the First Amendment.

<sup>93</sup> See, e.g., *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 257-58 (N.Y. 1968).

consistency in the court's decision.<sup>94</sup> He wrote, "If, then, a two-dimensional likeness in oil and canvas is an expression of sentiment, how can it be said that a three-dimensional likeness in plastic is *not*?"<sup>95</sup>

Had the Georgia Supreme Court taken into account the perspective of a visually impaired person, it would have been compelled to recognize the informational value and public-interest implications of three-dimensional representations of King. In doing so, the court would have necessarily recognized that such a domain cannot be subject to monopolization through the right of publicity. Unfortunately, this did not happen, and we are left with an opinion that is demonstrably analytically wrong.

*American Heritage* is not alone in its ableist approach to the right of publicity. The *Restatement (Third) of Unfair Competition* follows the same mistaken path. As with *American Heritage*, the Restatement does not explicitly reject a disability perspective, but it does proceed in ignorance of one.

The Restatement defines the right of publicity as follows: "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate . . . ."<sup>96</sup> To narrow the right of publicity so that it is not wildly extensive in scope, the Restatement uses a limiting definition of "purposes of trade."<sup>97</sup> When a person's likeness is "placed on merchandise," then the use counts as being for "purposes of trade."<sup>98</sup> The Reporter's Note to the Restatement cites *American Heritage* as a "merchandise" case, a category that includes items such as t-shirts and games.<sup>99</sup> Notably, the Restatement identifies separately "works of . . . nonfiction, or in advertising that is incidental to such uses" involving a person's identity as ordinarily not qualifying under the "purposes of trade" language.<sup>100</sup> Although a three-dimensional statue could logically be classified as a work of nonfiction, the Restatement declines to do so. Thus, the Restatement furthers the ableist project of the *Amer-*

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<sup>94</sup> See *American Heritage*, 296 S.E.2d at 708 (Weltner, J., concurring).

<sup>95</sup> See *id.*

<sup>96</sup> THE RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 46 (1995).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* § 47.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

*ican Heritage* court by encouraging other courts to follow the same mistaken path.

### B. *Copyright and Three-Dimensional Works*

Copyright is a body of federal law that provides authors and artists with a monopoly privilege over the fruits of their creative labors, thereby allowing lawsuits against persons who reproduce copyrighted works without authorization.<sup>101</sup> The federal copyright statutory scheme is highly complex—even to the point of being likened to the tax code.<sup>102</sup> When it comes to three-dimensional works, the statutory law displays an ableist perspective, both in how it has been drafted and in how its language has been interpreted.

Although three-dimensional and two-dimensional works alike qualify as copyrightable subject matter, these two categories are treated differently. If a copyrighted sculpture is reproduced as a sculpture, such a reproduction generally constitutes copyright infringement.<sup>103</sup> Similarly, if a photograph is reproduced as a photograph, an infringement action generally accrues.<sup>104</sup> But reproductions that span the 2-D/3-D divide may receive disparate treatment. When a sculptor sued over a photograph taken of his sculpture, the court deemed the photograph to be a fair use.<sup>105</sup> On the other hand, when

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<sup>101</sup> The U.S. Copyright Act is codified at 17 U.S.C. §§ 101-1328 (2006). The basic entitlement to sue for unauthorized reproduction of creative works is provided for in 17 U.S.C. §§ 106, 501 (2006).

<sup>102</sup> *See, e.g.,* United States v. Moran, 757 F. Supp. 1046, 1049 (D. Neb. 1991) (Looking to other “complex statutory schemes, such as the federal criminal tax statutes,” to determine that “willful” in the criminal copyright infringement context requires specific intent, in that there “must have been a ‘voluntary, intentional violation of a known legal duty.’” (quoting Cheek v. United States, 498 U.S. 192, 200 (1991))).

<sup>103</sup> *See, e.g.,* Alva Studios, Inc. v. Winninger, 177 F. Supp. 265, 267-68 (S.D.N.Y. 1959) (rejecting the defense that plaintiff’s sculpture was a copy of a sculpture in the public domain given evidence that the copy was sufficiently original and the defendant engaged in “actual copying” of the plaintiff’s original work).

<sup>104</sup> *See, e.g.,* Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 462-63 (S.D.N.Y. 2005) (holding that a reasonable question of material fact existed as to whether “substantial similarity [was] either present or absent” in comparing an original photograph and a stylized billboard reproduction of the same that had been changed somewhat).

<sup>105</sup> *See, e.g.,* Gaylord v. United States, 85 Fed. Cl. 59, 71-72 (Fed. Cl. 2008) (holding as “fair use” under 17 U.S.C. § 107 the government’s portrayal of a commissioned war memorial sculpture on a U.S. Postal Service commemorative stamp).

photographs have been reproduced as sculptures, courts have not deemed the sculpture to be a fair use.<sup>106</sup>

These cases, considered together with the copyright system they define, betray a lack of regard for the visually impaired. The consequence is that copyright law deprives blind persons of valuable means of perceiving the world.

Further evidence of bias in copyright law is found in copyright's treatment of architecture. Throughout most of its history, American copyright law did not reach architectural works. In 1990, however, Congress passed the Architectural Works Copyright Protection Act (AWCPA) to amend the copyright law to provide coverage for architectural works.<sup>107</sup> By expanding copyright protection to cover this category of previously unprotected works, Congress provided exclusive rights that were more limited than those available for books, paintings, or other traditional subjects of copyright. Specifically, the 1990 law provides that even though works of architecture may be copyrighted, the copyright cannot be used to prevent others from making "pictures, paintings, photographs, or other pictorial representations" of buildings "ordinarily visible from a public place."<sup>108</sup> As commentators have noted, this safe harbor does not embrace three-dimensional representations.<sup>109</sup> What commentators have not pointed out, however, is the ableism inherent in this slicing of entitlements.

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<sup>106</sup> See *Rogers v. Koons*, 960 F.2d 301, 309-12 (2d Cir. 1992) (holding that there was infringement where artist created a sculpture from a photograph depicting a litter of puppies held by two adults); *United Feature Syndicate, Inc. v. Koons* 817 F. Supp. 370, 379-82 (S.D.N.Y. 1993) (holding that there was infringement where sculpture depicted Odie, a character from the Garfield comic strip). Cf. *Blanch v. Koons*, 467 F.3d 244, 250-59 (2d Cir. 2006) (holding that there was no infringement based on the fair use defense where same artist incorporated portions of a photograph into a two-dimensional collage). But see *Dyer v. Napier*, 81 U.S.P.Q.2d 1035 (D. Ariz. 2006) (holding that there was no infringement where sculpture made from photograph of lion holding cub in mouth because copied aspect of photograph was naturally occurring subject matter, implying that the result could be different if the photograph's subject matter was contrived).

<sup>107</sup> See Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5133 (1990) (codified as amended in scattered sections of 17 U.S.C.).

<sup>108</sup> 17 U.S.C. § 120 (2006).

<sup>109</sup> See Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477, 495 (1990); Melissa M. Mathis, *Function, Nonfunction, and Monumental Works of Architecture: An Interpretive Lens in Copyright Law*, 22 CARDOZO L. REV. 595, 611-12 (2001); see also Posting of Marty (attributed to Glenn Mitchell) to Shapeblog, [http://www.shapeblog.com/2006/06/protecting\\_the\\_skyline.html](http://www.shapeblog.com/2006/06/protecting_the_skyline.html). (June 1, 2006, 17:42 EST) (discussing intellectual property implications of three-dimensional printing and three-dimensional photographs).

Three-dimensional models serve blind persons in the same way that two-dimensional photographs serve the sighted—allowing people who have never visited a building to be able to perceive its shape. But the ability-discrimination of the AWCPA goes further. Even in the absence of a photograph, a sighted person can perceive the shape of a building by visiting the building site and viewing the structure directly. Blind persons, however, do not have this option, because buildings are generally on a scale that is too large for manual investigation. One might suggest that blind persons could be put on an equal footing by exempting three-dimensional models in those specific cases where they are made expressly for and limited in distribution to the blind. One can imagine that this might be done under the auspices of a non-profit organization, like those that provide audio transcriptions of books.<sup>110</sup> If presented with such facts in a case, it seems highly likely that a court would exempt such models from infringement on the basis of a fair use defense.

Yet there are at least two problems with positing such judicial exception-making as the answer to the 2-D/3-D discrimination inherent in copyright law after AWCPA. First, there are practical considerations. No such program exists, and even if one were set up, access could be cumbersome. Second, such an approach is theoretically unsatisfying, as judicially crafted exceptions available only to the non-sighted are by nature segregationist. The world that would be created by such a legal regime would allow three-dimensional models to be displayed in a special museum for the blind or available for purchase via mail order for the blind, but not made available to the public generally. While judicially plausible, such a “separate but equal” regime would be clearly inferior. Contrast such a prospect with a world in which three-dimensional representations of buildings are not *prima facie* copyright infringements. Replicas might be much more prevalent. For example, a tourist browsing a gift shop might find three-dimensional representations of newly constructed buildings for sale alongside postcards. In such a world, the blind are included on an equal footing—a result much more in keeping with current disability theory.

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<sup>110</sup> Under federal law, certain “authorized entit[ies],” including non-profit organizations, may produce audio transcriptions of books for use by the visually impaired without violating the copyright law. *See* 17 U.S.C. § 121 (2006).

### C. *Trade Dress Protection and Three-Dimensional Models*

All of the principal doctrines of intellectual property law have expanded in recent decades, but none has undergone a greater expansion than trademark law. This is particularly true with regard to the subfield of trade-dress protection. An ever increasing variety of plaintiffs are using trade-dress law to attempt to exercise monopoly privileges over products not susceptible to patents or copyright protections. A particularly unfortunate development in the courts—one that especially impacts the blind—relates to three-dimensional replicas.

At the outset, it is important to note that it is beyond dispute that commercially sold two-dimensional photographic depictions of, for instance, a Chevrolet sports car, a U.S. Air Force F-16 fighter jet, or a U.S. Army Humvee utility vehicle do not constitute actionable trademark infringement. Yet manufacturers of such vehicles have been successful in claiming that three-dimensional depictions of these objects are protected trade dress and, therefore, the subject of a monopoly held by their manufacturers.<sup>111</sup>

It was not always this way. Current industry practice in claiming these entitlements developed over time. The greatest shift with respect to vehicle designs seems to have occurred during the 1990s, when many toy manufacturers began licensing vehicle designs from automobile manufacturers, putatively as protected trademarks and trade dress.<sup>112</sup> This trend expanded in the 2000s to include defense contractors seeking royalties for military replicas. For example, in 2006, AM General, the manufacturer of the military Humvee, and General Motors, purveyor of the civilian-version Hummer, were successful against the maker of a toy Humvee in upholding a summary judgment on appeal for trade dress infringement.<sup>113</sup> In addition, defense contractors have recently pressured manufacturers and dis-

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<sup>111</sup> See, e.g., *Gen. Motors Corp. v. Lanard Toys, Inc.*, 468 F.3d 405 (6th Cir. 2006).

<sup>112</sup> This shift in industry practice can be seen by reference to packaging for toy car replicas over the period.

<sup>113</sup> See *Gen. Motors Corp.*, 468 F.3d at 415-20. The *General Motors* case is a strange one to those familiar with trademark law. The court's opinion is analytically flawed and its holding appears to be a results-oriented effort to uphold the claims of General Motors and AM General. See *id.* The court's analysis shows deep misapprehensions of trademark law in some areas, and in other areas it proceeds to conclusions without logic or supporting rationale. See *id.*

tributors in the hobby industry to sign licensing agreements and pay royalties on model kits of military hardware.<sup>114</sup>

As litigation against model manufacturers develops out of these industry trends, the courts taking on these cases would benefit from a critical-disability perspective. Specifically, courts should be cognizant of the important informational value such models have as an irreplaceable means for blind individuals to perceive the physical form of the subjects modeled.

As is generally the case with buildings, many big vehicles, such as airplanes, ships, and tanks, are large enough that a non-sighted person generally cannot get a good sense of the object's shape without a scaled-down replica. Automobiles and smaller watercraft are, admittedly, a different case. Such vehicles may be small enough that a blind person can feel around them to perceive their shape. But a blind person can do so only if she or he has access to the object in question. People who can see face no such problem of access, since First Amendment rights or inherent limitations on trademark doctrine prevent monopolization of two-dimensional representations of cars and other objects of industrial manufacture. Thus, trademark law, as enshrined in industry custom and as interpreted by the courts, threatens to disadvantage the blind and visually impaired in a unique way.<sup>115</sup>

This brings us to an issue of basic fairness. If book publishers and other media companies can produce and sell two-dimensional representations of industrial products, then three-dimensional models and the audience wishing to perceive that subject matter three-dimensionally ought to be afforded the same consideration. The ableist approach to trademark law threatens an especially great injustice because trademark protection is capable of existing forever. Unlike copyrights, which expires at some point in the future,<sup>116</sup> and right-of-

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<sup>114</sup> See Commentary, *Talking Points on the Military Toy Replica Act*, available at <http://www.hmahobby.org/pdfs/talking-points.pdf>.

<sup>115</sup> Even more problematic is that industry custom can end up steering the course of the law, as courts look to industry custom in resolving intellectual property questions. See generally Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007).

<sup>116</sup> See 17 U.S.C. §§ 302-305 (2006). But see *Eldred v. Ashcroft*, 537 U.S. 186, 242-43 (2003) (Breyer, J., dissenting) (noting that since the 1998 Sonny Bono Copyright Term Extension Act, copyright terms may be "virtually perpetual").

publicity monopolies, which generally do the same,<sup>117</sup> trademarks and trade dress are protected as long as they are commercially exploited.<sup>118</sup> Thus, if three-dimensional representations are upheld as protectable trade dress, the manufacturing of such objects may be subject indefinitely to monopolization. Such a situation requires those who wish to access the information in three-dimensional form to pay monopoly prices—at least assuming such models are available. One must consider that monopoly privileges result not only in higher prices, but also, sometimes, in the total unavailability of certain goods. As holders of legally granted monopoly charters, rights-holders may choose to refrain entirely from concluding deals that would make vehicle replicas available. For instance, in the *General Motors* case, the Sixth Circuit awarded GM trade-dress protection despite the fact that GM could not show, at the relevant time, any concrete plan to manufacture Hummer toys.<sup>119</sup>

#### CONCLUSION

Intellectual property law's disregard for people with disabilities is clearly not motivated by animus. But the benign aims of courts do not alleviate the problems created by jurisprudence that proceeds without regard to differences in abilities. Courts should think broadly about abilities when working through intellectual property problems. If courts do expand their perspective, two desirable things will result, one intrinsic and one extrinsic. Intrinsically, disability-aware jurisprudence will result in opinions that are more analytically sound. Extrinsically, persons with disabilities will not be made to shoulder needless burdens.

In concluding, it is apropos to ask a coarser question: Is it too much to ask that intellectual property law be made disability neutral? Or, to put it more bluntly, is fashioning legal doctrine to be disability neutral the equivalent of making able-bodied persons take the wheel-

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<sup>117</sup> See, e.g., CAL. CIV. CODE § 3344.1(g) (West 2009). But see TENN. CODE ANN. § 7-25-1104 (2009) (stating that the right of publicity is capable of infinite duration so long as property rights are exploited commercially without a lapse of two years or more).

<sup>118</sup> See, e.g., *Merch. & Evans, Inc. v. Roosevelt Bldg. Prods. Co.*, 963 F.2d 628, 639 (3d Cir. 1992), *overruled on other grounds by* *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

<sup>119</sup> See *Gen. Motors Corp. v. Lanard Toys, Inc.*, 468 F.3d 405, 414-20 (6th Cir. 2006). Ordinarily, the lack of concrete plans to use a trademark in a given commercial sector makes the trademark incapable of enforcement. See, e.g., *Silverman v. CBS, Inc.*, 870 F.2d 40, 47 (2d Cir. 1989).

chair ramp? The answer is no. A brief recourse to the theoretical groundings offered to justify intellectual property regimes explains why not.<sup>120</sup>

To the extent that we view intellectual property rights as being justified by moral imperatives and personal rights, we must consider that the rights of creators and manufacturers—i.e., intellectual property holders—cannot be construed so as to deny the personal rights of persons with disabilities to express themselves and comprehend the world around them.

To the extent that we conceive of intellectual property rights as being theoretically grounded in an economic justification—the clear justification for trademark<sup>121</sup> and the justification arguably espoused by the U.S. Constitution for copyright and patent protection<sup>122</sup>—then it is even clearer that a disability-neutral conception of intellectual property rights is not unreasonable. Copyright and patent law is already very poorly calibrated for providing optimal incentives relative to the competitive trade-offs that come from monopoly pricing.<sup>123</sup> Thus, a refusal to extend these monopoly rights to the realm of three-dimensional works does not work a demonstrable hardship upon rights holders. A roll-back of intellectual property rights is just as likely to provide net social welfare gains generally. In fact, one can go further. If one accepts arguments that intellectual property rights are, in general, currently too extensive for ideal economic effects, then the critical-disability perspective offered here would have beneficial economic effects to society in general.

At root, regardless of whether one believes that intellectual property law will be unduly burdened by being disability neutral, and regardless of what theoretical justifications one does or does not find availing, there is one conclusion that is beyond dispute. Bringing a disability perspective to intellectual property jurisprudence and law-making brings an honesty that is otherwise missing. My hope is that

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<sup>120</sup> For a discussion of such justifications and how they have been employed, see William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168 (Stephen R. Munzer, ed., 2001). See also Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287 (1988).

<sup>121</sup> See *Park 'n Fly v. Dollar Park & Fly*, 469 U.S. 189, 198 (1985).

<sup>122</sup> See U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and the useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries[.]”).

<sup>123</sup> See, e.g., Eric E. Johnson, *Calibrating Patent Lifetimes*, 22 *SANTA CLARA COMPUTER & HIGH TECH. L.J.* 269 (2006).

the perspective laid out here will open the eyes of courts and lawmakers to look beyond their own ways of perceiving, understanding, and interacting with the world when thinking about intellectual property.