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Here's Why it's Time the Lanham Act Recognizes Personal Brands

The [Lanham Act](#) defines and governs trademarks, service marks, and unfair competition, all to protect American consumers from market confusion. Under the [Lanham Act](#), a mark is famous if it is “widely recognizable to the general consuming public of the United States.” When a celebrity brings a claim under the Lanham Act for the unauthorized use of their image, courts may find that the celebrity’s name and image constitute an unregistered trademark, while the celebrity’s *persona* is the goods or services which the celebrity places into commerce. To analyze the claim, several factors help determine the likelihood of market confusion. Of these factors, strength of the mark—referring to the “[level of recognition](#) the celebrity enjoys among members of the population,”—poses interesting challenges to influencers and models, filtering out anyone who has not reached celebrity status.



[John Christian Fjellestad](#) on [Flickr](#).

The [Second Circuit's recent affirmation](#) of the [lower court's decision](#) in *Carmen Electra et. al. v. 59 Murray Enterprises Inc.* illustrates this point. In this case, Carmen Electra, and several other models sued a gentlemen's club for, *inter alia*, false endorsement under the Lanham Act and/, i.e., unauthorized use of the models' photographs on the club's marketing materials. Although the court recognized that Carmen Electra passes celebrity muster, [it had this to say for the others](#), "while these [models] have participated in promotional campaigns for a wide variety of brands and appeared in magazines, TV shows, and movies, their resumes are devoid of evidence that they actually garnered recognition for any of their appearances. Simply listing brands or magazine titles is insufficient."

It is not the intention of this writing to comment on the validity of the *Electra*, or similar decisions. Rather, these cases beg the question that this writing seeks to explore: should models and influencers be analyzed as celebrities?

The Market: A Before-and-After

Prior to the late 1990's, the idea of a ["personal brand"](#) did not exist. Those that reached celebrity fame did so by garnering significant attention from the mass media for their accomplishments in their field – often the sports and entertainment industries. Media content reached us through our household televisions, radios, print subscriptions, and local movie theaters, while a new medium called "the internet" was in its infancy. With a [limited number](#) of televisions, all household members, each representing a different demographic, often watched the [same thing at the same time](#), exposing all viewers to the same content. Advertisers reached the public by purchasing ad space in front of as many eyes as possible. This ["spray and pray"](#) method is the advertising equivalent of firing a buck shot, hoping enough pellets land to generate a return on investment.



[cmun_Project](#) on [Flickr](#). Top Right Photot:

Text

Bottom Left Photo: Text.

Bottom Right Photo: [Fausto García-Menéndez](#) on [Unsplash](#).

But the growth of the internet gave rise to a market transformation. Today, thanks to sophisticated sorting algorithms and the wide availability of [personal devices](#), we no longer huddle around a single television. Each household member enjoys a private and personalized media experience complete with tailored search results, advertisements, and media content based on past browsing history and content interactions. Whereas before, an advertiser of sports-related merchandise had to fire a buckshot at *men aged 25-40* for example, they can now target just the fans of a *specific team*, the advertising equivalent of a sniper. [Privacy](#) concerns aside, this means that the more time one spends online, the less exposure one has to products, services, and content irrelevant to their interests. For instance, if you are not in the market for men's fashion, you've probably never heard of [@adamgonon](#), but 55,000+ people look to him for style guidance, and major brands such as [Brooks Brothers](#) have looked to Adam for his endorsements. If you are not into makeup, you probably haven't heard of [@thomashalbert](#) but 300,000+ people flock to their social media for tips, techniques, and endorsements. We have entered the influencer era.

Aren't Models and Influencers the Same Thing?



[cody lannom](#) on [Unsplash](#).

Top Right Photo: Text.

Bottom Left Photo: Text.

Bottom Right Photo: [Taan Huyn](#) on [Unsplash](#).

It's tempting to consider these terms "model" and "influencer" as interchangeable. While there is no bright line distinction and quite a bit of overlap, for the purposes of this writing, we will distinguish the two by their commercial offerings. [Models](#), for our oversimplified purposes, offer the use of their "likeness" or physical attributes to brands as marketing tools for selling the brand's products. [Influencers](#), on the other hand, "are people who have built a reputation for their knowledge and expertise on a specific topic." Their reputation earns them a social media following, which they monetize as their commercial offering, giving brands a direct line of communication to their target market. They are professional endorsers who drive commerce through strategic brand partnerships. Though they differ in their commercial offerings, one important similarity between the models and influencers is that they provide "business-to-business" services to the brands in their niche.

Are Influencers and Models Considered Celebrities?

[Celebrities](#) have garnered fame, usually as a result of their work in a specific niche. This fame generates a broad consumer demand for [media coverage](#) surrounding that celebrity's life. It is this consumer demand, this paper argues, that makes a celebrity's personal brand a consumer product. Viewed this way, a celebrity provides "business-to-customer" services to the general public as informers and entertainers. Comparatively, while the word "model" may conjure up images of [supermodels](#), only the elite few who have achieved celebrity status, the vast majority of models are not known outside of their niche. Similarly, the majority of influencers are not known outside of their niche markets, often to their benefits.



[Satyawan](#)

[Narinedhat](#) on [Unsplash](#).

Top Right Photo: Text.

Bottom Right Photo: Text.

Bottom Right Photo: [Chas McGregor](#) on [Unsplash](#).

Some brands work with supermodels, yet many brands prefer to work with lesser-known models to ensure their products have the spotlight. Relatedly, [studies show](#) that micro-influencers are more trusted by their followers than their macro counterparts for several reasons including their relatability and authenticity. Simply put, their lack of fame is an asset. For example, a new mother seeking to “lose the baby weight,” will likely trust an average mom who posts about the fitness routines she does while her baby sleeps over Kylie Jenner, a celebrity-billionaire with access to an army of nutritionists, personal trainers, and nannies.

The Secret Sauce: Strong Personal Branding

Although celebrities, models, and influencers alike have placed their strong personal brands into commerce, they differ in their offerings and in the markets they serve. Recall that courts define a celebrity’s mark as their name and image while their persona is their goods in commerce. These attributes, when combined, comprise a celebrity’s *personal* brand. Major corporate brands can [spend](#) millions developing a brand image that will resonate with their target markets. Similarly, influencers expend significant resources building an authentic personal brand comprised of visuals and messaging, and models work tirelessly to maintain their physical attributes — the cornerstone of their personal brands. The more consistent their personal brand is, the stronger their reputation for trustworthiness in their niche becomes. This reputation is their [credit-in-trade](#).

Should Models and Influencers be Analyzed as “Famous” Under the Lanham Act?

It’s tempting to lump models and influencers into a category with celebrities because they are both featured in the media and may have fans. But for most celebrities, the analysis of their fame within a segment of the general public is appropriate because that is the market they serve. It stands to

reason, therefore, that models and influencers should also be analyzed appropriately against the markets they serve. They are not retailers; they provide wholesale services to retail brands. This is not to say that everyone with a social media profile and a strong sense of self deserves Lanham Act protection; there can, and should, be a distinctive line between who should and should not receive Lanham Act protection.

Perhaps the inquiry should be: 1) do they operate their personal brands as a commercial business; 2) do they serve a business-to-business, or business-to-consumer market; 3) what is their niche; and 4) have they earned recognition amongst their potential customers within their niche market. Importantly, this inquiry is measurable.

Courts are correctly hesitant to consider social media following, which is an easily inflatable number, as evidence of recognition. Better social metrics, however, include “[views](#),” the number of people who have viewed a profile, “[engagement](#),” the number of actions people took on a profile or its content, and whether those viewing and engaging include the brand pages within the appropriate niche. Also, contracts with brands can be a strong indicator of recognition in this context for both models and influencers.

In summation, while courts have yet to incorporate the term “personal brand” into their Lanham Act lexicon, they have afforded celebrities personal brand protection for some time. Moving forward, celebrities should still be analyzed in terms of the general public because they serve the consumer market for celebrity-centered content. But unless and until a monetized personal brand crosses the threshold into the realm of celebrity, courts should still afford them Lanham Act protection as business-to-business service providers and analyze their recognition among potential customers—the brands—in the niche markets they serve.

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