



December 2022

Dropping the Mic on Indie Artists: How Trademark Law Fails to Protect Independent Artists Against Music Industry Giants

Kaitlin Hocker

University of Georgia, jwt74222@uga.edu

Follow this and additional works at: <https://digitalcommons.law.uga.edu/jipl>

Recommended Citation

Kaitlin Hocker, *Dropping the Mic on Indie Artists: How Trademark Law Fails to Protect Independent Artists Against Music Industry Giants*, 30 J. INTELL. PROP. L. 189 (2022).

Available at: <https://digitalcommons.law.uga.edu/jipl/vol30/iss1/7>

This Notes is brought to you for free and open access by Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Journal of Intellectual Property Law by an authorized editor of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#) For more information, please contact tstriepe@uga.edu.

Dropping the Mic on Indie Artists: How Trademark Law Fails to Protect Independent Artists Against Music Industry Giants

Cover Page Footnote

J.D. Candidate, 2023, University of Georgia School of Law. I dedicate this to Ms. Anita "Lady A" White.

***DROPPING THE MIC ON INDIE ARTISTS: HOW
TRADEMARK LAW FAILS TO PROTECT
INDEPENDENT ARTISTS AGAINST MUSIC
INDUSTRY GIANTS***

*Kaitlin Hocker**

* J.D. Candidate, 2023, University of Georgia School of Law. I dedicate this to Ms. Anita “Lady A” White.

TABLE OF CONTENTS

I.	INTRODUCTION	191
II.	BACKGROUND	192
A.	THE LADY ANTEBELLUM CASES	192
B.	THE LANHAM ACT VS. COMMON LAW FOR TRADEMARK INFRINGEMENT CLAIMS.....	195
	1. The Lanham Act.....	195
	2. Common Law.....	197
C.	SEARCH ENGINE AND STREAMING COMPLICATIONS IN TRADEMARK LAW.....	198
III.	ANALYSIS.....	199
A.	THE REBELUTION CASE IN COMPARISON WITH THE LADY ANTEBELLUM CASES.....	199
B.	COMMON LAW RIGHTS AT A NATIONAL LEVEL	204
IV.	CONCLUSION	205

I. INTRODUCTION

“Anita ‘Lady A’ White was worried she would be erased. Now she worries it has already happened.”¹ An independent musician loses more than just a name when a famous musician—backed by a record label—begins using the same band name. They can lose their livelihood. This intellectual property injustice happened to Anita “Lady A” White.² In June 2020, the well-known band “Lady Antebellum” (“LAE”) took on White’s band name—“Lady A”—as their own.³ The band formerly known as “Lady Antebellum” claims it did not intend to damage Lady A’s musical career.⁴ Rather, the band changed its name “in recognition ‘of the hurtful connotations of the word ‘antebellum.’”⁵ Even so, LAE’s name change has detrimentally affected Anita White’s career.⁶

Trademark law should protect independent creators. Trademark law’s traditional purpose is to protect consumers from confusing the identity of the source of the goods and services they intend to buy.⁷ It is also a tactful mechanism to protect creators like independent artists, who lack the resources to wage full-blown lawfare. Independent artists are defined by their self-made qualities—they produce their music without the backing of a record label or business partnership.⁸ Because they lack the financial support of a record label, they often only have a “moderate budget.”⁹

Independent artists must have viable legal recourse against giants of the music industry. They should not be forced—by their lack of financial and legal resources—to capitulate to well-known artists’ whims. The law protects these trademark rights through both the Lanham Act and common law,¹⁰ but both

¹ Ethan Millman, *One Year Later, Anita ‘Lady A’ White Is Still Looking for Justice*, ROLLING STONE (June 11, 2021), <https://www.rollingstone.com/pro/features/lady-a-one-year-later-interview-1182189/>.

² See generally *White v. Lady A Ent., LLC*, No. C20-1360-RSM, 2021 WL 1387065 (W.D. Wash. Apr. 13, 2021) (discussing the legal dispute between Anita White and Lady A Entertainment, LLC, previously known as “Lady Antebellum”).

³ *Id.*

⁴ *Scott v. White*, 539 F. Supp. 3d 831 (M.D. Tenn. 2021).

⁵ *Id.* (citation omitted).

⁶ *White*, 2021 WL 1387065, at *1.

⁷ *Allard Enters. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 574 (6th Cir. 2001).

⁸ *Independent Music: A Simple Definition*, DISCTOPIA, <https://disctopia.com/what-is-independent-music/> (last visited Oct. 24, 2021).

⁹ *Id.*

¹⁰ See Patrick Desmond, *Assignment of Mark Rights at Common Law and Under the Lanham Act*, 12 J. CONTEMP. LEGAL ISSUES 197, 198-99 (2001) (emphasizing that courts do not enforce marks unless they are substantially the same product as the trademarked product).

have advantages and disadvantages for plaintiffs.¹¹ And with the rise of trademark lawsuits related to how consumers interact with creators' marks,¹² the age of online streaming demands a more nuanced approach to settling these band name disputes.¹³

Part II of this Note provides a background to the *Lady Antebellum* cases, which will serve as a lens for whether trademark law adequately protects independent artists against trademark infringement suits over band names. Part II also briefly explains the Lanham Act and common law trademark infringement claims. Part III evaluates which legal recourse best serves independent artists like Anita White. This Note concludes in Part IV that trademark law infringement recourses should be reformed with consideration for how the internet has affected the music industry by extending common law trademark rights to a national level.

II. BACKGROUND

A. THE LADY ANTEBELLUM CASES

Anita White, the original Lady A, began her musical career “as a [backup] singer in a Motown Revue band during the 90[s].”¹⁴ She performs various genres, ranging from soul to Blues to gospel and funk.¹⁵ White is truly a self-made artist in every sense of the word; in 2015, she produced a mini tour featuring herself and other artists from her hometown of Seattle, Washington.¹⁶ For thirty years, Lady A could perform her music under the stage name that she had made for herself, acting as her manager and agent, with no conflicts over trademark infringement or threats to her band name until June 2020.¹⁷

¹¹ *Id.* at 199-200.

¹² See generally Deborah F. Buckman, *Lanham Act Trademark Infringement Actions in Internet and Website Context*, 197 A.L.R. Fed. 17 (2004) (explaining how trademark laws are changing to accommodate the innovation of trademark suits in the internet era).

¹³ DMN Staff, *Two Bands with the Same Name? A Legal Guide for Working It Out*, DIGIT. MUSIC NEWS (June 10, 2013), <https://www.digitalmusicnews.com/2013/06/10/twobands/>.

¹⁴ *Bio*, LADY A, LADY A BABY BLUES, <https://www.ladyababyblues.com/bio> (last visited Oct. 24, 2021).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Anita “Lady A” White, *Blues Singer Lady A: I Should Not Have to Bend to Band’s Will Because They’ve Got Money*, ROLLING STONE (July 10, 2020, 10:12 AM), <https://www.rollingstone.com/pro/features/lady-a-lawsuit-interview-1026047/>.

In June 2020, during a summer of increased awareness for the *Black Lives Matter* movement after the murder of George Floyd,¹⁸ LAE’s “hearts . . . stirred with conviction.”¹⁹ LAE changed their name from “Lady Antebellum” to “Lady A” to make the band “more ‘inclusive’ as the word, ‘[a]ntebellum,’ had associations ‘referring to the period of history before the Civil War, which includes slavery.’”²⁰ The band asserts that it did not intend to deprive Anita White of her band name with the band’s name change and claims both LAE and Anita White decided to “‘peacefully coexist’ during the Zoom call [addressing the dispute].”²¹

According to Anita White, the series of conversations between her and LAE did not occur in the way that LAE describes.²² White asserts that she “was ‘not happy’ with the agreement” and “obtained new counsel following the discussions.”²³ White tried to avoid litigation by offering a settlement agreement between her and LAE, asking for \$10 million, “which she says would have been split between herself and donations to *Black Lives Matter*.”²⁴ Also, White asserts that she “[did not] think coexistence would work” because she had been virtually erased both from streaming services and from the internet more broadly.²⁵ White even offered creative alternatives, such as White taking on the name “‘Lady A the artist,’ [while LAE] could be known as ‘Lady A the band.’”²⁶ These efforts were futile because LAE insisted that coexistence would be possible.²⁷

Unfortunately, White was correct—coexistence was impossible; LAE filed suit against White²⁸ in the Middle District of Tennessee “seeking a declaratory judgment that [LAE is] not infringing on [White’s] purported trademark

¹⁸ Valerie Wirtschafter, *How George Floyd changed the online conversation around BLM*, BROOKINGS (June 17, 2021), <https://www.brookings.edu/techstream/how-george-floyd-changed-the-online-conversation-around-black-lives-matter/>.

¹⁹ Joe Coscarelli, *Lady Antebellum, Hit Country Trio, Changes Its Name in Wake of Protests*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/arts/music/lady-antebellum-name-change-lady-a.html>.

²⁰ Gabrielle Chung & Sarah Michaud, *Band Formerly Known as Lady Antebellum Files Lawsuit Against Lady A After Singer Asks for \$10 Million*, PEOPLE (July 8, 2020, 9:25 PM), <https://people.com/country/band-formerly-known-lady-antebellum-files-lawsuit-against-singer-lady-a/>.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ White, *supra* note 17.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ White v. Lady A Ent., LLC, No. C20-1360-RSM, 2021 WL 1387065, at *1 (W.D. Wash. Apr. 13, 2021).

rights.”²⁹ LAE claims in the suit that the band had been using both federally registered trademark names “Lady Antebellum” and “Lady A” simultaneously for years.³⁰ LAE applied to register the mark “Lady A” for several commercial uses of the mark, which the United States Patent and Trademark Office (“USPTO”) approved as early as 2011.³¹

In this lawsuit, LAE asserts that up until 2020, Lady A never made challenges to LAE’s “open, obvious, and widespread nationwide and international use of the LADY A mark as a source indicator for [LAE’s] recorded, downloadable, and streaming music and videos . . . live musical performances . . . or souvenir merchandise.”³² LAE also made the assertions that Anita White never registered “Lady A” or applied for registration of the trademark and that LAE’s music on streaming services is “immediately distinguishable,” ensuring that no “consumers have been confused about the source of [LAE’s] music and [Anita White’s] music.”³³ On these assertions, LAE contended that they were not infringing on any of Lady A’s rights to her band name.³⁴

White tried to counter LAE’s motion for summary judgment by moving to dismiss for lack of personal jurisdiction—an attempt to move the lawsuit to Washington, where she resides.³⁵ In the alternative, White asked the court to dismiss the case because LAE’s suit was an “improper ‘anticipatory’ declaratory judgment action.”³⁶ White also moved to transfer the case because “she anticipate[d] witnesses residing in Washington . . . will be needed to provide corroboration of her trademark rights” and will not be able to travel to Tennessee.³⁷ The court’s analysis of the motion to dismiss for lack of personal jurisdiction was partially based on White’s claim that she “owns nationwide common law rights in the mark.”³⁸ The court concluded that she had purposefully availed herself to the forum of Tennessee through these actions and saw no other compelling reasons to allow the motion.³⁹ The court denied both motions.⁴⁰

²⁹ *Scott v. White*, 539 F. Supp. 3d 831, 836 (M.D. Tenn. 2021).

³⁰ *Id.* at 836-38.

³¹ *Id.*

³² *Id.* at 837.

³³ *Id.*

³⁴ *Id.* at 837-38.

³⁵ *Id.* at 836, 838.

³⁶ *Id.* at 843.

³⁷ *Id.* at 847.

³⁸ *Id.* at 838.

³⁹ *Id.* at 841.

⁴⁰ *Id.*

Following LAE's lawsuit against Anita White, White filed a countersuit against LAE on September 15, 2020, in the Western District of Washington.⁴¹ She filed claims against LAE "for trademark infringement and unfair competition."⁴² Under this suit, she filed a "Motion to Dismiss or, in the alternative, to Transfer or Stay."⁴³ The court denied White's motion to transfer.⁴⁴ Although the court originally granted the motion to stay,⁴⁵ the court ultimately "knocked back White's additional attempts to dismiss the lawsuit outright."⁴⁶ The initial litigation between LAE and Anita White filed by LAE is currently ongoing, and it seems certain that the case will continue in the Middle District of Tennessee.⁴⁷ That venue puts White at a grave disadvantage in the suit because she is defending her trademark of the name "Lady A," under the legal basis of common law trademark infringement rights.⁴⁸

B. THE LANHAM ACT VS. COMMON LAW FOR TRADEMARK INFRINGEMENT CLAIMS

1. *The Lanham Act*

The Lanham Act, enacted in 1946, was legislated by Congress to provide a "national system of trademark registration."⁴⁹ To form a trademark, the law requires two things: the mark "must be in use in commerce[,] and it must be distinctive."⁵⁰ As for the "use in commerce" requirement, the law does not require that the mark is currently in use, so long as there is "in writing, a good

⁴¹ See *White v. Lady A Ent., LLC*, No. C20-1360-RSM, 2021 WL 1387065 (W.D. Wash. Apr. 13, 2021) (providing context for Anita White's countersuit and why she was unsatisfied with her prior discussions concerning the mark with Lady A Entertainment).

⁴² *Id.* at *3.

⁴³ *Id.* at *1.

⁴⁴ *Id.* at *2.

⁴⁵ Dylan Smith, *Federal Judge Denies Original Lady A's Motion to Dismiss or Transfer Lawsuit Filed By Lady Antebellum*, DIGIT. MUSIC NEWS (May 21, 2021), <https://www.digitalmusicnews.com/2021/05/21/lady-a-lawsuit-motion-to-dismiss/>.

⁴⁶ Chris Cooke, *Judge declines to force Lady A v Lady A case to Washington state*, COMPLETE MUSIC UPDATE (May 14, 2021), <https://completemusicupdate.com/article/judge-declines-to-force-lady-a-v-lady-a-case-to-washington-state/>.

⁴⁷ *Id.*

⁴⁸ See *White v. Lady A Ent., LLC*, No. C20-1360-RSM, 2021 WL 1387065 (W.D. Wash. Apr. 13, 2021) (arguing that the suit should be transferred to Washington because it would burden the witnesses White needs to have to argue for her common law infringement claims).

⁴⁹ *Lanham Act*, Legal Information Institute, CORNELL L. SCH., https://www.law.cornell.edu/wex/lanham_act (last visited Jan. 17, 2022).

⁵⁰ *Id.*

faith intent to use the mark in commerce at a future date.”⁵¹ Furthermore, this type of “commerce” does not have to be interstate commerce; activities occurring only in one state still satisfy the Lanham Act’s requirement.⁵² The “distinctive requirement” uses four categories to determine distinctiveness, including “arbitrary/fanciful, suggestive, descriptive, and generic,”⁵³ which are listed in a hierarchical order of protectiveness (or “strength”) of the mark by trademark law.⁵⁴ An arbitrary or fanciful mark is stronger than a generic mark. Thus, generic marks are entitled to less protection against infringement.⁵⁵ An alternative for proving distinctiveness, known as “acquired distinctiveness,” involves proving “that ‘in the minds of the public, the primary significance of [the mark] is to identify the source of the product rather than the product itself”⁵⁶

To succeed on a claim of trademark infringement, the plaintiff has the burden of proving that “(1) the plaintiff has a valid and legally protectable mark; (2) the plaintiff owns the mark; and (3) the defendant’s use of the mark to identify goods or services causes a likelihood of confusion.”⁵⁷ Under the Lanham Act, the likelihood of confusion is used as the test “for infringement of any type of trademark.”⁵⁸ Seven factors are considered for this test:

- (1) strength of mark alleged to have been infringed; (2) similarity of infringed and infringing marks; (3) similarity between goods and services offered under marks; (4) similarity of actual sales methods used by marks’ holders; (5) similarity of advertising methods; (6) alleged infringer’s intent to misappropriate proprietor’s good will; and (7) existence and extent of actual confusion in consuming public.⁵⁹

⁵¹ *Id.*

⁵² 1 JOHN G. MILLS III ET AL., PATENT LAW FUNDAMENTALS § 5:57 (2d ed. 2022).

⁵³ *Lanham Act*, *supra* note 49.

⁵⁴ *Trademark Strength*, INT’L TRADEMARK ASS’N (Nov. 5, 2020), <https://www.inta.org/fact-sheets/trademark-strength/>.

⁵⁵ *Id.*

⁵⁶ *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 115 (2d Cir. 2001) (citation omitted).

⁵⁷ *Lanham Act*, *supra* note 49.

⁵⁸ 112 Am. Jur. 3d *Proof of Facts, Likelihood of Confusion Pursuant to the Federal Lanham Act*, 15 U.S.C.A. §§ 1051 *et seq.*, § 3 (2010).

⁵⁹ *Id.* (citing *Webster v. Dean Guitars*, 955 F.3d 1270, 1278 (11th Cir. 2020)).

While this test makes it seem like a plaintiff must go to great lengths to defend their mark, registration for a mark is not required to protect it.⁶⁰ Nonetheless, there are extensive benefits to registering the mark, specifically related to litigation, because registration makes the mark incontestable and “creates presumptions in [] case[] of [a] suit.”⁶¹

The parameters for evaluating when the consumer is confused for the likelihood of confusion test has undergone expansion since the creation of the act.⁶² For example, many courts now are willing to accept that the consumers can be confused before the actual sale.⁶³ This doctrine is commonly known as the “initial interest confusion doctrine[,]” and its primary purpose is “to prevent a company from gaining an unfair competitive advantage through its use of a competitor’s trademark.”⁶⁴

2. Common Law

Suing for trademark infringement under the common law doctrine differs extensively from the Lanham Act. First, if the mark qualifies as “arbitrary, fanciful, or suggestive,” then just using the mark provides common law rights to the mark.⁶⁵ Second, determining whom the mark belongs to when there is a conflict over the same mark is based on different forms of priority; for an inherently distinct mark, the first entity to use the mark has priority, while the priority for a descriptive mark “rests on obtaining secondary meaning before one’s opponent acquires rights.”⁶⁶ Perhaps the starkest difference between common law trademark infringement suits and those under the Lanham Act is that “common-law rights are territorially limited to the geographic area in which a mark is used,” while the Lanham Act applies nationally—unless one party can prove that they had prior rights to the mark.⁶⁷

⁶⁰ *Id.* at § 4.

⁶¹ *Id.*

⁶² Bryce J. Maynard, Note, *The Initial Interest Confusion Doctrine and Trademark Infringement on the Internet*, 57 WASH. & LEE L. REV. 1303, 1304 (2000).

⁶³ *Id.* at 1313.

⁶⁴ *Id.*

⁶⁵ 112 AM. JUR. 3D *Proof of Facts, Likelihood of Confusion Pursuant to the Federal Lanham Act*, 15 U.S.C.A. §§ 1051 *et seq.*, § 3 (2010).

⁶⁶ *Id.* at §9.

⁶⁷ *Id.*

C. SEARCH ENGINE AND STREAMING COMPLICATIONS IN TRADEMARK LAW

Given that the Lanham Act has been in place since 1946,⁶⁸ it is important to ask whether any intellectual property nuances have affected its level of protection given the drastic technological advances that have occurred since the creation of the law. While the initial purpose of the law has not changed (i.e., preventing consumer confusion), new trademark issues concerning the Lanham Act have emerged and, more broadly, the extent of trademark protection.⁶⁹ More specifically, internet search engines and music streaming services offer extreme benefits and drawbacks in terms of trademark law protection for independent artists. On the one hand, search engines can be a tool for creators because they “[help] . . . [uncover] brand names that are the same or similar to [the creator’s] brand name.”⁷⁰ On the other hand, “only the results at the very top of a result list are likely to be clicked on, and most users are unlikely to sift through more than a few pages of query results to find what they are looking for.”⁷¹ The order in which search results appear, unfortunately, can result in a widespread harmful erasure of independent artists like Anita White.

Signed artists can afford to buy out advertising and publicity to ensure that their names appear at the top of these results, making it extremely difficult for independent artists to maintain their brand if a signed artist decides to take on an indie band’s name.⁷² Anita White acknowledged the publicity theft she has experienced due to the nature of search engine results; she has stated that often “new fans [send her] emails asking how to get [her] music because they [cannot] find [her] anywhere” because searching “Lady A” results in LAE’s music rather than White’s.⁷³

The issues related to how the internet has affected the intellectual property rights of independent artists do not stop at search engines. Popular streaming services, like Spotify and Apple Music, work from the record label-friendly “pro

⁶⁸ *Lanham Act*, *supra* note 49.

⁶⁹ Buckman, *supra* note 12.

⁷⁰ *What are the best tools for a trademark search?*, KISSPATENT (Feb. 27, 2020), <https://kisspatent.com/faq/what-are-the-best-tools-for-a-trademark-search>.

⁷¹ Maynard, *supra* note 62 at 1308.

⁷² *See generally id.* at 1308-09 (stating that search engines can be manipulated through advertising because “the amount web site owners can charge advertisers to advertise on their sites is directly dependent on how many ‘hits’ the web site receives” so entities with the ability to pay for advertising can affect search engines by paying for ads on websites).

⁷³ White, *supra* note 17.

rata” model.⁷⁴ Under this model, “rights-holders are paid according to [their] market share” so that “[t]he people who hold the rights to the most listened-to tracks . . . stand to make the most.”⁷⁵ While this system seems fair at first glance, it hurts independent artists because major record labels typically have deals with streaming services like Spotify.⁷⁶ Spotify “pays to license the music of major label artists, something they [do not] do for indies,” and indie artists have reported making less than the average per stream, [also known as a “listen”], payout that ranges from “0.006 to \$0.0084 per stream.”⁷⁷ A direct way that streaming services hurt independent artists is through free trial periods for their customers.⁷⁸ During the free trial, many streaming services do not pay independent artists to encourage larger artists “to retain their music catalogs for their service, thus enticing more users.”⁷⁹

The drafters of the Lanham Act could not have anticipated how the internet would affect trademark owners in such a substantial monetary way. The accessibility of the internet and its deference to those willing to pay large sums for greater internet traffic and exposure calls for a change in legislation to protect independent artists from trademark infringement. The odds of independent artists making a profit are already stacked against them.

III. ANALYSIS

A. THE REBELUTION CASE IN COMPARISON WITH THE LADY ANTEBELLUM CASES

Do the Lanham Act, and common law doctrine do enough to protect independent artists from trademark infringement? This question, in part, can be answered by evaluating a case in which one independent artist was able to successfully prove that a signed artist infringed on his band name: *Rebelution, LLC*

⁷⁴ Paula Mejia, *The Success Of Streaming Has Been Great For Some, But Is There A Better Way?*, NPR (July 22, 2019, 6:00 AM), <https://www.npr.org/2019/07/22/743775196/the-success-of-streaming-has-been-great-for-some-but-is-there-a-better-way>.

⁷⁵ *Id.*

⁷⁶ LT Wright, *Why Do So Many Musicians Hate Spotify?*, SPINDITTY (Feb. 3, 2022), <https://spinditty.com/industry/why-so-many-artists-hate-spotify>.

⁷⁷ *Id.*

⁷⁸ Alyssa Goldrich, Note, *Streaming Moguls are Biting the Hand that Feeds Them: Artists Beg for a Change in Intellectual Property Laws*, 15 J. INT'L. BUS. & L. 287, 288-89 (2016).

⁷⁹ *Id.* at 289.

v. Perez.⁸⁰ In *Rebelution LLC v. Perez*, Marley Williams, an independent artist, argued that Armando Perez, generally known by his stage name “Pitbull,” infringed on his trademark name, “Rebelution,” and filed suit against Perez for claims of “trademark infringement and unfair competition under federal and state law.”⁸¹ Williams used the mark “Rebelution” as his band name since 2004 and used it for his self-titled album in 2006.⁸² Williams registered the mark with the USPTO on September 15, 2006, and it was approved on December 25, 2007.⁸³ The main question for the court was to determine “whether Perez’s use of the word ‘Rebelution’ in his album title is confusingly similar to the title of [the] plaintiff’s album and band name.”⁸⁴

Perez insisted that he had never heard of “Rebelution” in relation to another musician, but rather he decided to use the mark after seeing the word itself on a storefront in Miami.⁸⁵ Additionally, Perez’s defense rested on the argument that he was “entitled to First Amendment protections for his use of the word [R]ebelution” and “no reasonable jury could find a likelihood of confusion.”⁸⁶ The court immediately ruled out the First Amendment protection because, in order for the word “Rebelution” to be protected under this assertion, it must have entered “the public discourse or become an integral part of our vocabulary.”⁸⁷ Instead, the court conducted a thorough analysis to determine if “Rebelution” was “confusingly similar to the title of [the] plaintiff’s album and band name.”⁸⁸ The court first evaluated the strength of the mark. It determined its strength “[laid] somewhere between the suggestive and fanciful categories” of strong.⁸⁹ The court importantly noted that “[t]he fact that plaintiff’s music does not have the extent of commercial success attributed to defendants’ music does not significantly alter the analysis.”⁹⁰ The court ultimately decided that this factor favored the plaintiff despite the defenses’ assertion that there was third-party usage of the mark.⁹¹

⁸⁰ *Rebelution, LLC v. Perez*, 732 F. Supp. 2d 883 (N.D. Cal. 2010).

⁸¹ *Id.* at 883.

⁸² *Id.* at 885.

⁸³ *Id.*

⁸⁴ *Id.* at 888.

⁸⁵ *Id.* at 889.

⁸⁶ *Id.* at 887.

⁸⁷ *Id.* at 887-89.

⁸⁸ *Id.* at 888.

⁸⁹ *Id.* at 891.

⁹⁰ *Id.* at 891.

⁹¹ *See id.* at 891-92 (asserting that the defendant had not demonstrated enough proof that the third-party users of the mark had publicly used it in a commercial sense as required by the Lanham Act).

The court then assessed whether the proximity of the good would lead to consumer confusion.⁹² The defense argued that consumers would not be confused because Perez's music was a completely different genre than the plaintiff's music.⁹³ The court was unpersuaded by this argument because "[Perez markets his] products to a wide range of potential buyers, many of whom could also be consumers of plaintiff's music."⁹⁴ After determining that the proximity factor favored the plaintiff, the court analyzed whether the marks were similar enough to cause consumer confusion, testing "on three levels: sight, sound, and meaning."⁹⁵ The defense argued that since "Rebelution" was used on the album cover art in front of a picture of Perez that this would prevent consumer confusion, but the nature of internet advertisements complicated this case.⁹⁶ Advertisement paid for by Pitbull would cause internet searches to produce his music when searching the word "Rebelution" instead of plaintiff's music.⁹⁷ The court concluded that this factor favored the plaintiff given that both Perez's use of "Rebelution" and the plaintiff's use would be "encountered in the online marketplace."⁹⁸

Although the court concluded, in assessing the fourth factor, that no evidence of actual confusion existed between the marks, the court did worry about consumer confusion, given that the marketing channels of the two artists overlapped.⁹⁹ The concern caused the fifth factor, converging marketing channels, to be decided in favor of the plaintiff.¹⁰⁰ The degree of care factor did not favor either party, according to the court.¹⁰¹ The court determined that Perez did not act in bad faith by using the mark.¹⁰² Finally, the court determined it was unlikely that the defendants would expand their business using the mark since the two parties were "already operat[ing] in the same marketplace."¹⁰³ One important takeaway from this decision that affects indie artists, and their trademark rights, is how the court acknowledges the effects of the internet on

⁹² *Id.* at 891.

⁹³ *Id.* at 893-94.

⁹⁴ *Id.* at 894.

⁹⁵ *Id.* (citing *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 351 (9th Cir. 1979)).

⁹⁶ *Id.* at 894.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 896-97.

¹⁰¹ *Id.* at 897.

¹⁰² *See id.* at 898 (noting that Perez has "had significantly more commercial success than Rebelution" and "it [was] unlikely that defendants used plaintiff's mark to tread on plaintiff's goodwill).

¹⁰³ *Id.*

the trademark rights of the indie artist plaintiff. The court noted that a turning point had occurred in the music industry, where the tradition of having only physical music available to the public is a relic of the past.¹⁰⁴ The court explained that “[g]one are the days when music consumers went to the neighborhood record store to browse an aisle carefully organized into genres by a music aficionado [sic]” because this music industry tradition was “replaced by iTunes, traditional marketing campaigns by Facebook banner ads and YouTube videos.”¹⁰⁵

The *Rebellion* case proves that indie artists like Anita “Lady A” White can go against industry giants and win. But there are key differences between how Anita White protected her brand and how the plaintiff in the *Rebellion* case protected his. First, the *Rebellion* plaintiff preemptively protected his brand by registering his band name and album with the USPTO.¹⁰⁶ The *Rebellion* plaintiff had a stronger protection argument than White by having a definitive time stamp of approval from the USPTO, proving he had rights to the mark before Perez.¹⁰⁷ Both Anita White and the owner of the *Rebellion* mark used their marks before their adversaries began to claim ownership of them. Anita White’s mark, however, can be characterized as weaker because she created her brand without the formal protection of the Lanham Act.¹⁰⁸

Second, there is no mention in *Rebellion* that the defendant tried to gain registration for the contested mark, as compared the plaintiff taking these measures to protect the mark.¹⁰⁹ In White’s case, LAE has protected the mark “Lady A” through USPTO registration as of 2011.¹¹⁰ White tries to counter the issue of not registering her mark on the basis that she “owns nationwide common law rights in the mark” since she “has used the trademark ‘LADY A’ for nearly 30 years.”¹¹¹ The court was seemingly unimpressed with White’s argument, largely because common law trademark rights are restricted to “actual, continuous use in particular areas,” but White has been using her trademark in various parts of the country.¹¹² Furthermore, White’s argument becomes

¹⁰⁴ *Id.* at 897.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 885.

¹⁰⁷ *Id.*

¹⁰⁸ *Scott v. White*, 539 F. Supp. 3d 831, 837, 841 (M.D. Tenn. 2021).

¹⁰⁹ *See generally Rebellion*, 732 F. Supp. 2d at 883 (asserting that the defendant attempted to use the contested mark for his album without any reference to whether he had attempted to register the mark beforehand as the plaintiff had successfully done).

¹¹⁰ *Scott*, 539 F. Supp. 3d at 831.

¹¹¹ *Id.* at 838.

¹¹² *Id.* at 842-43 (citation omitted).

convoluted when attempting to establish her common law rights. Venue is an essential issue when determining and defending common law rights to a trademark, given that common law rights are determined by “whether the mark’s primary significance is a generally known geographic location”¹¹³ In *Scott v. White*, White tries to change the venue from Tennessee to Washington, her home state, to strengthen her argument that she has continuously used the mark in that region.¹¹⁴ The judge, however, noted that she began defending her mark against LAE in Tennessee by “initially engaging a Tennessee-based attorney and through discussions and exchanging [] draft agreements with the Tennessee-based plaintiffs, directly related to [LAE’s] pending request for a declaration of non-infringement.”¹¹⁵

By seeking legal counsel in Tennessee, White weakened her chance of prevailing on protecting her mark two-fold. First, White lost her argument that venue should be changed by pursuing legal counsel in the state of Tennessee, and in the process, weakened her argument for common law rights;¹¹⁶ the court noted that she had performed in Tennessee several times during White’s “Lady A” career, debilitating her argument that she had common law rights related to her career being based in Washington rather than Tennessee.¹¹⁷ It is possible that White could have taken the more precautionary and preventive route that the *Rebellion* plaintiff took by registering her “Lady A” with the USPTO decades ago when she began her career. This position, however, minimizes how nearly impossible it would have been for White to foresee internet algorithms and search engines being such a threat to her career decades down the line. If White had not expanded her career to the national level, perhaps the Lanham Act would have provided White with the common law protection needed from LAE’s infringement, the same way it did in *Rebellion*. More importantly than this speculation, White’s case is indicative of a larger threat concerning trademark infringement, the music industry, and the success of independent artists.

What is most significant to discuss for future claims of independent artists is whether another legal recourse could be implemented to better meet the needs of indie artists who either (1) do not have the legal hindsight or dexterity to register their mark or (2) who operate at a national level so that their geographic scope is too expansive for current common law rights coverage. While it seems

¹¹³ 22 AM. JUR. 3D *Proof of Facts, Common-Law Trademarks or Trade-name Rights In Geographical Areas of Prior Use*, §1 (1993).

¹¹⁴ *Scott*, 539 F. Supp. 3d at 831.

¹¹⁵ *Id.* at 842.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 842-43.

too soon to say whether White can prove the strength of her mark against LAE, it is essential to consider what the future of trademark law for independent artists potentially provides for indie artists to prevent another “Lady A” situation from occurring.

B. COMMON LAW RIGHTS AT A NATIONAL LEVEL

The Lanham Act and the current common law rights doctrine are too outdated to protect independent artists in an era where music is consumed mainly through the internet. In terms of reforming the current legislation, the Lanham Act would be much more difficult to adjust to protect independent artists, which is most strongly supported by the success of the indie artist plaintiff in *Rebellion*. But what about independent artists who lack the foresight, or perhaps the legal dexterity, to know that they must register their trademarks to successfully defend them, despite having used the mark for several years?

An area ripe for reform for this type of trademark infringement is under the common law. Broadening the scope of the common law’s geographic reach in the era of internet streaming will be beneficial to independent musicians in several ways. It would certainly improve Anita White’s chances of winning her ongoing case. First, common law protection belongs to the first creator who uses the mark in commerce.¹¹⁸ This premise favors independent artist rights because “use in commerce” is often broadly construed,¹¹⁹ so all that an indie artist would need to show is a history of releasing music to a streaming service that pays the artist per stream. It is important to note, though, that the indie artist cannot release a song on a streaming service only with the intent to gain a right to the mark; there is a standard of good faith for attaining common law rights through commerce.¹²⁰

The common law trademark protections as they currently exist sound ideal for independent artists in the modern internet era, although that is up until the requirement that common law trademark protection must be confined to a specific geographic region to qualify for protection.¹²¹ This requirement is not contemporarily realistic when so many goods and services can be acquired through the internet, which is not confined to a single geographic region. While Anita White asserts her common law rights in Seattle, a city recognized for

¹¹⁸ AM. JUR. 3D *Proof of Facts, Common-Law Trademarks or Trade-name Rights In Geographical Areas of Prior Use*, §7 (1993).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* §10.

producing well-known artists,¹²² she still suffers from her limited geographic protection—especially if she is forced to defend her rights in a state like Tennessee¹²³, where LAE has the home field advantage due to being based there¹²⁴. If the geographic limitation for common law rights expands, it would not be detrimental to commerce or consumer confusion. Instead, it would merely be an equalizer between creators with extensive legal resources and those without by reducing external advantages that the internet provides to those who can afford algorithmic advertising.¹²⁵

IV. CONCLUSION

While it is still uncertain whether Anita “Lady A” White will receive a just verdict for her trademark infringement claims, it is important to look to the future of what trademark infringement protection has the potential to be if proper legislative reform is implemented through the common law. The mitigation of consumer confusion is at the forefront of trademark law,¹²⁶ but creators like Anita White will be discouraged from producing their work for consumers if they must endure extensive measures to ensure their mark truly belongs to them. Trademark law nuances created by the internet cannot be ignored, and the music industry cannot afford to drop the mic on indie artists to protect music industry giants.

¹²² *Music and Concerts*, VISIT SEATTLE, <https://visitseattle.org/things-to-do/arts-culture/music-and-concerts/> (last visited Nov. 28, 2021).

¹²³ See generally *Scott v. White*, 539 F. Supp. 3d 831 (M.D. Tenn. 2021) (discussing the reasons for Scott’s aversion to continuing the lawsuit in Tennessee).

¹²⁴ Ilara Urbinati, *Lady A’s Nashville City Guide*, LEO (Oct. 18, 2020), <https://www.leoedit.com/culture/lady-as-nashville-city-guide/>.

¹²⁵ See Maynard, *supra* note 62 at 1308 (explaining that those who can afford to pay for advertising for search engines receive increased consumer traffic to their pages because they are listed on the first page of the search engine results).

¹²⁶ *Allard Enters. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 574 (6th Cir. 2001).