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Cover Page Footnote

The author would like to thank Jane Ginsburg, Alice Haemmerli and Avery Katz for their helpful comments on an earlier version of this paper. Of course, all mistakes and opinions expressed herein remain the author's.

Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity

Vincent M. de Grandpré *

INTRODUCTION

For those who seek to use celebrity identity for commercial purposes, the law of publicity remains as complex and confusing as ever, even if much, perhaps too much, has already been written on the topic. The difficulty begins with the fact that there is no single right of publicity in the United States today. To the extent that human identity is protected against unauthorized commercial use, it is under state law.¹ In addition, adjudication in this area of the law remains notoriously inconsistent. Some courts focus on the affront suffered by those who are unwillingly associated with someone else's commercial pursuit,² while others sanction an infringer's unjust enrichment.³ At other times still, judges emphasize an infringer's unfair competition against the plaintiff,⁴ the need to offer

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¹ See 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3, at 1-2 (2d ed. 2001) (the right of publicity, the right "to control the commercial use of [one's] identity" is a "state-law created intellectual property right whose infringement is a commercial tort of unfair competition."). According to McCarthy, half of the states have some form of right of publicity. See *id.* at § 6:1, at 6-5. Human identity is also protected by the Fourth Amendment under the rubric of constitutional privacy, and by state privacy laws. See *id.* § 5:52-5:55, at 5-94 to 5-102. Constitutional privacy focuses on government interference, however, while I am most interested in unauthorized uses of identity by private parties.

² See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097 (9th Cir. 1992); *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 873 (C.D. Cal. 1999); and *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 263 (Sup. Ct. 1984).

³ See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575-76 (1977); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 134 (2d Cir. 1984); and *Lugosi v. Universal Pictures*, 603 P.2d 425, 438, 441 (Cal. 1979) (Bird, J., dissenting).

⁴ See, e.g., *Zacchini*, 433 U.S. at 575; *Lugosi*, 603 P.2d at 438.

incentives to performers and celebrities generally,⁵ and even the risk of consumer confusion.⁶ It seems, however, that no single policy can explain all right of publicity cases, and disagreements about the relative merits of these justifications most certainly influence trial courts' assessments of the legality of unauthorized uses of identity. One federal appellate panel even expressed doubts about the very rationale for the right.⁷

Courts also seem to disagree about the likelihood and extent of injuries that result from unauthorized uses of celebrity identity.⁸ As a result, there is little certainty about the legality of a whole range of unauthorized expressive uses of celebrity likeness.⁹ At the same time, a debate continues to rage in academic journals about the legality and importance of "recoding," i.e., "transformative" uses of cultural symbols by an audience, for their own communicative purposes.¹⁰ So-called postmodern authors argue that celebrity

⁵ See, e.g., *Zacchini*, 433 U.S. at 573 (right of performance); *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 678 (7th Cir. 1986) (right of performance); and *Lugosi*, 603 P.2d at 441 (Bird, J., dissenting).

⁶ See, e.g., *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89, 99 (Tenn. Ct. App. 1987). Risk of consumer confusion is not necessary to prove right of publicity infringement, however, see *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 419 (1983).

⁷ See *Memphis Dev. Found. v. Factors, Etc., Inc.*, 616 F.2d 956, 959 (6th Cir. 1980). The holding of *Factors* was legislatively overruled by TENN. CODE ANN. § 47-25-1104 (1995).

⁸ Compare *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 969 (10th Cir. 1996) or *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) with *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992). The professional letter turner was eventually awarded \$403,000 in damages. See *CA Fed. Jury Awards Vanna White \$403,000 over Robot Ad*, ENT. LITIG. REP., Feb. 25, 1994.

⁹ See, e.g., *ETW Corp. v. Jireh Publ'g., Inc.*, 99 F. Supp. 2d 829 (N.D. Ohio 2000) (involving "limited edition prints" of golfer Tiger Woods at the 1997 Masters tournament sold by sports painter Rick Rush).

¹⁰ On recoding, see generally Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights – Comment on Robert H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work"*, 68 CHI.-KENT L. REV. 805 (1993), (citing Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863 (1991) (recoding is "a set of subcultural practices and activities in which 'the consumption of commodified representational forms is a productive activity in which people engage in meaning-making to adapt signs, texts, and images to their own agendas.'")); and Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999). By

persona¹¹ should be part of the public domain, available for all to “recode,” particularly if these activities have a profound significance for the producers and consumers of recoded social symbols.¹²

The confusion surrounding the right of publicity has been unsettling for those who seek to use celebrity identity nationwide. The multiplicity of rights of publicity has led trademark practitioners to propose federal legislation on the subject matter.¹³ It is feared that a lack of uniformity in state laws chills commercial uses of celebrity identity and favors forum shopping.¹⁴ These concerns are

“transformative” uses of human identity, I mean uses that are different from, and supersede, the plaintiff’s “use,” if any, of his personality. In the context of copyright law, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message” (citation omitted)); and Pierre N. Leval, *Commentary: Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (“The [transformative] use must employ the quoted matter in a different manner or for a different purpose from the original.”).

¹¹ Persona is “the personality that a person (as an actor or politician) projects in public,” and identity, “the distinguishing character or personality of an individual” (last visited Dec. 18, 2001). See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, available at <http://www.m-w.com>. I use the terms *persona* and *identity* interchangeably.

¹² Two articles stand out in their postmodern critique of the right of publicity: David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1982); and Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993).

¹³ See INTERNATIONAL TRADEMARK ASSOCIATION, DRAFT PUBLICITY RIGHTS LEGISLATION (Proposal to Amend the Trademark (Lanham) Act of 1946, Sept. 30, 1996) (draft since withdrawn pending further research); Symposium, *Rights of Publicity: An In-Depth Analysis of the New Legislative Proposals to Congress*, 16 CARDOZO ARTS & ENT. L.J. 209 (1998); and more specifically Richard S. Robinson, *Preemption, The Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183 (1998); and Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 477 (1999). The lack of uniformity of the right of publicity across states may worry some, as others were concerned about the multiplicity of state trademark dilution statutes before the Lanham Act was amended by the Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified at 15 U.S.C.A. 1125(c), 1127 (West 1998 & Supp. 1998)). Others are also concerned about the interface between the federal Copyright Act and state rights of publicity. See, e.g., *Wendt v. Host Int’l, Inc.*, 197 F.3d 1284, 1285 (9th Cir. 1999) (Kozinski, J., dissenting).

¹⁴ See Jacqui Gold Grunfeld, *Docudramas: The Legality of Producing Fact-Based Drama – What Every Producer’s Attorney Should Know*, 14 HASTINGS COMM. & ENT. L.J. 483, 509-11 (1992) (discussing Elizabeth Taylor’s action against ABC for planning a docudrama about her life).

understandable: the general principles of fairness and equity that fostered the emergence of the right of publicity must give way, in their maturity, to more certain legal rules. The right of publicity is in need of a theoretical model, and assessing right of publicity infringements on criteria of unjust enrichment or fair rewards is unlikely to yield consistent case law.

Economics can go a long way towards making sense of the right of publicity because the rationale for the right of publicity is to offer incentives to celebrities and others to market their identity. In fact, the only decision of the United States Supreme Court on the right of publicity indicates that economics would shore up our understanding of how to balance this right with third-party speech. In *Zacchini v. Scripps-Howard Broadcasting*,¹⁵ the Court explored the constitutional limits of the right of publicity. By contrast with the right of privacy which protects “reputation, with the same overtones of mental distress as in defamation,” the Court wrote, “the State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.”¹⁶ The Court held that like copyright and patent, the right of publicity “provides an incentive for him [Zacchini] to make the investment required to produce a performance of interest to the public.”¹⁷ Although the *Zacchini* Court also alluded to the need to reward performers for their trade, its reasoning, which focused on the need to offer incentives, implied that a plaintiff’s fair reward—or a defendant’s unjust enrichment—had to be assessed in light of the right of publicity’s instrumental function.¹⁸

¹⁵ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

¹⁶ *Id.* at 573.

¹⁷ *Id.* at 576.

¹⁸ *See id.* at 573-76. (“Ohio’s decision to protect petitioner’s right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act.”). Note that the Supreme Court’s jurisdictional posture in *Zacchini* may have affected what the Court allowed itself to say about the right of publicity. The trial court had found for the plaintiff, but the Ohio Court of Appeals and Ohio Supreme Court had reversed, holding that whatever right the plaintiff had, a television station had a privilege to report matters of public interest. But “[i]nsofar as the Ohio Supreme Court held that the First and Fourteenth Amendments of the United States Constitution required judgment for respondent,” the U.S. Supreme Court reversed. *See Zacchini*, 433 U.S. at 565-66. The scope of the *Zacchini* holding is also unclear. Unlike most right of publicity cases, *Zacchini*

In this regard, the failure of American courts to heed the suggestion of the Supreme Court is largely responsible for the diversity of outcomes in right of publicity cases. Although case law is replete with references to unjust enrichment,¹⁹ regrettably few judges pause to consider the incentives structure facing performers, celebrities and right of publicity plaintiffs generally. Yet, what is unjust in the context of the commercial exploitation of persona depends on too many factors to be decided without careful consideration of a plaintiff's situation.²⁰ To be helpful, claims of unfairness must be unbundled, that is to say that claims about the distributive consequences of particular activities must be informed by a close scrutiny of the market in which injustice is alleged to have occurred.²¹

Surprisingly perhaps, few economic analysts of the law have studied the right of publicity. Of those who have, Mark Grady's effort clearly stands out as the most detailed.²² Building on his work,

did not involve an unauthorized use of identity for promotional purposes, but a performance which, as the Court pointed out, is perhaps "the strongest case for the 'right of publicity.'" See Douglas G. Baird, Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.*, 30 STAN. L. REV. 1185, 1186-87 (1978) (arguing that rights of performance cases should really be distinguished from other right of publicity cases).

¹⁹ See, e.g., *Carson v. Here's Johnny Portable Toilets, Inc.* 698 F.2d 831, 838 (6th Cir. 1983) (Kennedy, J. dissenting); and *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978). See also Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 59-62 (1994) (discussing the prominence of the unjust enrichment rationale in publicity theory).

²⁰ As Douglas G. Baird wrote about misappropriation:
It is more than a little distressing to find in many of the opinions that adopt natural rights theory a statement to the effect that "[t]he controlling question . . . is whether the commercial practice at issue is fair or unfair." If the only limit on the plaintiff's right were whether or not the grant of relief would be fair, judges would have little guidance other than their own subjective perceptions of what was good.
See Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 419-20 (1983) (footnote omitted). Indeed, it is not always transparent what courts consider unfair in third-party exploitation of the plaintiff's identity.

²¹ Furthermore, to the extent that the law forbids unauthorized uses of identity to prevent undue enrichment, the rules of right of publicity infringement should account for the fact that media organizations also profit from their exploitation of human identity.

²² See Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97 (1994). See also RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW*

I also present an economic analysis of the right of publicity, attempting to assess whether the current rules foster efficiency or not.²³ Economics may also help us understand the evolution of the right of publicity in the last one hundred years or so, from not being recognized at all, to being recognized as an inalienable personal right, to becoming, in many jurisdictions, a form of property.²⁴

To be sure, economic reasoning does not account for all the considerations that legal experience has deemed relevant in analyzing right of publicity cases, and I do not wish to belittle the importance of moral discourse. To the contrary, clarifying oft-cited economic arguments would allow the rest of the right of publicity debate to proceed more tractably. Irrespective of our views about the proper scope of this right, most of us have become sensitive to the logic of markets. Economic arguments have become so common in the analysis of property rights that any pragmatic conception of the right of publicity stands to be influenced by efficiency considerations.

I present my argument in the following manner. Part II of this paper summarizes the current scope of the right of publicity, emphasizing both the inconsistencies of the current case law and the

49 (5th ed. 1998); Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978); 1 MCCARTHY, *supra* note 1, § 2:7, at 2-19 to 2-22; and JULIUS C.S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA 245-57 (1996).

²³ Efficiency describes an allocation of resources that maximizes aggregate economic value. Aggregate value refers to the sum of individual value, as measured by how much people are willing to pay for the use of a resource. See POSNER, *supra* note 22, THE ECONOMIC ANALYSIS OF LAW, at 13.

²⁴ Economic theory holds that a property right over a resource only arises if the costs associated with changing from a scheme of common to private property are outweighed by the benefits expected from privatization. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 349 (1967). What accounts for this cost-benefit shift in the last century? On this matter, a theory that will not work is the circular one that the right of publicity should be protected because human identity is valuable, as evidenced by the public's willingness to purchase identity-rich goods and services. On the one hand, this theory does not explain the evolution in the legal protection of identity. On the other hand, the marketplace for identity presupposes the right of publicity. But how could we justify this right in the first place? See Douglas G. Baird, *supra* note 18, and Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988). See also Madow, *supra* note 12, at 148-79 (discussing the evolution of public attitude towards unauthorized use of a celebrity's likeness).

obvious limitations of the standard condition of right of publicity infringement, namely that the defendant's use of the plaintiff's identity must be "commercial" in nature. Having shown that the right of publicity is in need of a theoretical model, I go on in Part III to develop an economic model of the right of publicity. After looking briefly at the theory of property rights and the market for celebrity identity, Part III emphasizes that unauthorized uses of celebrity identity not only result in congestion externalities but also account for powerful network effects. Indeed, well known celebrities acquire secondary meanings and become, quite literally, figures of speech. Moreover, celebrity markets are plagued with high transaction costs that may prevent the production of "celebrity-rich," socially valuable goods and services, particularly of the "recoding" type. As a result, Part III underscores that the current right of publicity is overbroad. Instead, the law should grant every person a property right in her identity; but if she is a celebrity and her persona has acquired secondary meaning, she should only recover if the unauthorized use of her identity is deceptive or directly competes with her own use, without being transformative. In addition, the law should consider whether the plaintiff and defendant could have agreed to the allegedly infringing use if the defendant had sought authorization or whether transaction or coordination costs would have prevented that transaction. Finally, Part IV dwells on the distributive consequences of the rules proposed here. To the extent that an efficient right of publicity would be perceived as unfair because it allows third parties to benefit economically from a person's fame, Part IV suggests that celebrity identity should be protected by a liability rather than a property rule.

Of course, this is not the first article written about the right of publicity. Yet, no one, to my knowledge, has attempted to explain the right of publicity in economic terms to the extent proposed here. Further, this article attempts to develop a language to allow both friends and foes of the right of publicity to speak to one another, particularly with respect to the phenomenon of "recoding." In this respect, I hope that I can, in my own limited way, pursue the type of discussion that Michael Madow initiated in 1993 and that has continued since then to challenge us.

II. A SUMMARY OF THE LAW OF PUBLICITY

The right of publicity is the right of any person to prevent others from using her identity for commercial purposes.²⁵ The elements of this cause of action usually are: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of the plaintiff's name, likeness or distinguishing characteristics to the defendant's advantage, usually commercial; (3) lack of consent; and (4) resulting injury.²⁶ Although some might consider this definition overbroad, the right of publicity has expanded in all jurisdictions, since its inception in the 1950's, to protect the amorphous concept of human "identity."²⁷ To be sure, much state legislation²⁸ declares that the right of publicity is only infringed if certain personal attributes—name, voice or picture—are used. But the list of these protected

²⁵ Everyone, not only celebrities, has a right of publicity. *See* 1 MCCARTHY, *supra* note 1, §§ 4.1 and 4.3, at 4-5 to 4-7. Because of the economics of litigation, however, only celebrities are likely to rely on the right of publicity. Be that as it may, I use the term "celebrities" to describe any person whose identity is of value to others.

²⁶ *See, e.g., Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417-18 (Under California law, "a 'direct' connection must [also] be alleged between the use and the commercial purpose."). *See also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995). Section 46 states: "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 under the rules stated in §§ 48 and 49."

²⁷ We owe to Judge Frank of the Second Circuit the modern description of the right of publicity as a form of property. *See Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). Before then, courts relied on the right of privacy to protect individuals from the unauthorized use of their name or likeness. Given that the imperatives of commerce have played such a crucial role in the development of the right of publicity as property, an analysis of the economics of the market for celebrity persona seems all the more appropriate.

²⁸ In a significant number of American jurisdictions, the right of publicity is statutory in nature: *see, e.g.,* N.Y. CIV. RIGHTS LAW §§ 50 & 51 and CAL. CIV. CODE § 3344. In some states, *e.g.* New York or Virginia, legislation is the only source of this right (*see* *Stephano v. News Group Publ'ns Inc.*, 474 N.E.2d 580, 583 (N.Y. 1984); *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204, 1206 (W.D. Va. 1981)), but not in all (*see, e.g.,* *Slivinsky v. Watkins-Johnson Co.*, 221 Cal. App. 3d 799, 807 (1990) (California); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (Illinois)). By contrast, the right of publicity exists only at common law right in a number of other jurisdictions: this was the case of Ohio, for example. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575-76 (1977). On the legal sources of the right of publicity, *see generally* Lorin L. Reisner, *The Right of Publicity: History and Scope*, 1999 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series 574 PLI/Pat 725).

characteristics is expanding in most jurisdictions²⁹ and has always been interpreted broadly and purposively.³⁰ Furthermore, in answer to new forms of exploitation, the tendency of courts has been to hold that any depiction or act from which a person may be *identified* is an appropriation of identity, regardless of *how* the plaintiff is identified.³¹ Thus, subject to statutory language when applicable, courts have moved away from formulaic definitions of right of publicity infringement.

Many courts have also lowered the threshold of misappropriation and sanctioned depictions that *evoke* a plaintiff rather than *identify* him. For example, the depiction of a slightly modified racecar was held to infringe the driver's right of publicity even if his features were hidden by protective gear.³² In *White v. Samsung Electronics*, the Ninth Circuit held that there existed a genuine issue of fact as to whether the defendant's humorous ad featuring a robot on a game

²⁹ For example, the California statute was amended in 1984 to add voice and signature to name and likeness as personal attributes, which may not be appropriated without authorization. See 1984 CAL. STAT., 1704, § 2. Common law rights of publicity have also been defined increasingly broadly. See, e.g., *McFarland v. Miller*, 14 F.3d 912 (3d Cir. 1994) (protecting stage identity).

³⁰ See *Kerby v. Hal Roach Studios, Inc.*, 127 P.2d 577, 579 (Cal. Dist. Ct. App. 1942) ("New sets of facts are continually arising to which accepted legal principles must be applied, and the novelty of the factual situation is not an unscalable barrier to such application of the law."). In New York, for example, that the statute only covered "portrait or picture" and "name" did not prevent courts from issuing remedies against imitations by look-alike persons and manikins: see *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254 (Sup. Ct. 1984) (look-alike); and *Young v. Greneker Studios, Inc.*, 26 N.Y.S.2d 357, 358 (Sup. Ct. 1941) (manikin).

³¹ See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992) ("[i]t is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so. [...] A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth."). This tendency is particularly evident in the Ninth and Sixth Circuits, in their interpretation of California and Michigan law especially. See J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture – The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA. J.L. & ARTS 129, 135 (1995); Steven C. Clay, Note, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485, 494-95 (1994); *Cohen v. Herbal Concepts, Inc.*, 472 N.E.2d 307, 309 (N.Y. 1984); *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 622-23 (S.D.N.Y. 1985); and *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 415 (9th Cir. 1996).

³² *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).

show set, wearing a dress, jewelry and a wig, infringed the plaintiff's right of publicity.³³ A court also allowed TV host Johnny Carson to obtain damages when a portable toilet provider included in its name the widely known phrase "Here's Johnny" by which Carson was introduced nightly on his show.³⁴ Plaintiffs have even alleged, with mixed results, that their performing style had been infringed.³⁵ The power conferred by the right of publicity has become all the more significant that evoking a celebrity today requires saying, writing or showing less and less.³⁶ Although advertisers have used celebrities to sell goods and services at least since the 1700's,³⁷ the twentieth century brought increased public familiarity with celebrities' looks, acts and personal histories. These trends have resulted in an expanding right of publicity, focused on the protection of the elusive concept of human identity.³⁸ As one might guess, these developments have allowed celebrities to gain extensive control over the public use of their characteristic features.

Not all unauthorized uses of a person's likeness amount to right of publicity infringement, however: subject to the applicable statutes, only *advertisement* and *commercial uses* trigger liability.³⁹ Advertisement is generally defined as the solicitation of patronage "intended to promote the sale of some collateral commodity or service," and may include not-for-profit ads.⁴⁰ By contrast,

³³ *White*, 971 F.2d 1395.

³⁴ *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

³⁵ *Compare* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) *with* *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S.2d 661, 664 (App. Div. 1977).

³⁶ In *Allen*, the plaintiff was held to be recognizable from the defendant's use in part because its ad displayed videotapes of movies about which the protagonist in one of Allen's films had a fetish. *See Allen*, 610 F. Supp. at 618. *Cf. Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108 (N.Y. 1913), where the plaintiff's name probably had to be used in a photoplay so that the public could understand whom it featured. Of course, the defendant's use would probably be held privileged today.

³⁷ *Madow*, *supra* note 12, at 148-49.

³⁸ *See id.* at 177, 178.

³⁹ *See, e.g.*, CAL. CIV. CODE § 3344(a) (1999); FLA. STAT. Ch. 540.08 (1999); N.Y. CIV. RIGHTS LAW § 51 (1992); and 765 ILL. COMP. STAT. 1075/10 (2001). This rule of law generally accords with the more limited scope of protection afforded by the First Amendment to commercial speech, i.e. speech that relates "solely to the economic interests of the speaker and its audience." *See Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 561-566 (1980).

⁴⁰ In New York, *see Davis v. High Soc. Magazine, Inc.*, 457 N.Y.S.2d 308, 313 (App.

commercial use is a more elusive concept. At its simplest, it implies a use for profit, but the concept has evolved to mean uses not privileged in the interest of the public.⁴¹ Thus, publishers or broadcasters are generally sheltered from liability even though they too are profit-making entities.⁴²

At the heart of the public interest defense lies news reporting, which includes not only reporting on current events, but also “stories of consumer interest,” “matters of scientific and biological interest” and satire.⁴³ In most jurisdictions, statutes themselves allow the use of a person’s identity for news reporting or public affairs,⁴⁴ but even when they do not, courts read a First Amendment exception into the law.⁴⁵ Works of fiction, entertainment publications and broadcasts also receive a generous measure of First Amendment protection: in the words of the Tenth Circuit, “[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.”⁴⁶ An ad incidental to a privileged use may also be privileged.⁴⁷

Beyond these general principles, however, defining when a particular use of identity is in the public interest, and therefore

Div. 1982); *Almind v. Sea Beach Ry. Co.*, 141 N.Y.S. 842, 843 (App. Div. 1913). The law may have changed on this last point, however: *see Beverley v. Choices Women’s Med. Ctr., Inc.*, 587 N.E.2d 275, 278-79 (N.Y. 1991). In this case involving a hospital calendar, the Court of Appeals emphasized the “for-profit” character of the hospital, and the calendar’s clear promotional vocation. *See also* MCCARTHY, *supra* note 1, § 8.11, at 8-95 (discussing the line between news, fiction and advertising).

⁴¹ *See* *Davis v. High Soc. Magazine, Inc.*, 457 N.Y.S. at 313-14.

⁴² *See* *Arrington v. N.Y. Times Co.*, 434 N.E.2d 1319, 1322 (N.Y. 1982), and *Falwell v. Penthouse, Int’l Ltd.*, 521 F. Supp. 1204, 1210.

⁴³ *See* *Stephano v. News Group Publ’ns, Inc.*, 474 N.E.2d 580, 585 (N.Y. 1984); *Finger v. Omni Publ’ns Int’l*, 566 N.E.2d 141, 144 (N.Y. 1990); and *Davis*, 457 N.Y.S.2d at 315.

⁴⁴ *See, e.g.*, CAL. CIV. CODE § 3344(d) (1999).

⁴⁵ Under New York law, *see Stephano*, 474 N.E.2d at 584-85; *Howell v. New York Post Co.*, 612 N.E.2d 699 (N.Y. 1993), *aff’d*, 619 N.E.2d 650 (N.Y. 1993). The concepts of public interest and newsworthiness should also be defined broadly. *See Stephano*, 474 N.E.2d at 585.

⁴⁶ *See* *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996), (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)). *See also* *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).

⁴⁷ *See* *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 130-31 (2d Cir. 1984); and *Booth v. Curtis Publ’g Co.*, 223 N.Y.S.2d 737, 743-44 (App. Div. 1962). *But see* the dissent in *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10 (App. Div. 1975), *aff’d*, 352 N.E.2d 584 (N.Y. 1976). For more details, *see also* 2 MCCARTHY, *supra* note 1, § 7:11, at 7-19.

privileged, is not an easy task. Generally speaking, non-authorized use of human persona is less likely to be privileged if it occurs in connection with goods rather than in the news or in the entertainment media. For example, in *Beverly v. Choices Women's Medical Center, Inc.*, the New York Court of Appeals refused to apply the public interest exception to a calendar illustrating important dates in the history of the women's movement, holding that the defendant was not a "media enterprise."⁴⁸ In another case, *Rosemont Enterprises v. Urban Systems*,⁴⁹ a court held that a board game where players were required to answer questions about Howard Hughes' life was not a biographical work in a different form; it was a commodity and an "entertaining game of chance."⁵⁰ And these courts are hardly alone in their fear that medium-neutrality would result in the complete abridgment of the right of publicity.⁵¹

Yet, other courts have applied the public interest defense without regard for the medium, focusing exclusively on the expressive content of the defendant's activity rather than its form.⁵² News-related goods, posters of athletes for example, have been held to be privileged.⁵³ In a most remarkable case, a baseball players' association sought to enjoin the defendant from selling trading cards

⁴⁸ *Beverly*, 587 N.E.2d at 279.

⁴⁹ *Rosemont Enter. Inc. v. Urban Sys.*, 345 N.Y.S.2d 17 (App. Div. 1973).

⁵⁰ Law school socratic method fans might quarrel with the court's decision in *Rosemont Enterprise*: why are questions and answers not informative? See also Ira J. Kaplan, *They Can't Take That Away From Me: Protecting Free Trade in Public Images From Right of Publicity Claims*, 18 LOY. L.A. ENT. L. REV. 37, 52-53 (1997); and *Molony v. Boy Comics Publishers, Inc.*, 98 N.Y.S.2d 119, 123 (App. Div. 1950) ("It does not follow that plaintiff's exploit has been fictionalized merely for the reason that it has been told through a form of picture-writing, which is as old as the human race."). A similar reasoning could apply to the *Rosemont* case.

⁵¹ See generally 2 MCCARTHY, *supra* note 1, § 7, at 7-27 (arguing that the law should focus on the medium, not the message for fear of making the First Amendment "the vehicle for legalizing commercial theft"). See also *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (enjoining use of baseball players' names and game statistics on a baseball table game); and *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967) (enjoining use of professional golfers' names).

⁵² See *Stephano*, 474 N.E.2d at 585 ("It is the content of the article and not the defendant's motive or primary motive to increase circulation which determines whether it is a newsworthy item, as opposed to a trade usage, under the Civil Rights Law.").

⁵³ See *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790 (1995). But see *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 88 (2d Cir. 1989).

that parodied the plaintiff's members.⁵⁴ The Tenth Circuit dismissed the view that the medium the defendant had chosen to trade in diminished its constitutional right to lampoon the players: "The protections afforded by the First Amendment, however, have never been limited to newspapers and books."⁵⁵ The Court went on to remark that the First Amendment had served to protect "untraditional forms of expression" such as flag burning, nude dancing, and wearing a jacket bearing the words "Fuck the Draft."⁵⁶ But if we ignore political speech, which knows almost no limits,⁵⁷ the *Cardtoons* reasoning embodies a minority position.

Although courts look more favorably upon unauthorized use of human persona in the entertainment and news media, media defendants are not entirely safe from liability either. For example, courts have often re-characterized a defendant's alleged fiction as disguised commercial exploitation, although the distinction between these two concepts is not always clear.⁵⁸ With the same result, other courts have held that a defendant's use of a plaintiff's likeness, seemingly in the public interest, "has no real relationship to the article."⁵⁹ A defendant may also be found to infringe the plaintiff's right of publicity if the former commits a fault in publishing false or fictitious information, even if the defendant's use was otherwise in the public interest.⁶⁰ Thus, unauthorized biographies that

⁵⁴ *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996).

⁵⁵ *Id.* at 969.

⁵⁶ *Id.*

⁵⁷ See, e.g., *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 508 (Sup. Ct. 1968) (in which the court refused to award a remedy where a defendant had published a poster of the plaintiff, a comedian in the habit of running for President.) See also Ellen Koteff, *Pizza Hut Lampoons First Lady, But to Be the Big New Yorker, You've Got to Be a Good Sport*, NATION'S RESTAURANT NEWS, Nov. 8, 1999, at 35 (discussing Pizza Hut's advertisement featuring a Hillary Rodham Clinton look-alike).

⁵⁸ Compare *Geary v. Goldstein*, 831 F. Supp. 269 (S.D.N.Y. 1993) with *Frank v. Nat'l Broad. Co., Inc.*, 506 N.Y.S.2d 869 (App. Div. 1986).

⁵⁹ See *Murray v. N.Y. Magazine Co.*, 267 N.E.2d 256, 258 (N.Y. 1971). But cf. *Thompson v. Close-Up, Inc.*, 98 N.Y.S.2d 300 (App. Div. 1950) (where a photo of the plaintiff was used in an article on the sale of illicit drugs, although the plaintiff had no connection with this field of activity) with *Finger v. Omni Publ'ns Int'l, Ltd.*, 566 N.E.2d 141, 144 (N.Y. 1990) (questionably finding a real relationship between a picture of the plaintiff's family and the topic of experimental fertilization techniques).

⁶⁰ In New York, at least, this type of right of publicity infringement follows the rules of

substantially fictionalize or deliberately falsify a person's life have been held to attract liability.⁶¹

Furthermore, even media organizations cannot avoid "paying the help" if news or serious commentary is not involved, for their actions might then become "advertisement in disguise."⁶² For example, in *Grant v. Esquire*⁶³ a federal district court held that a fashion magazine could not publish movie stars' pictures modified to model clothes, without commentary or information.⁶⁴

In its only decided case on the right of publicity, the United States Supreme Court also denied immunity to a media organization. In *Zacchini v. Scripps-Howard Broadcasting*,⁶⁵ a television station presented on the evening news all fifteen seconds of Hugo Zacchini's human cannonball act. The Court held that the television station had no constitutional privilege to appropriate the defendant's performance and threaten his livelihood because his act was not otherwise a newsworthy event.⁶⁶ While the Court acknowledged that its reasoning was imprecise, it added:

defamation: a defendant may only infringe the right of publicity of a public figure or of a limited-purpose public figure if the defendant acted with malice. See *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 132 (2d Cir. 1984); *Spahn v. Julian Messner, Inc.*, 233 N.E.2d 840, 842 (N.Y. 1967), *appeal dismissed*, 393 U.S. 1046 (1969). See also *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 424 (1983).

⁶¹ Under New York law, see *Spahn*, 233 N.E.2d at 842; see also *Hicks v. Casablanca Records*, 464 F. Supp. 426, 433 (S.D.N.Y. 1978). The law in other states may vary: see 2 MCCARTHY, *supra* note 1, § 8:73, at 8-107 (discussing fact, fiction and docudrama).

⁶² "Advertisement in disguise" is the name of the New York doctrine, which has functional equivalents in all states: See, e.g., *Murray v. N.Y. Magazine Co.*, 267 N.E.2d 256, 258 (N.Y. 1971); MCCARTHY, *supra* note 1, § 8.12, at 8-102.2.

⁶³ *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973).

⁶⁴ In a similar event, Life magazine published in 1989 a "story" about how Clark Gable would fare at the end of the century, complete with a picture of the cast of the television show, *Magnum, P.I.* See JOSHUA GAMSON, CLAIMS TO FAME: CELEBRITY IN CONTEMPORARY AMERICA 51-53 (1994). See also *Taggart v. Wadleigh-Maurice*, 489 F.2d 434 (3d Cir. 1973), where the court, reversing a grant of summary judgment for the defendant, found that a genuine issue of fact arose as to whether the plaintiff had been "drawn out as a performer" rather than merely "photographed as a participant in a newsworthy event" (the Woodstock festival).

⁶⁵ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

⁶⁶ *Id.* at 576.

[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.⁶⁷

Moreover, although the Court recognized that entertainment benefited from constitutional protection, it also observed that *Zacchini* was not seeking to repress expression, but to be paid for it.⁶⁸

The Supreme Court's holding in *Zacchini*, in the context of a news bulletin, underscores the difficulty of applying the commercial use criterion of right of publicity infringement. Not only is the expression "commercial use" not very enlightening, the Supreme Court certainly undermined the view that the medium of expression was determinative of the issue of infringement. Yet, not only has the commercial use condition already proved to be unsatisfactory, as in *Rosemont Enterprises* or *Beverley*, it will become increasingly difficult to defend in years to come as more goods and services take the form of information. A few examples may illustrate this point.

In recent years, film studios have sought to pay for ballooning production costs by pushing product placement to a degree never seen before.⁶⁹ Movies are a fantastic commercial medium: brand name products can be woven into a story, appear in a natural setting, be remembered for as long as the movie will be, and potentially

⁶⁷ *Id.* at 574-75.

⁶⁸ *Id.* at 578.

⁶⁹ For an instructive account of consumer reactions to product placement, see Denise E. DeLorme and Leonard N. Reid, *Moviegoers' Experiences and Interpretation of Brands in Films Revisited*, 28(2) J. OF ADVER. 71 (June 22, 1999). See also Eric Harrison, *Advertising Is So Much a Part of Life That It's Understandable to Find Familiar Products in Films. But Sometimes it Goes Too Far*, L.A. TIMES, Aug. 29, 1999, at 4 (describing the extent of product placement in the recent movies, sometimes at the expense of the underlying story). Product placement has also attracted some legal academic commentary: see generally Steven L. Snyder, Note, *Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?*, 1992 U. ILL. L. REV. 301; Robert Adler, *Here's Smoking at You, Kid: Has Tobacco Product Placement in the Movies Really Stopped?*, 60 MONT. L. REV. 243 (1999).

shape younger viewers' aspirations and identity.⁷⁰ As a news magazine put it: "the cinema is the adman's perfect setting—no distractions, no way to change channels."⁷¹ Product placement on television is popular for the same reasons: it delivers advertising when viewers are most attentive.⁷²

Tied-marketing and licensing arrangements have also become an important source of revenue for movie producers.⁷³ According to one estimate the producers of Teenage Mutant Ninja Turtles had licensed over 200 products, earning in 1989 more than \$350 million.⁷⁴ If entertainment and advertising are intertwined both on- and off-screen, to what extent can an easy distinction be made between commercial and non-commercial uses of celebrity identity?⁷⁵

⁷⁰ See DeLorme and Reid, *supra* note 69. Most importantly, product placement can be awesomely lucrative: see Ruth La Ferla, *For Fashion Designers, The Big Screen Becomes a Celluloid Runway*, N.Y. TIMES, Dec. 14, 1997, § 9, at 2 (discussing the use of Ray-Ban sunglasses by the lead roles in *Men in Black* which "brought a sales increase that the company put at threefold"); Stuart Elliott, *Reebok's Suit over "Jerry Maguire" Shows Risks of Product Placement*, N.Y. TIMES, Feb. 7, 1997, at D2 ("Sales of Reese's Pieces soared more than 70 percent post-'E.T.'").

⁷¹ *Rocky the Salesman (Brand Name Advertising in Motion Pictures)* THE ECONOMIST, Apr. 20, 1991, at 70.

⁷² See generally Terry Lefton, *You Can't Zap These Ads*, THE INDUSTRY STANDARD, March 26, 2001, available at <http://www.thestandard.com> (last visited Sept. 3, 2001) (describing product placement on TV show *Survivor: The Australian Outback*); Stuart Elliott, *Real or Virtual? You Call It: Digital Sleight of Hand Can Put Ads Almost Anywhere*, N.Y. TIMES, Oct. 1, 1999, at C1 (focusing on virtual ads that are also "capable of fighting commercial flight").

⁷³ See Louise Kramer, *Tricon Promo's Phantom Impact: Fast-Food Chains Alter Ads to Move 'Star Wars' Toys*, ADVERT. AGE, July 5, 1999, at 1 ("The 'Star Wars' deal stems from a reported \$2 billion pact PepsiCo signed with Lucasfilm in 1996 that also included its Pepsi-Cola Co. and Frito-Lay units. Tricon retained the link after PepsiCo spun it off in 1997."). See also Karen Hudes, *Independent Film, But With a Catch: A Corporate Logo*, N.Y. TIMES, Nov. 15, 1998, at A43 (discussing Tommy Hilfiger's \$10 million promotional campaign also advertising the movie *The Faculty*. Not only did characters in the movie wear Hilfiger's wardrobe, the movie's cast was featured in TV commercials for Hilfiger. "We think that film is very much our future here," said Hilfiger's Marketing VP).

⁷⁴ See *Selling America's Kids: Commercial Pressures on Kids of the 90's*, at <http://www.consumersunion.org/other/sellingkids/index.htm> (last visited Nov. 3, 2001).

⁷⁵ The recently adopted CAL. CIV. CODE § 3344.1 (West 2001) states in relevant part: "(3) If a work that is protected under paragraph (2) [a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial

The Italian clothes retailer Benetton is known for its “United Colors of Benetton” advertising campaign which, in its later phases, simply featured dramatic human events. One such installment featured a gripping photograph of thousands of Albanians escaping from their disintegrating country on a precarious boat. This ad simply consisted of a photograph and the Benetton trademark. It is interesting to note that this advertisement would probably not be so characterized under New York Civil Rights Law §§ 50 & 51: it can easily be distinguished from the *Beverley* case because of the absence of laudatory terms.⁷⁶ The publication of the ad contemporaneously with the events taking place in Albania also supports the claim that Benetton was trying to open the world’s eyes to the tragedy next door. Of course, we all know what Benetton is and where to purchase Benetton goods, but this merely underscores that in the advertisers’ global market, less and less needs to be said to promote well known products.⁷⁷ What is commercial use becomes

announcement for any of these works,] includes within it a use in connection with a product, article of merchandise, good, or service, this use shall not be exempt under this subdivision, notwithstanding the unprotected use’s inclusion in a work otherwise exempt under this subdivision, if the claimant proves that this use is so directly connected with a product, article of merchandise, good, or service as to constitute an act of advertising, selling, or soliciting purchases of that product, article of merchandise, good, or service by the deceased personality without prior consent from the person or persons specified in subdivision (c).” Assessing what is a commercial use of identity promises to become a more complicated task.

⁷⁶ See *Beverley v. Choices Women’s Med. Ctr., Inc.*, 587 N.E. 2d 275, 278-79 (N.Y. 1991).

⁷⁷ See Stephen R. Barnett, Comment: *The Right of Publicity Versus Free Speech in Advertising: Some Counterpoints to Professor McCarthy*, 18 HASTINGS COMM. & ENT. L.J. 593, 597 n.20 (1996). The author cites Richard Meares, *Ad Man Defends Notorious Benetton Campaign*, REUTERS WORLD SERV., Sept. 26, 1995, quoting Oliviero Toscani, creative director for publicity at Benetton, stating that “There isn’t a difference any more between advertising and editorial.” The distinctive style pioneered by Toscani, Creative Director at Tina Brown’s *Talk* magazine, has been imitated, for example in retailer Kenneth Cole’s Spring 2000 advertising campaign at <http://www.kennethcole.com> (last visited Sept. 30, 2001) or in The Body Shop’s ads for its hemp line of products available at <http://bodyshop.com/usa/interactivist/body-hemp.html> (last visited Oct. 8, 2001). See also Joanne Morreale and Karen Buzzard, *The Serialized mini-Drama: A new Trend in Advertising*, in ADVERTISING AND POPULAR CULTURE: STUDIES IN VARIETY AND VERSATILITY 94 (Sammy R. Danna ed., 1992) (discussing the public’s response to a New England Telephone serialized drama type commercial. The featured actors became so well known locally that people would stop them on the street and admonish them about how they handled the family crisis which was the central issue of the commercial). Custom

even more elusive in a postmodern culture where no clear line can be drawn between high culture and mass or popular culture, as well as between art and profit making.⁷⁸

Finally, any methodology focusing on the commercial status of the infringer or on the commercial character of the allegedly infringing expression will become increasingly difficult to apply on the Internet. The problem had already arisen on television where, by contrast to the written medium, there is a more confusing continuum between commercial and non-commercial expression.⁷⁹ This is only more so on the Internet, where entertainment, information and commercial expression are increasingly merging, particularly as bandwidth becomes cheaper.⁸⁰ In this context, many uses will have

publishing also presents similar difficult issues: see Alex Kuczynski, *Big Tobacco's Newest Billboards Are on the Pages of Its Magazines*, N.Y. TIMES, Dec. 12, 1999, § 1, at 1 (describing the growth of custom publishing for tobacco companies).

⁷⁸ See Frederic Jameson, *Postmodernism and Consumer Society*, in MOVIES AND MASS CULTURE 185, 186 (John Belton ed., 1996) (describing postmodern culture in these terms). Consider, for example, that Keith Haring quickly opened a Pop Shop in New York upon becoming famous; the nature of his work also made it difficult to disentangle his art from its merchandizing. See NEAL GABLER, *LIFE THE MOVIE: HOW ENTERTAINMENT CONQUERED REALITY* 133 (1998). More recently, graffiti artist KAWS has made a name for himself by mingling his work with advertisement in public places. How would the law react if the artist received some form of financial support from advertisers on whose boards he chose to draw? See Carly Berwick, *Public Arts Redux*, available at <http://www.feedmag.com/essay/es303lofi.html> (last visited Sept. 22, 2001). See also Somini Sengupta, *Marks from the Underground: The Graffiti Esthetic Surfaces in the Arts*, N.Y. TIMES, May 6, 1999, at B1 (discussing the integration of 1980's graffiti artists into the art and corporate worlds). Consider also the case of ads for Bombay Gin where artists are recruited to design a martini glass, for the sake of advertising; see <http://www.bombay.com/design> (last visited Sept. 6, 2000).

⁷⁹ See *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485 (N.Y. 1952).

⁸⁰ See Patrick Allossery, *A Turning Point for the Ad Industry*, NAT'L POST, Jan. 14, 2000, at C03 (quoting an ad executive saying about the AOL-Time Warner merger: "With all their new media capability and all the products they, themselves, have to advertise, do you think that these companies will be satisfied with 30-second TV ads? Our role as agencies will increasingly be to create non-linear ad content that is at the crossroads of movies and advertising.") See also Stuart Elliott, *When Dot-Coms Want to Build up Their Images, They Hitch Their Web Sites to a Star*, N.Y. TIMES, Nov. 16, 1999, at C14 (quoting a New York advertising executive: "The latest thing is the merging of commerce and entertainment to create content that consumers remember. . . ."); and Michael McCarthy, *Dot-coms Look for Starring Roles in Product Placement*, USA TODAY, Feb. 22, 2000, at 10B (discussing the AOL-Warner Bros. cross promotion deal in/of the movie *You've Got Mail*; a product placement executive is quoted as saying "[t]he fact that AOL is buying Warner Bros. shows the Internet world appreciates the value of entertainment content.").

both expressive and commercial aspects.

To sum up, not only has the definition of the right of publicity expanded in recent years to protect celebrity identity, the necessary criterion of infringement, commercial use, has become more difficult to apply. The result of these trends is a right of publicity that is broader, and possibly shakier, than ever.

III. AN ECONOMIC MODEL OF THE RIGHT OF PUBLICITY

A. *The Theory of Property Rights*

As we all know, social life is premised on the view that the presence of others enhances our lives, at least sometimes. From this reality, however, it follows that every society must adopt rules to minimize social costs and maximize the benefits of our gregarious life. Hence, an important goal of any successful legal system is to promote efficiency, for example by minimizing the cost of accidents or maximizing the value of scarce resources like land.⁸¹

Efficiency, however, is not achieved by preventing harm at any cost because precautions themselves are costly. Thus, an efficient law must create incentives for people to reduce harm to themselves and others up only to the point where the expense of doing so equals the benefit to all third parties. In the words of Robert Cooter, this *marginal principle* provides that “social costs should be minimized by equating the incremental benefit of each precautionary activity to its incremental cost.”⁸²

Property rights promote efficiency because they concentrate in an owner’s hands all of the costs and benefits associated with a particular activity; as a result, the owner’s self-interest calculus fully internalizes the social costs of his doing, thereby defeating

⁸¹ See generally Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1 (1985) (discussing rules that combine compensation for harm with incentives for efficient precaution within the context of the joint production.).

⁸² See *id.* at 1.

externalities.⁸³ Externalities, the detriments imposed, or benefits bestowed, by a person on third parties cause inefficiency because they distort prices and incentives.⁸⁴ For example, the failure of a profit-maximizing steel mill to account for the cost of pollution leads it to expand output beyond the point where the social marginal cost of its activity equals its social marginal revenue. The pollution externality results in too little fresh air for the taste of everybody else, and overall utility or value is not maximized.

Externalities are not only widespread, they also are “bi-directional” and they do not depend on a concept of causation.⁸⁵ Confronted with two competing activities, an economist does not seek to determine which one *causes* damage to the other, but rather to what extent these two activities are incompatible. For example, an economist does not argue that steel producer—rather than nature lovers—should pay for environmental clean up because they cause pollution. Our hypothetical observer would merely comment that it is cheaper to prevent the emission of noxious gases than to clean them up, and that it is cheaper to collect clean-up costs from a few steel mills than from everybody else.

The presence of externalities does not tell us anything about how this failure of the price system *should* be addressed. Rather economic analysts of the law strive to find rules that reconcile competing activities most efficiently. More specifically, an efficient

⁸³ Readers of Economics will be familiar with various expressions of this idea. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, 36-37 (5th ed. 1998); Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244-45 (1968) (discussing the “tragedy of the commons”). Every person having access to a common resource has interest in using it to the point where marginal cost equals marginal revenue from use. Yet, if every person does so while ignoring other people’s calculations, the resource will be overused and perhaps destroyed. The solution to the “tragedy of the commons” consists of attributing a right of property to a single person who thereafter has an incentive to match the resource’s costs and benefits. For an application of this principle to the field of intellectual property, see Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 *J.L. & ECON.* 265 (1977).

⁸⁴ See Demsetz, *supra* note 24, at 347-48; JOSEPH E. STIGLITZ, *PRINCIPLES OF MICRO-ECONOMICS* 179-82 (1993) (explaining that externalities distort the demand or supply for goods and services).

⁸⁵ See R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 12-13 (1960) (explaining that resources find their most efficient use in a free market, irrespective of initial ownership, provided that there are no transaction costs).

law creates incentives for both polluters *and polluted* to use precautions up to the point where the cost of precautions equals the injury suffered.⁸⁶ Stated otherwise, the efficient production of a clean environment is a case of joint-production: it depends not only on the activities of polluters, but also on the precautions of the polluted. Robert Cooter gave these conditions of efficiency the elegant name of “double responsibility at the margin.”⁸⁷

Not every legal rule, of course, is designed to enhance efficiency: some legal rules were no doubt adopted to promote equity, i.e., to effect a particular distribution of social costs rather than to limit their overall level. A consideration of the distributive effect of the right of publicity is contained in Part IV.

B. *The Market for Celebrity Identity*

Without much exaggeration, consumers are solicited every minute of every day to buy more products and services than they could ever use. On the Internet, for example, there is already far more information available than consumers could ever use or enjoy. In these plentiful markets, it is useful to understand that firms really compete for the scarcest of all resources, human attention.⁸⁸ Successful companies are those that command eyeballs both because

⁸⁶ See generally *id.* (For example, the law might not grant a remedy in nuisance to the person who built her cottage in the middle of an industrial park.)

⁸⁷ See Cooter, *supra* note 81, at 4.

⁸⁸ Esther Dyson, now ICANN interim chairperson, seems to have coined the expression “market for attention.” In her view, the true measure of a firm’s ability to turn a profit is not its tangible, or even intellectual property, assets because these depreciate too fast in fickle consumer markets. The key to a firm’s success, Dyson argues, is its sustained ability to draw and keep consumer attention. See ESTHER DYSON, *RELEASE 2.1: A DESIGN FOR LIVING IN THE DIGITAL AGE* 172-201 (1998); Daniel H. Pink, *Release 2.0: A Design for Living in the Digital Age (Book Review)*, 29 WASH. MONTHLY 54, (Dec. 1997); Eben Moglen, *The Invisible Barbecue*, 97 COLUMB. L. REV. 945, 952-53 (1997) (using the terms “market for eyeballs”). This business model also extends beyond the digital world. Consider, for example, the sales of Nike, the sporting goods marketer, have dropped significantly after the (first) retirement from the NBA of its main spokesman, super-athlete Michael Jordan. Jordan had been at the core of a hugely successful marketing campaign which had drawn a wide range of consumers to Nike because of Jordan’s on and off the court style. See Charlie Gillis, *Nike Runs into Trouble Post-Jordan as Stock Falls*, NAT’L POST, Feb. 9, 2000.

they continue to derive much of their revenues from advertising⁸⁹ and because the ability to draw attention allows these businesses to enter into a growing number of product or service lines, thereby maximizing the “top-of-mind awareness” that they enjoy among consumers.⁹⁰

In the market for eyeballs, people who have the ability to deliver public attention are in high demand.⁹¹ In this respect, a marketer can

⁸⁹ That traffic is crucial to the digital medium explains the emergence of sites offering sweepstakes and prizes to draw visitors. See Austin Bunn, *Starved for Attention*, N.Y. TIMES, Feb.13, 2000, § 6, at 20 (citing Iwon.com and freelotto.com) (Internet sites last visited Dec. 18, 2001). See also Catherine Greenman, *Enjoy Your New Software, and Check Out the Advertisements*, N.Y. TIMES, Mar. 23, 2000, at G7 (discussing the trend towards ad-supported software). The dependence of website publishers on advertising explains the considerable efforts made by firms to gather information about web users, both on and offline. See Bob Tedeschi, *DoubleClick's Competitors Breathe a Sigh of Relief as an Uproar over Privacy Abates, at Least for the Moment*, N.Y. TIMES, Mar. 6, 2000, at C10 (“[A]dvertisers have watched “click through” rates – the average percentage of Web surfers who click on any single banner ad – fall below the 1 percent mark, compared with about 2 percent in 1998. In view of that drop, advertisers have become less willing to pay high advertising rates for banners, forcing Web site publishers to scramble for other sources of revenue.”). The recent “dot.com” meltdown has not yet affected online businesses’ dependence on advertising revenues even if overall online advertising spending did not grow in 2001 and more websites developed subscriber-based business models.

⁹⁰ Witness Amazon.com’s strategy of entering new product lines at record breaking speed, imitated to some extent by other merchants like Buy.com. See Saul Hansell, *Amazon's Risky Christmas*, N.Y. TIMES, Nov. 28, 1999, § 3, at 1. This phenomenon testifies not only to the importance of “eyeball control” but also to the versatility of digital technology. Because an increasing portion of a firm’s value added can be sold in the form of bit streams (sound, images, price quotes or consumer information, etc.), it is comparatively easier for Internet businesses to leverage their brand name from one line of business to another. For a different application of this proposition, see Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, 4 FIRST MONDAY 8 (Aug. 1999), at http://www.firstmonday.org/issues/issue4_8/moglen/index.html/ (last visited Sept. 30, 2001) (discussing the ubiquity of bits in the digital medium).

⁹¹ See, e.g., Stuart Elliott, *When Dot-Coms Want to Build up Their Images, They Hitch Their Web Sites to a Star*, N.Y. TIMES, Nov. 16, 1999, at C14 (explaining that the technique of “borrowed interest” (using celebrities in advertising) is well suited to differentiate website publishers and establish their credibility because celebrities lend instant recognizability); Austin Bunn, *Starved for Attention*, N.Y. TIMES, Feb.13, 2000, § 6, at 20 (enumerating online retailers using celebrities as spokespersons); Jennifer Gilbert, *Celebrity Pitchpersons Build Instant Brands For Dot-coms: Bargainbid.com Taps Dangerfield*, ADVER. AGE, Nov. 8, 1999, at 100 (“On the dot-com horizon, Mr. Twitchell said, is the use of cartoons as spokespeople.”). Celebrity advertisement may be particularly attractive to young adults, a demographic segment particularly valuable to advertisers. See, e.g., Patricia Winters Lauro, *Big Marketers Are Betting on “Austin Powers” to Endear Them to Young*

always rely on a celebrity's manicured image to reach a desired population in ways that one-shot ads cannot. Famous people offer advertisers relationships with which they can communicate with the purchasing public.⁹² And the influence of celebrities is only likely to grow in coming years as entertainment markets become more global and a select number of international stars earn ever-larger revenues from their public appearances or merchandising.

But what explains the public's interest in celebrities? Several theories have been formulated to explain this phenomenon, of which we can retain a few promising ones. In his provocative work *Life The Movie*, Neal Gabler argues that entertainment, and the movies in particular, have become so important in our individual existence that American public life itself has evolved to resemble the movies.⁹³ Gabler argues that this trend has reshaped every sphere of human activity from politics to religion to the arts, all because of the need for these activities to rival readily available entertainment in keeping public attention. Not only have moving pictures become the central metaphor for understanding American public life, they have changed our epistemology, the very understanding of the world in which we live. According to Gabler, we now live in the "lifies."⁹⁴ This "lifies" metaphor not only captures the reality that Americans use a significant portion of their income to be entertained; it conveys the idea that we have populated our lives with celebrities, those lead actors whose stories we eagerly watch and weave into our lives.⁹⁵

People, N.Y. TIMES, June 14, 1999, at C17. Of course, niche marketing is not new: see, e.g., GAMSON, *supra* note 64, at 42-43.

⁹² See ADAM MORGAN, EATING THE BIG FISH: HOW CHALLENGER BRANDS CAN COMPETE AGAINST BRAND LEADERS 106 (1999) ("At its most basic, if 70% of human communication is nonverbal, it is reasonable to look for the expression of one's identity to be manifested in some kind of visual form. Phil Knight of Nike has remarked of the Air Jordan "Jump Man" icon, which came almost to embody the brand's attitude in the 1980's, that it saved a lot of time – you couldn't explain much in 60 seconds, but if you showed Michael Jordan, you didn't need to.").

⁹³ See NEAL GABLER, LIFE THE MOVIE: HOW ENTERTAINMENT CONQUERED REALITY (1998).

⁹⁴ See Gabler, *supra* note 78, at 5.

⁹⁵ See also RICHARD SCHICKEL, INTIMATE STRANGERS: THE CULTURE OF CELEBRITY (1985).

Our urge to know and associate with celebrities is not only motivated by our desire to be entertained, however. As one author notes, “celebrities have become, in recent decades, the chief agents of moral change in the United States.”⁹⁶ They have come to embody abstract issues or points of view, and are shorthand forms for ideals or expertise.⁹⁷ Theorists have also argued that celebrities attract us because we see them as individuals who stand out in our anonymous, mass society.⁹⁸ We seek them because they make us feel in-the-know or on the inside; in our mass society, they humanize our lives.⁹⁹ “Stars” attract us because they seem to be free, on-the-go and liberated from the constraints of daily life.¹⁰⁰

Not surprisingly, Gabler, like others,¹⁰¹ has argued that the identity of modern Americans is shaped not only by their intimate relationships, but also by their only-superficially intimate ones with well known personalities.¹⁰² As Kenneth Gergen writes, “[w]e may

⁹⁶ See *id.* at 39. See also Paul Richter, *Pentagon Reaches for Stars to Recruit Defense: U.S. Tries to Enlist Celebrities in Campaign To Attract Young People*, L.A. TIMES, Jan. 29, 2000, at A11 (describing the Pentagon’s attempt to enlist celebrities to convey information about military opportunities to young people).

⁹⁷ See LEO BRAUDY, *THE FRENZY OF RENOWN: FAME AND ITS HISTORY 600-01* (Vintage Books 1997) (1986) (“Complex phenomena wear the reduced features of emblematic individuals”); MORGAN, *supra* note 92, at 119 (“The single, photographed act of Princess Diana shaking hands with an AIDS patient at the Middlesex hospital in London did more to change the British public’s perception on AIDS, how it was transmitted, and their relationship with those who had contracted the disease than years of public information, editorial, and advertising.”).

⁹⁸ See Gabler, *supra* note 78, at 7.

⁹⁹ See SCHICKEL, *supra* note 95, at 13, 250 (discussing the power of television to make us feel intimate with celebrities, and discussing the myth that all celebrities know one another, and are part of an apparently cohesive community); and Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 47 (1997) (arguing that celebrities provide us with role models).

¹⁰⁰ See SCHICKEL, *supra* note 95, at 244-51.

¹⁰¹ See GERGEN, *infra* note 103, at 56-57, 71-72; and generally SCHICKEL, *supra* note 95.

¹⁰² See John Belton, *Introduction*, in *MOVIES AND MASS CULTURE* 1, 3 (John Belton ed., 1996) (pointing out that we tend to deny that our identities are shaped by our alienated relationship with mass culture). About the illusion of intimacy with celebrities, see also GAMSON, *supra* note 64, at 172-85 (arguing that our relationship with celebrities is made of a curious mix of fact and fiction in which we revel). The effect of celebrities on individual identity is complex but perhaps most extensive and transparent in the case of children. This reality certainly explains in part why advertisers target celebrity marketing at children. For a brief but instructive account of this market, see Consumers Union, *Selling America’s Kids: Commercial Pressures on Kids of the 90’s*, available at <http://www.consumersunion.org/other/sellingkids/index.htm> (last visited Sept. 30, 2001).

know more about Merv, Oprah, Johnny and Phil than we do our neighbors.”¹⁰³ Consider, for example, the outpouring of sympathy and the personal grief suffered by so many on the death of Princess Diana,¹⁰⁴ or in Canada, a few years ago, on the death of newscaster Barbara Frum.¹⁰⁵ As far as movie stars are concerned:

It is undoubtedly true that for many people film relationships provide the most emotionally wrenching experience of the average week. The ultimate question is not whether media relationships approximate the normal in their significance, but whether normal relationships can match the power of artifice.¹⁰⁶

As a result, celebrities have become a sort of “‘social glue,’ allowing people from different points of society to converse, to share feelings and essentially to carry on informal relations.”¹⁰⁷ In this view, then, the demand for celebrity images and information is driven in large part by society’s communication needs and by our respective need to forge a personal identity.¹⁰⁸

¹⁰³ See KENNETH J. GERGEN, *THE SATURATED SELF: DILEMMAS OF IDENTITY IN CONTEMPORARY LIFE* 56 (1991) (referring to talk show hosts). Gergen also discusses the cases of individuals who confuse relationships with celebrities with intimate ones. Thus, David Letterman apparently sought to enjoin a woman from claiming that she was his wife. See also SCHICKEL, *supra* note 95, at 1-3 (discussing John W. Hinckley, Jr.’s letters to actress Jodie Foster about murdering President Reagan).

¹⁰⁴ This example is from GABLER, *supra* note 78, at 7.

¹⁰⁵ The parallel with Walter Cronkite, “the most trusted man in America,” was striking. See, e.g., SCHICKEL, *supra* note 95, at 14-15. According to Schickel, celebrities succeed in giving the impression of intimacy with us by sharing their “lives” and “sentiments” with the public on television shows. Consider, for example, how late-night shows seem to have become a mandatory stop for American politicians.

¹⁰⁶ See GERGEN, *supra* note 103, at 57. See also GAMSON, *supra* note 64, at 129-41, 192 (describing celebrity watchers as both “cynical and believing”).

¹⁰⁷ See GERGEN, *supra* note 103, at 56, (citing Cynthia Heimel, *VILLAGE VOICE*, Jan. 2, 1990); BRAUDY, *supra* note 97, at 4, 601 (“The fame of others, their distinguishing marks, becomes a common coin of human exchange — code words more forceful (and easier to express) than mutual political or religious beliefs for establishing intimacy. Talk of fame and its gradation is one of the few conversations that joins rather than separates us.”).

¹⁰⁸ See Shay Sayre, *T-Shirt Messages: Fortune or Folly for Advertisers*, in *ADVERTISING AND POPULAR CULTURE: STUDIES IN VARIETY AND VERSATILITY* 73, 77-82 (Sammy R. Danna ed., 1990), citing ROBERT A. WICKLUND, *SYMBOLIC SELF-COMPLETION* (1982) and

Explaining how fame arises, or is produced, is as difficult as describing the factors affecting the demand for celebrity. In many ways, celebrity seems to be as unpredictable and fortuitous as life itself. Moreover, becoming famous is hardly a solitary endeavor; it always requires a public and its acclaim. Hence, theorists often emphasize the importance of the media and the public in the collaborative making of celebrities.¹⁰⁹ By contrast with tangible goods, and to a much greater extent than other intangible goods such as artistic and literary works and inventions, fame is hardly the sole realization of its apparent subject.¹¹⁰ As the Sixth Circuit observed: “[f]ame often is fortuitous and fleeting. It always depends on the participation of the public in the creation of an image. It usually depends on the communication of information about the famous person by the media.”¹¹¹

Grant McCracken, *Culture and Consumption: A Theoretical Account of the Structure and Movement of the Cultural Meaning of Consumer Goods*, 13 J. OF CONSUMER RESEARCH 71-84 (1986) (discussing a survey of college students on their motivation for wearing “message” t-shirts which found that “students use t-shirts to communicate symbolically with one another.”). As the author noted at 82, however, the meanings associated with particular images are constantly fluctuating.

¹⁰⁹ A number of authors go so far as to describe a certain brand of celebrities as the lesser element in this production mix. See GABLER, *supra* note 78, at 160-68 (discussing the case of Zsa Zsa Gabor); and GAMSON *supra* note 64, at 1-12, 57-125. Gamson presents the interesting case of Angelyne, a local Hollywood celebrity who appears to have no claim to fame except to have posed in a sufficient number of tourist pictures to have become a Hollywood fixture. Angelyne, a Marilyn Monroe type, has been featured in magazine articles, television shows and advertisement billboards, and has starred in commercials. There is little doubt that the media contribute extensively to modern day celebrity. MTV’s CEO Tom Freston has stated that MTV’s success can be explained in substantial part by consumer research: “We are probably the preeminent researcher of kids, teens and young adults.” See Sally Beatty & Carol Hymowitz, *How MTV Stays Tuned In to Teens*, WALL ST. J., Mar. 21, 2000, at B1. It is not clear, however, how broadly applied this model is. See *contra* GAMSON, *supra* note 64 at 115-20 (stating that most media organizations know little about their public).

¹¹⁰ By looking at a number of “reputational histories,” Michael Madow has convincingly argued that media play a key role in creating disparities in fame among successful artists, athletes and business people. See Madow, *supra* note 12, at 184-92 (1993) (discussing the surprising case of Einstein’s celebrity). It could be objected that this analysis is indiscriminate: economic value is always created by social interaction. In the final analysis, the value of any good results from relationships, if only in the marketplace. The difference between identity and tangible goods is one of degree, but of meaningful degree. Fame is exclusively dependent on what most often are fickle and capricious tastes.

¹¹¹ *Memphis Dev. Found. v. Factors, Etc., Inc.*, 616 F.2d 956, 959 (6th Cir. 1980).

Unsupervised public uses of a person's identity often contribute significantly to a celebrity's reputation or fame. For example, actress Sarah Michelle Gellar, a.k.a. *Buffy The Vampire Slayer*, would not have the notoriety she has today without the deluge of fan fiction that features her television character.¹¹² Moreover, it is doubtful that Buffy's fan fiction could have been orchestrated to the same effect; creating buzz for oneself most often implies "letting go" and allowing a large measure of public freedom.¹¹³

In some cases, third parties seem almost solely responsible for the commercial value of a person's identity. In 1960, Cuban photographer Alberto Korda snapped a photo of revolutionary leader Che Guevara at the funeral of guerillas who had died in the explosion of a Belgian freighter. The photographer took the picture by happenstance, capturing Guevara wearing a starred-beret as he gazed for a moment into the distance. Korda offered the photo to news media but they declined to buy it. So the picture hung on a wall in his office for seven years, until an Italian editor saw it after Guevara's death and immediately purchased it. The photo was first published in 1967 and has since become one of the most broadly diffused images of all times, plastered to support social causes and personal revolts of all types.¹¹⁴

Che Guevara's case is instructive because Che's fame has continued to grow since his death, obviously without promotional efforts on his part.¹¹⁵ Guevara's case also illustrates the inherently

Factors has been legislatively overruled on the issue of the descendibility of the right of publicity: TENN. CODE ANN. § 47-25-1104 (1995).

¹¹² See <http://www.fanfiction.net> (last visited Sept. 30, 2001), cited in Ann Powers, *Fans Go Interactive, and Popular Culture Feels the Tremors*, N.Y. TIMES, Sept. 20, 2000, § H, at 25.

¹¹³ But see Craig Smith, *Wyman's Remarks Annoy Hawks*, SEATTLE TIMES, Oct. 29, 1993, at C1 (mentioning linebacker Brian Bosworth's own release of "No-Boz" t-shirts to fan his fame).

¹¹⁴ See Pascal Fletcher, *Vodka and Che Guevara Just Don't Mix*, FINANCIAL TIMES (LONDON), Sept. 11, 2000, at 11 ("Since then, it has adorned T-shirts, wallposters, banners and even wristwatch faces around the world.").

¹¹⁵ See David Sapsted, *Che Guevara Sullied by Vodka Advert, Claims Photographer*, THE DAILY TELEGRAPH (LONDON), Aug. 8, 2000, at 7 ("Henry Butterfield Ryan, a former United States diplomat and author of *The Fall of Che Guevara*, said the picture, which he described as 'one of the great photographic images of all time', is the primary reason for

cumulative process by which one gains social currency: not only might Che not have chosen to associate himself with everything he has been made to endorse since his death, he simply would not have been able to actively promote so many causes and products. Rather, celebrity differs from tangible commodities to the extent that an exclusive right holder probably cannot maximize its value.

But the public also tires of celebrities; many become stale, the buzz surrounding them giving way to fatigue and even contempt. For this reason, becoming and remaining a celebrity requires careful management, for it depends on constantly evoking the right impressions and remaining in the public's unaided memory. For a celebrity agent or managing company this means ensuring that its clients give the right interviews, embrace the right type of causes and go to the right kinds of events. It may extend to creating fan clubs and ensuring that a celebrity meets the right type of people and accepts the right types of endorsements.¹¹⁶

Fame, therefore, presents a case of joint-production: its production depends on the collaboration of celebrities, publicists, the media, the public, and creators like Korda who "recode" celebrities.¹¹⁷ Of course, producing fame, like any other good, may be achieved with different combinations of factors of production. Fame may arise as the near-exclusive result of a person's activities, with minimal public or media input. For example, a runner who breaks an Olympic record becomes an instant celebrity without much media promotion.¹¹⁸ Other celebrities may become so only as a result of

Che Guevara's legendary status.").

¹¹⁶ See, e.g., GAMSON, *supra* note 64, at 82-83 (describing potential conflicts between a sponsoring organization, a studio or record label, for example, and a celebrity: "for those pursuing bankability based primarily on personality rather than ability, being linked to specific projects and roles carries an even more fundamental risk."); and Michele Willens, *When Celebrity Hearts Bleed*, N.Y. TIMES, April 16, 2000, §9, at 1 ("News coverage is increasingly fixated on celebrities, so causes recruit famous spokesmen, who in turn reap the benefit of coverage that is more flattering than usual").

¹¹⁷ See *supra* note 81 and accompanying text (introducing the concept of joint-production).

¹¹⁸ This would also be the case of a person who becomes famous as a war hero, or for winning the lottery. Of course, we almost always depend on the media to learn about events that we do not witness ourselves. Nonetheless, there is distinction, if only of degree, between people that become famous *because* of the media's promotional efforts and those

relentless advertisement and media promotion, without there being any great reason as to why that person became a celebrity.¹¹⁹ Finally, other people rise to fame without slick promotion and media assistance, but through word-of-mouth, or a certain “underground” network.

Of course, these distinctions are only ones of degree. Nonetheless, there is no doubt that celebrity presents a case of joint-production among a person, the media, the public and “recoders.” And although fame can be achieved with different proportions of each factor of production, the inputs of the public and of “recoders” often contribute significantly to this production mix.

C. *The Economic Case for the Right of Publicity*

In light of the foregoing, how does the right of publicity promote efficiency in the market for celebrity? Judges and academics have argued that the right of publicity does so by offering additional incentives for potential celebrities to invest in skills that could make them famous and increase the value of their persona.¹²⁰ Indeed, at the margin, increasing such rewards would result in additional investments in celebrity-making by an increasing number of individuals. Without a right of publicity, ongoing renown might never be achieved in the first place.¹²¹

There are difficulties with this theory, however. As a preliminary matter, the right of publicity rewards far more than exemplary

whose fame is more immediate (or less mediated).

¹¹⁹ See DANIEL J. BOORSTIN, *THE IMAGE: THE GUIDE TO PSEUDO-EVENTS IN AMERICA* 45-76 (1961) (describing celebrities as persons who are well known for being well known).

¹²⁰ Applied to celebrities themselves, the argument goes that too few skills will be developed unless the law internalizes into all potential celebrities’ private decision-making, a private benefit equal to the benefit that they convey on all of us. See, e.g., *Zacchini*, 433 U.S. at 573; *Mathews v. Wozencraft*, 15 F.3d at 437-38; *Lugosi*, 603 P.2d at 441 (Bird, J., dissenting). In this view, awarding Michael Jordan the exclusive right to market his persona increases the revenues he may expect to earn if he is successful, thereby creating additional incentives for him to become famous, presumably by training hard.

¹²¹ In this view, public identity resembles other intellectual properties, like artistic and literary works and inventions. See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 28 J. LEGAL STUD. 325, 326 (1989).

achievement; it offers no incentives to those who become famous accidentally, such as lottery winners.¹²² Even without invoking such an extreme case, the importance of skills or talent in the making of celebrity should not be overstated. Fame rewards pure talent only unreliably and, as the RESTATEMENT (THIRD) ON UNFAIR COMPETITION points out: “[i]n other cases the commercial value acquired by a person’s identity is largely fortuitous or otherwise unrelated to any investment made by the individual, thus diminishing the weight of the property and unjust enrichment rationales for protection.”¹²³

Moreover, one might wonder whether the right of publicity is an effective way to sponsor fame. Marginal analysis tells us nothing about how much the right of publicity contributes to the overall supply of celebrity: this issue rather depends on the supply function of celebrities, their income elasticity and the level of economic rent they enjoy. Consider, for example, that the vast majority of right of publicity plaintiffs come from fields of endeavor that already offer substantial rewards to their stars; these plaintiffs would surely still make a living without the right of publicity.¹²⁴ In any case, the elusive character of fame probably makes it difficult for an aspiring celebrity to assess rationally the marginal value of additional preparation. This is the case for two reasons: in fields where talent or skills contribute to success to a more limited degree—in the arts or in show business, for example, where the definition of excellence depends on public taste and is therefore more elusive—assessing the marginal return of additional training is simply impossible. And in fields where skills and talents are clearly tributary of fame—such as sports, where there are objective criteria of success—the market structure will often make it nearly impossible for a contestant to assess rationally the marginal revenue of an additional hour of training.¹²⁵

¹²² See PINCKAERS, *supra* note 22, at 249.

¹²³ RESTATEMENT (THIRD) ON UNFAIR COMPETITION § 46 cmt. c.

¹²⁴ See MCCARTHY, *supra* note 1, § 4.1, at 4-3; RESTATEMENT (THIRD) ON UNFAIR COMPETITION § 46 cmt. c. (1995); and Grady, *supra* note 22, at 111.

¹²⁵ See ROBERT H. FRANK AND PHILIP J. COOK, *THE WINNER-TAKE-ALL-SOCIETY* 3, 24-26 (1995) (describing “winner-take-all” markets where even small differences in

To put the matter more incisively, fame pre-existed the right of publicity and no one apparently needed the law's protection to become famous before this century. This fact suggests either that the cost of developing a well known identity is slight or that there are incentives to do so independent of the right of publicity.¹²⁶ Indeed, we would still have celebrities without the right of publicity, and their quality would not be lower.¹²⁷

A better argument in favor of the right of publicity is that it offers incentives for celebrities and their promoters to prevent the over-exploitation of certain personae. Indeed, although it may not at first appear to be the case, the identity of celebrities may be over-exploited.¹²⁸ As Mark Grady rightly pointed out by considering the case of *Waits v. Frito-Lay*,¹²⁹ individual consumption of celebrity goods and services often creates negative externalities. In *Waits*, a potato chip manufacturer had sponsored TV commercials that featured music sung in a pop singer's distinctive style, without compensating him. The Ninth Circuit found against the defendant and ordered the payment of damages. Why? Mark Grady explains that the confectionary company's use of a Waits sound-alike voice ignored the social cost of its behavior, namely that it tired the public of his gravelly voice and associated Waits' voice with potato chips.¹³⁰

performance result in enormous differences in income).

¹²⁶ See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 273 (1987) (making this argument about trademarks).

¹²⁷ It would be entirely speculative to conclude that the right of publicity has increased the quality of fame from which our society benefits. In fact, conservative authors have aired the opposite, if equally speculative, view that the rise of the right of publicity has been paralleled by a cheapening of American culture. See, e.g., JAMES B. TWITCHELL, *CARNIVAL CULTURE: THE TRASHING OF TASTE IN AMERICA* (1992).

¹²⁸ This proposition may be surprising because celebrity has (some of) the attributes of a public good. Public goods, like fresh air or national defense, share the characteristics that their consumption is nonrivalrous and nonexcludable. Consumption of a good is nonrivalrous if it costs nothing for an additional person to consume it. Consumption is nonexcludable if it costs a lot to exclude any individual from enjoying it once one individual already consumes it. See STIGLITZ, *supra* note 84, at 180-82.

¹²⁹ See *Waits v. Frito-Lay, Inc.*, 978 F.2d. 1093 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993); and Grady, *supra* note 22, at 101.

¹³⁰ Like all other goods, the plaintiff's voice had a decreasing marginal value in use and Frito-Lay's use diminished public fondness for it. There might even have come a point at which people would have been willing to pay not to hear Waits' voice again. For Grady, the problem is compounded by the fact that most unauthorized uses of human personae are

By ordering the payment of damages, the Court simply forced Frito-Lay to bear the social cost of its actions.

Thus, creating a property right in human identity internalizes in a single person's decision-making process all relevant costs and benefits, and allows her to choose the optimal level and mix of uses for her identity. In this view, the right of publicity is more necessary than ever because the ubiquity of images in our society has only accentuated the problem of negative externalities that arise in the consumption of celebrity goods and services.¹³¹

This account of the right of publicity is incomplete, however, because not all uses of human identity tire the public.¹³² Indeed, individual consumption of celebrity identity not only results in negative externalities, but often also leads to positive network effects.¹³³ Why? Many uses of celebrity identity are faddish and, at certain points along the demand curve for celebrity goods and services, individual consumptions are not rivalrous, but complementary.¹³⁴ There are two explanations for this phenomenon. In some cases, there may be a bandwagon effect, in which early consumption of goods by some people modifies the tastes of others.¹³⁵ A common example of this phenomenon is when some

"lesser" uses that cheapen the value of a person's identity. See Grady, *supra* note 22, at 103-04. For other expressions of the congestion externality reasoning, see PINCKAERS, *supra* note 22, at 246; MCCARTHY, *supra* note 1, § 2.3, at 2-14; POSNER, *supra* note 22, at 49; *Lahr v. Adell Chem. Co.*, 300 F.2d 256, 259 (1st Cir. 1962); *Guglielmi v. Spelling-Goldberg Prod.*, 603 P.2d 454, 461 (Cal. 1979); and *Matthews v. Wozencraft*, 15 F.3d 432, 437-38 (5th Cir. 1994).

¹³¹ This reality may also explain the emergence of the right of publicity in this century; see *supra* note 24 and accompanying text. See also Grady, *supra* note 22, at 105.

¹³² There are some obvious limits to the congestion externalities argument; otherwise, *the Bible* or *the Odyssey* would hold little interest today.

¹³³ Stated differently, celebrity identity has some of the attributes of public goods. On network effects, see generally S.J. Liebowitz and Stephen E. Margolis, *Network Effects and Externalities*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 671-75 (Peter Newman ed., 1998).

¹³⁴ See, e.g., Madow, *supra* note 12, at 221-22.

¹³⁵ See Harvey Leibenstein, *Bandwagon, Snob and Veblen Effects in the Theory of Consumer Demand*, Q. J. OF ECON. 183 (1950); and Jeff Biddle, *A Bandwagon Effect in Personalized Licence Plates?*, 29 ECON. INQUIRY 375 (1991) (presenting evidence of a bandwagon effect in vanity licence plates).

people modify their preferences to conform to others.¹³⁶ To illustrate the matter, my blaring Tom Waits' music from my car may not diminish the value that others derive from listening to him; in fact, they may enjoy Waits' music even more because I make it fashionable.

Another reason why not all uses of celebrity identity are rivalrous is that consumption and learning may take place simultaneously.¹³⁷ My enjoyment of Tom Waits' musical genre may depend on being exposed to his voice through other people's consumption: his music may be an acquired taste.¹³⁸ Similarly, a person seeing my Air Jordan shoes may try to find out more about Michael Jordan, particularly if I seem to enjoy being associated with him through my footwear. These phenomena may be especially significant in markets where goods advertise a celebrity—the t-shirt market for example—or for celebrities whose fans mimic their dress or distinctive features.

It is for similar reasons that informative uses of celebrity identity are not generally thought to be damaging. To be sure, unauthorized biographies, entertainment magazines, even the news, cause congestion externalities by adding to a celebrity's exposure. Yet, the informative character of these uses creates net positive externalities because, whether authorized or not, these uses enrich the social meaning of celebrities. And although unauthorized biographies, for example, may interfere with a celebrity's management of her persona, such uses of identity usually also delay the moment when the public tires of a particular celebrity. Thus, consumption of celebrity identity not only imposes social costs in the form of

¹³⁶ See Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 36 J. ECON. LITER. 75, 78-81 (1998) (referring to conformism).

¹³⁷ See generally G. Stigler and G. Becker, *De Gustibus Non Est Disputandum*, 67 AMER. ECON. REV. 76 (1977); and EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* (4th ed. 1995) (describing the contemporary understanding of how innovation spreads).

¹³⁸ There is evidence that the demand for music recordings changed after the appearance of the walkman. This shift in demand has been explained in part by the fact that, from then on, a considerable fraction of consumption was private rather than public. See, e.g., Sagi Douglas, *Decade's Come a Long Way, Baby: Home Tech in the 80's*, VANCOUVER SUN, Dec. 16, 1989, at D1.

negative externalities; it also results in social benefits in the form of network effects.

This discussion of network effects ties in directly with what was stated earlier about the demand for celebrity identity being driven by consumers' identity and expressive needs. As noted earlier, celebrities contribute significantly to people's self-awareness. As a result, they acquire a secondary meaning and become shorthand expressions for timely views, events or ideals.¹³⁹ In fact, the modern-day ubiquity of celebrities and our desire to be entertained nearly guarantee that the public will begin using them as *figures of speech* to express everything from the trivial to the sublime, all with ensuing implications for human identity. Celebrities enhance our discourse and allow our mass society to reach mass understanding. But the value of a language is proportional to the number of people who speak and understand it; this is the main source of positive externalities that arise in the consumption of celebrity identity.¹⁴⁰ What makes celebrities' likeness valuable, and what is at risk of over-exploitation, therefore, is not their traits, names or voices *per se*; it is the meaning associated with their persona, their power to evoke positive ideas and feelings from an audience.

Moreover, there are costs associated with the right of publicity because enforcing such a right makes it more expensive, in absolute terms, for up-and-coming public figures to draw on already appropriated styles or features.¹⁴¹ The right of publicity also chills commercial, expressive uses of already famous people. In this light, a central challenge of the right of publicity consists in balancing

¹³⁹ See *supra* note 102 and accompanying text. For an interesting legal treatment of these issues, see generally Kwall, *supra* note 99.

¹⁴⁰ For a brief look at the economics of language, see Landes & Posner, *supra* note 126, at 271-73.

¹⁴¹ I say "in absolute terms" because some of this genre-recycling is clearly allowed under the current law: see Hughes, *supra* note 10, at 947. On the other hand, certain right of publicity cases — Groucho Marx Prods. v. Day and Night Co., 689 F.2d 317 (2d Cir. 1982), for example — have been criticized for privatizing a genre that had originally sustained more than a single performer.

rights in personal identity with the necessity of allowing everyone to dip into a rich common cultural pool.¹⁴²

These last two propositions—that consumption of identity results in network effects and that the right of publicity makes certain forms of expression more costly—explain in economic terms the idea voiced by many others that the current right of publicity is overbroad because it prevents socially valuable “recoding.”¹⁴³ These authors have argued that the right of publicity is overbroad because it prevents a whole range of “transformative” uses of cultural symbols that are most important to subcultures—racial, ethnic or sexual minorities—whose identities are not adequately reflected in mainstream media.¹⁴⁴ The recoding critique of the right of publicity makes perfect economic sense because popular figures, like popular copyrighted characters¹⁴⁵ or popular trademarks,¹⁴⁶ do acquire a secondary meaning and enter the public discourse. It is also unquestionable that today’s stars draw some of their appeal from cultural references that once belonged to others.¹⁴⁷ Moreover, the

¹⁴² This argument has often been aired with respect to copyright. *See, e.g.*, BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2, 78 (1967); and William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 347-49 (1989).

¹⁴³ *See generally* Aoki, *supra* note 10; Madow, *supra* note 12; Haemmerli, *supra* note 13; and Hughes, *supra* note 10. However, most academic commentary about recoding has been made in the context of copyright. *See supra* note 10 and accompanying text (defining recoding).

¹⁴⁴ *See, e.g.*, RICHARD DYER, HEAVENLY BODIES: FILM STARS AND SOCIETY 141-94 (1986) (discussing Judy Garland and the gay community).

¹⁴⁵ *See, e.g.*, Warner Bros. Inc. v. Amer. Broad. Co., 720 F.2d 231, 242 (2d Cir. 1983) (“It is decidedly in the interests of creativity, not piracy, to permit authors to take well-known phrases and fragments from copyrighted works and add their own contributions of commentary or humor.”); and MORGAN, *supra* note 92, at 58 (“The Energizer Bunny, equally, has become a part of the popular culture.”).

¹⁴⁶ Genericized marks are broadly recoded marks. This is the case of “thermos” and “escalator,” among others. Some trademarks which have not yet been found by courts to be generic are also the object of common recoding: Xerox, the Marlboro Man (*see, e.g.*, MARTIN P. LEVINE, GAY MACHO: THE LIFE AND DEATH OF THE HOMOSEXUAL CLONE (1998)), Rolls Royce. That their owners think it is necessary to launch advertising campaigns to “educate” the public about their proper use is convincing evidence of ongoing threatening recoding. *See* JANE C. GINSBURG ET AL., TRADEMARK AND UNFAIR COMPETITION: CASES AND MATERIALS 349-60 (2d ed. 1996).

¹⁴⁷ *See* Hughes, *supra* note 10, at 947 (“Madonna, Prince, and Elvis Costello have drawn from Marilyn Monroe, Jimi Hendrix, and Buddy Holly, respectively.”).

recoding critique also makes sense from an economic point of view because we might suspect network externalities associated with celebrity uses to be especially significant among communities for whom identity concerns are particularly acute.¹⁴⁸

The best economic case for the right of publicity, therefore, is that it offers incentives to celebrities and their managers to prevent the over-exploitation of social symbols: like trademarks, rights of publicity protect the public's recognition of figures useful for social communication.¹⁴⁹ In this utilitarian view, the right of publicity, like a trademark, is only a bribe paid by the law to induce the private protection of a semiotic value.¹⁵⁰ In fact, it is mostly public relations investments that would not be undertaken without the right of publicity. Yet, celebrities also undoubtedly enter our public discourse and become figures of speech. In that capacity, the value of a person's identity is proportional to the number of people who have access to it and use it. Thus, efficient rules of right of publicity infringement should prevent the over-exploitation of celebrity identity while at the same time encouraging communicative uses that produce greater positive externalities than negative ones.

¹⁴⁸ See *Elvis Presley Enters. v. Elvisly Yours, Inc.*, 936 F.2d 889 (6th Cir. 1991); *Estate of Elvis Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); Steven M. Cordero, Note, *Cocaine-Cola, the Velvet Elvis, and Anti-Barbie: Defending the Trademark and Publicity Rights to Cultural Icons*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599, 633-37 (discussing the case of Elvis Presley); Madow, *supra* note 12, at 144-45 and 185-88 (discussing John Wayne cards and Albert Einstein, the personification of the genius scientist); Hughes, *Recoding*, *supra* note 10, at 935-36 (discussing Jeff Koons's art and many other examples); and DYER, *supra* note 144 (discussing Judy Garland and the gay community). A mainstream example of transformative use of identity is the bronze statue at Arlington National Cemetery of the raising of the American flag over Iwo Jima in 1944. The bronze statue, which was shaped from a Pulitzer Prize-winning photograph, became a symbol of courage and the sign of America's ascendance in international affairs. It has been imitated, derided and venerated. See MORGAN, *supra* note 92, at 120-21 (pointing out that none of the men depicted are above the rank of sergeant); and JAMES BRADLEY, *FLAGS OF OUR FATHERS* (2000).

¹⁴⁹ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 49 (5th ed. 1998).

¹⁵⁰ For a more detailed presentation of this view of trademarks, see Justin Hughes, *Recoding*, *supra* note 10, at 996-1001. See also Henry Hansmann and Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEG. STUD. 95, 105-7 (1997) (analyzing moral rights in terms of how they protect the public's interest).

D. *The Optimal Right of Publicity*

1. *The Problem of Transaction Costs*

Economists often point out that market mechanisms are the most efficient means of resource allocation because they put decision-making powers in the hands of those who have the best information about the value of assets.¹⁵¹ If this is so, however, why bother defining the optimal scope of the right of publicity? As Ronald Coase suggested, why not simply give everyone an absolute property right in her identity and let the market decide who should control what rights over whose identity?¹⁵² As one might suspect, the problem lies with transaction costs, which can be sizable and may not be passed on to consumers.

From the point of view of a person seeking to use a celebrity's persona, transaction costs include the cost of identifying the owner of the right; the cost of negotiating use with the owner; and the cost of obtaining a right to use. Under the current law, the cost of identifying the owner of the right of publicity would seem manageable because the law grants every person power over her identity. With time, however, locating right holders becomes much more difficult, for example in cases regarding old film footage.¹⁵³ A related case where transaction costs may prevent efficient bargaining is when a commercially valuable image evokes the identity of several people and rights must be cleared with all of them. In those circumstances, attributing strong property rights in persona may result in an "anti-commons" problem: a productive intellectual

¹⁵¹ See Cooter, *supra* note 81, at 25-26.

¹⁵² See Coase, *supra* note 85.

¹⁵³ See generally Marcia Biederman, *They Right The Songs*, N.Y. TIMES, Mar. 14, 1999, § 14, at 4 (describing the rights clearing business, including for old footage: "Our job is half Sherlock Holmes and half Monty Hall"); and Stuart Elliott, *Real or Virtual? You Call It; Digital Sleight of Hand Can Put Ads Almost Anywhere*, N.Y. TIMES, Oct. 1, 1999, at C1 (describing the commercially interesting opportunity of placing virtual ads in old films, and the problem of compensating right holders for this use of their work.)

property resource may lie idle because multiple owners cannot agree on a common use.¹⁵⁴

The *cost of negotiating use* of a celebrity's identity may also be important because of the likely uncertainty of assessing the value for a person's likeness.¹⁵⁵ *Ex ante*, the cost associated with negotiating a celebrity deal is likely to be very large because a person's future popularity in any particular market is hard to predict. In addition, high monitoring costs probably prevent celebrities from entering into many profit sharing schemes. Finally, pending negotiations may give rise to a hold-out problem if the venture ends up being successful, and negotiations take place *post facto*.

A related problem also giving rise to transaction cost involves the opportunity for moral hold out. This was more or less explicitly the case in the *Martin Luther King, Jr. Center for Social Change* case where Rev. King's estate may have felt that the unauthorized use—plastic busts—cheapened the pastor's image.¹⁵⁶ Moral holdout also arises in cases of parody or caricature. In a case like *White*, for

¹⁵⁴ The proverbial example of this phenomenon is *The Brady Bunch*. Use of footage from the television show “has required agreement from each of the actors portraying Brady kids (and their parents, while the actors were still minors), the Brady parents, and the Brady housekeeper, Alice – as is typical of licensing agreements for such shows.” See Michael A. Heller, *The Tragedy of The Anticommons: Property in The Transition From Marx to Markets*, 111 HARV. L. REV. 621, 679, n.259 (1998). See also Marcia Biederman, *They Right The Songs*, N.Y. TIMES, Mar. 14, 1999, § 14, at 4 (giving the example of Elvis Presley on the Ed Sullivan Show and reporting a rights clearance expert as saying “The reason I have a business is this is so complicated”).

¹⁵⁵ The fact that celebrities rely on agents to negotiate and authorize public uses of their likeness suggests that negotiation costs are positive and that celebrities carefully pick the type of events or products with which they want to associate. In addition, behavioral science would suggest that “identity transaction” costs are high because psychological biases complicate the task of appraising the value of a celebrity's identity. Indeed, it is likely that celebrities systematically overvalue the commercial worth of their likeness because of an important endowment effect. What appears more naturally one's own than identity? Yet, having an identity is not determinative of the price one can obtain in a market for personality-rich goods and services. See generally Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1184-85 (1997); and Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1483-85 (1998).

¹⁵⁶ *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. American Heritage Prods., Inc.*, 694 F.2d 674, 683 (11th Cir. 1983) (stating that the King family considered the use “unflattering and unfitting.”).

example, it is unlikely that a proud or vain plaintiff would have consented to Samsung's use, nor would the joke have been the same had she consented.¹⁵⁷ Given that many people may be interested in using an omnipresent celebrity's likeness, the latter may simply decide not to consent to whole ranges of uses.

Finally, it is also costly to *obtain a license* to use a celebrity's likeness: if a person's public appeal can easily be tainted by negative associations, she will try to exercise as much control as possible over the circumstances of her appearance.¹⁵⁸ In turn, these demands imply non-negligible monitoring costs. Obtaining a nationwide license to use a person's likeness also imposes the cost of dealing with fifty different state laws that may vary considerably with respect to the scope of the protection they afford.¹⁵⁹ Licensees must ponder the risk of litigation arising from unclear "commercial use" standards.

On this analysis, therefore, obtaining a license to use a person's likeness entails non-negligible expenditures; only people who value a persona more than the total of these costs will succeed in negotiating a commercial use, even if the public values a commercial use of that person's likeness more than the transaction and monitoring costs.¹⁶⁰ Further, this situation is likely to become ever more frequent on the Internet where our traditional understanding of commercial use probably includes a whole range of self-edited and self-published products that are only marginally profitable.¹⁶¹ Moreover, potential licensees are often unable to pass on to consumers these additional transaction costs. For example, the logic of network effects suggests

¹⁵⁷ See *supra* note 31 (discussing the White Case). After all, caricature and self-deprecation are not equivalent.

¹⁵⁸ For example, celebrities may attempt to reserve to themselves the right to approve an advertisement's script or the time at which a TV commercial will be broadcast. That the collective right of publicity management organizations seem not to have not taken off may testify to the control that celebrities want to keep over their identities.

¹⁵⁹ For example, the scope and duration of the post mortem right of publicity vary significantly from state to state. Less than half of the states have statutes on the subject matter and the protection afforded ranges from 100 years to nothing at all. See generally MCCARTHY, *supra* note 1, § 9.18, at 9-44 – 9-45.

¹⁶⁰ In particular, it may be prohibitively expensive to coordinate a negotiation for the benefit of everyone who is interested in a celebrity's likeness.

¹⁶¹ See *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485 (N.Y. 1952).

that the entrepreneur who first marketed John Wayne greeting cards *cum* lipstick to the gay community could not have charged consumers what it would have cost him to purchase the actor's consent.¹⁶² And the uncertainty surrounding the profitability of any identity-rich venture always limits the ability of an entrepreneur to incur significant licensing costs up-front.

The significance of these transaction costs, and the difficulty in passing them on to consumers, can hardly be underestimated. To the extent that the value of a persona depends on its becoming a figure of speech, its value is proportional to the number of people who have access to, and use it as a reference point of sorts. Yet, transaction costs may easily outweigh the benefit that any individual person derives from a celebrity's identity, giving rise to a classic coordination problem. In light of these factors, the law must divide the rights in a person's identity and allocate them to those most likely to maximize their value.¹⁶³

2. *The Current "Commercial Use" Criterion of Right of Publicity Infringement*

The law's current solution consists of granting every person a right to prevent third parties from using her identity for commercial purposes, including for advertising. How efficient is this "commercial use" condition of right of publicity infringement? All things considered, the law's current test is less efficient than it is generally assumed to be. On the one hand, harm to a celebrity's persona may easily be caused by non-commercial uses, public interest advertisements, for example.¹⁶⁴ Privileged entertainment uses like photos on the cover of the *National Enquirer* also cheapen a

¹⁶² See *supra* note 148 and accompanying text.

¹⁶³ See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 125 (1979) (noting that in the presence of transaction costs and once a particular distribution of income is reached, "the wealth-maximization principle requires the initial vesting of rights in those who are likely to value them the most").

¹⁶⁴ Recall that these uses may be privileged: *see supra* note 40. If the commercial use requirement prevents a third party from depreciating a celebrity's identity by associating her with goods and services, it does not prevent a third party from depreciating it by associating her with ideas (subject to the law of defamation.).

celebrity's image and tire the public of her.¹⁶⁵ If it is true that amateur uses of human persona are less likely to degrade it, defamation actions, whether successful or not, amply show that people can be injured by each other and the media.¹⁶⁶

On the other hand, the current law fails to recognize that some commercial uses of a person's identity, unauthorized t-shirts, for example, may actually increase her fame rather than diminish it.¹⁶⁷ Furthermore, certain commercial uses have effects that are nearly identical to privileged ones. What is the difference between a Howard Hughes biography and a Howard Hughes board game requiring players to answer questions about the reclusive millionaire's life?¹⁶⁸ Was the court's decision in the latter case based on the view that board game players are less likely to discuss the millionaire's life than people who read a biography? The distinction would be questionable.¹⁶⁹

¹⁶⁵ Media uses are also capable of causing moral harm: *see, e.g.*, *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904 (D.N.J. 1986) (involving the unauthorized use of a photograph of the plaintiff while he served in Vietnam).

¹⁶⁶ *See also supra* notes 69-80 and accompanying text, on the difficulty of applying the commercial use criterion to mixed uses.

¹⁶⁷ *See, e.g.*, *Madow, supra* note 12, at 221-22. This reasoning did not sway the California Supreme Court on the facts of *Comedy III Prods. Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001). In that case, the Court held that reproductions of the Three Stooges sold on t-shirts infringed the Plaintiff's right of publicity. Moreover, the Court held that the admittedly expressive uses of the Three Stooges' likeness were not protected by the First Amendment because they were not so "transformative" as to override the Plaintiff's right of publicity. *Id.* at 808-10. But the California Supreme Court did observe that certain unauthorized uses of celebrity likeness were likely to increase a celebrity's fame. *Id.* at 808 (observing that a work containing transformative elements "is also less likely to interfere with the economic interest protected by the right of publicity") and 808 n.9 (noting in passing that unauthorized "noncommercial" uses may be more deserving of First Amendment protection, for example, "T-shirts of a recently deceased rock musician produced by a fan as a not-for-profit tribute.").

¹⁶⁸ Compare *Rosemont Enters. v. Random House, Inc.*, 294 N.Y.S.2d 122, 128 (Sup. Ct. 1968), *aff'd*, 301 N.Y.S.2d 948 (App. Div. 1969) (involving a biography of Howard Hughes), with *Rosemont Enters. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144, 146-47 (Sup. Ct. 1973), *modified*, 345 N.Y.S.2d 17 (App. Div. 1973) (involving a board game about Howard Hughes's life).

¹⁶⁹ In a society where bite-size information is increasingly common, social communication may also flow best in the form of anecdotes and vignettes. The consequence of the public's reduced attention span must be morseled communication. To consider the board game example again, have we not been caught repeating quiz-show or

Finally, the examples of recoding visited earlier all involve commercial uses; yet, a good argument could be made that some, if not all, of these uses had social value.¹⁷⁰ The fact that the right of publicity has no doctrine whose purpose is to allow third party improvements¹⁷¹ or to allow the use of personae that have become generic further suggests that “commercial use” is not a good proxy for “socially valueless use.”

3. *Efficient Rules of Right of Publicity Infringement*

My earlier discussion of economic theory suggests that efficient rules of right of publicity infringement satisfy two conditions. The first condition merely restates the *marginal principle* presented earlier:¹⁷² the law should curtail unauthorized public uses of human identity only up to the point where the social loss incurred from suppressing these uses, discounted for its improbability and timing, equals the marginal social benefit of increased protection of identity.¹⁷³ Thus, the law of publicity should prohibit unauthorized uses of identity that harm it—that result in net negative externalities—but would allow unauthorized uses that result in net positive externalities—informative or recoding uses, for example.

The second condition seeks to achieve “double responsibility at the margin.”¹⁷⁴ Efficient rules of right of publicity infringement should make both the right of publicity holder and third parties take an

Trivial Pursuit questions to friends? Has a board game like “Scruples” never triggered important conversations?

¹⁷⁰ See *supra* note 148 and accompanying text.

¹⁷¹ See generally Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989 (1997). Efficiency would suggest that the law should allow improvements (in the form of transformative uses) even if they competed with the celebrity’s use of her likeness.

¹⁷² See *supra* note 81 and accompanying text.

¹⁷³ This condition is an adaptation of the principle formulated by Judge Learned Hand in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff’d*, 341 U.S. 494 (1951), and transposed to free speech issues by Chief Judge Posner. See Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 8 (1986). For simplicity’s sake, my analysis ignores the cost of the legal apparatus necessary to enforce the right of publicity.

¹⁷⁴ See *supra* note 81 and accompanying text.

efficient level of “precautions” against the depreciation of the holder’s identity. Thus, the law should proscribe a third-party use of a persona that diminishes its value by an amount greater than the value of that third party’s use. Conversely, however, a right of publicity plaintiff should not recover if the cost of her “precautions” is less than the value of the use she seeks to prevent. Right of publicity holders should not be entitled to damages for uses that infringe on that part of their identity that is more valuable to others than it is to them. That task, of course, is no easy feat because high transaction costs obscure the true market value of human personae. Nonetheless, efficient rules of right of publicity infringement would distinguish between that part of a person’s identity that is most valuable to her, and that part of her “halo,” the value of which is maximized by third party uses.¹⁷⁵

An alternate way to present this argument is to point out, as was done before, that fame is produced and cultivated *jointly* by a celebrity, her publicists, the media, the public and recorders who infuse new life into it.¹⁷⁶ Although fame may be produced—in different contexts at least—with different proportions of these factors of production, the law should strive to create incentives for all of these contributors to collaborate efficiently. For example, giving celebrities absolute rights over their identity is unlikely to result in an optimal production of fame because our understanding of celebrity suggests that the media must be able to publicize it and the public must have meaningful opportunities to use it creatively, in formal and informal contexts.

¹⁷⁵ This idea bears similarity to the notion that a person who becomes famous waives some of her right to privacy to the public.

¹⁷⁶ See *supra* note 78 and accompanying text.

Hence, celebrity marketing may resemble what Robert Merges and Richard Nelson have termed “cumulative technologies’ industries,” industries where “overly broad rights will preempt too many competitive development efforts.”¹⁷⁷ In these cumulative technologies’ industries, the authors argue, the law should be concerned not only with the over-utilization of resources, but also with their under-utilization.¹⁷⁸ Similarly, it could be argued that because popularity, like innovation, is so notoriously difficult to predict, the law should be careful not to give an individual so broad a right over her identity that it prevents third parties from lending their best abilities to improve on its marketing, albeit for a profit. Once a celebrity acquires a secondary meaning, the only way to maximize its social value is to allow third parties to recode it.¹⁷⁹ Indeed, the striking feature of “recoding uses,” which post-modern authors have discussed for a number of years now, is that they involve cases of celebrities acquiring a secondary meaning that they themselves would *not* have been in a position to develop.¹⁸⁰

So, what rules of right of publicity infringement result in an efficient production of fame? Undoubtedly, creating some sort of property right in identity is an efficient solution to the problem of congestion externalities in consumption. Moreover, celebrities are best situated to maximize the core value of their likenesses, particularly in choosing how to associate their traits with goods and services. When celebrities acquire a secondary meaning, however, they become figures of speech; in this capacity, their value is maximized when the public and creators are allowed to use their identity freely. Indeed, expressive, recoding uses, whether commercial or not, that do not compete with a celebrity’s ability to exploit her identity are likely to result in net positive externalities. This is another way of saying that the public and third-party recoders

¹⁷⁷ See Robert P. Merges and Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 875 (1990). These authors describe cumulative technologies’ industries as those where “today’s advances build on and interact with many other features of existing technology.” *See id.* at 881.

¹⁷⁸ *See id.*

¹⁷⁹ Obviously there is no clear point where a celebrity acquires a secondary meaning; choosing one necessarily involves a certain degree of arbitrariness.

¹⁸⁰ *See supra* note 148 and accompanying text.

actively contribute to the making and upkeep of a person's fame. Moreover, courts should pay attention to transaction or coordination costs in determining whether a particular unauthorized use of a persona is legal. Thus, the law should grant every person a property right in her identity; but if she is a celebrity and her persona has acquired secondary meaning, she should only recover if the unauthorized use of her identity is deceptive or directly competes with her own use, without being transformative. In addition, the law should consider whether the plaintiff and defendant could have agreed to the allegedly infringing use if the defendant had sought authorization or whether transaction or coordination costs would have prevented that transaction.

The rules proposed here would leave intact a large part of the law of publicity. For example, unauthorized deceptive uses of persona would remain right of publicity infringements because these uses have no social value and cause significant injury to a celebrity, especially if she has already endorsed goods or services in related markets.¹⁸¹ Similarly, uses of persona in circumstances that are shocking or repulsive also result in near immediate harm, and should be considered deceptive.¹⁸² Unauthorized reproductions of performances would also remain right of publicity infringements because they directly compete with a performer's business, while the social benefit of copied performances is limited if the defendant does not improve on the plaintiff's act.¹⁸³ Finally, in all of these cases, transaction costs are not a significant problem.

At the other end of the spectrum, unauthorized informative uses would remain privileged because they result in positive rather than negative externalities.¹⁸⁴ Indeed, uses that trigger curiosity rather than fatigue usually do not result in congestion externalities. Moreover, informative uses often entail high transaction costs

¹⁸¹ As I see it, a use is deceptive if it inaccurately represents that a particular person has endorsed a good or service.

¹⁸² Transaction costs are usually not at issue in cases involving celebrity endorsements because advertisers often can internalize the whole benefit of the unauthorized use.

¹⁸³ Because current technology can reproduce performances at a low marginal cost, an infringing performer probably does not fulfill a need that the plaintiff could not have satisfied himself.

¹⁸⁴ See *supra* note 137 and accompanying text.

because it is notoriously difficult to make consumers pay for information.¹⁸⁵ On this account, cases like *Rosemont Enterprises* and *Abdul Jabbar*, although they involved commercial uses, may have been wrongly decided.¹⁸⁶

At least since the copyright case of *Campbell v. Acuff-Rose Music*, works of parody, even commercial, have been protected because a work's commercial nature is only one element in the inquiry of its purpose and character and not "every commercial use of copyrighted material is presumptively. . . unfair. . . ."¹⁸⁷ Further, parody or satire often *requires* that its victims not consent. Consider, for example, how after being derided for so long, former Vice President Dan Quayle agreed to be featured in a potato chip commercial, a reference to his difficulty spelling the word "potato."¹⁸⁸ Whether the move benefited the Vice President's image or not, we certainly understood his TV appearance to be self-interested. Truth be told, satire and self-deprecation are not the same, and the former does not tolerate paid accomplices. In addition, satire is unlikely to cause harm because the public probably does not believe that it originated with the celebrity.¹⁸⁹ For these reasons, most satires should be privileged, even if they take the form of a commercial good.

By contrast with the current law, the rules proposed here would privilege the majority of recoding uses cited above because although they might all have resulted in net positive externalities, they were

¹⁸⁵ Indeed, we all tend to discount what we do not know. Moreover, assessing the usefulness of information often depends on learning about its precise nature; but given that people cannot unlearn what they have just been made aware of, making people pay for information has always been a challenge.

¹⁸⁶ See *supra* notes 31, 49 and accompanying texts. In *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996), the Ninth Circuit held that the Defendant's use of the Plaintiff's real name in an advertisement was sufficient to support a right of publicity claim. But what economic injury had the Plaintiff suffered? Had GM's commercial featured an adequate disclaimer (so as to avoid consumer deception), how would it have threatened Abdul-Jabbar's ability to endorse goods?

¹⁸⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 584 (1994).

¹⁸⁸ See Maureen Dowd, *Selling Chips? Or Is it Quayle? It's All a Blur*, N.Y. TIMES, Jan. 29, 1994, § 1, at 6.

¹⁸⁹ Another type of unauthorized use which may be unlikely to cause harm is one which the celebrity can easily refute or disavow.

equally unlikely to have been negotiated.¹⁹⁰ By way of example, consider the marketing to the gay community of John Wayne greeting cards featuring a picture of the famed actor, modified to make it seem like he wore lipstick.¹⁹¹ It is highly unlikely that either Wayne or his family would have consented to his becoming a symbolic figure in the gay community. Even if the family had considered licensing the actor's image for the venture, its speculative nature and the risk of damage to Wayne's macho image would have given rise to insurmountable transaction costs. The entrepreneurial card-maker would also have been at a loss to pass on to consumers the full cost of what the Wayne estate would have liked to be paid for this use. Wayne stardom merely guaranteed that he would stay away from the card business at any affordable price. Yet, the proposed use was transformative, non-deceptive and apparently had some value to the community who recoded him.

An important lesson to draw from the current law of publicity is that the commercial nature of an unauthorized use of human identity cannot be determinative of the issue of infringement. After all, the Supreme Court's decision in *Zacchini* involved what was allegedly one of the most sacred form of speech, news reporting. Furthermore, it is also telling that no clear rules have developed to address instances where commercial and communicative speech is intertwined.¹⁹² Correspondingly, the commercial/non-commercial dichotomy should not be the touchstone of right of publicity infringement.

Expressive unauthorized commercial or advertising uses would often be privileged under the rules proposed, although there is much uncertainty concerning their legality now. Imagine that a pharmaceutical company published print ads, or "information pamphlets" featuring the photos of well known individuals who

¹⁹⁰ See *supra* note 148 and accompanying text.

¹⁹¹ Madow, *supra* note 12, at 144-45.

¹⁹² See *Riley v. Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781, 787-89 (1988) (describing charitable solicitations as mixed speech subject to more than minimal constitutional scrutiny); *MCCARTHY*, *supra* note 1, § 8:96, at 8-158.1 (suggesting that "the Supreme Court will denominate a mix of advertising, news, social comment and entertainment as 'commercial speech' subject to the lower level of constitutional protection.").

suffered from depression, and advised that anyone who thought that he or she struggled with this illness should seek professional help. Assume also that the advertising company controlled a large share of the market for antidepressant drugs. One might argue that this type of advertising results in net positive externalities because its subject matter is likely to trigger public discussion.¹⁹³ Moreover, the advertiser may not internalize all the benefits from the ads, and for this reason, could be prevented by transaction costs from reaching a deal with a celebrity. Finally, it is also unclear whether such a use either undermines the celebrity's incentives or devaluates her likeness.¹⁹⁴

Defendants who play up humor in advertisements, like in the *White* and *Allen* cases, should perhaps also be protected.¹⁹⁵ In the latter case, actor-director Woody Allen sought an injunction and damages against the defendants for publishing an advertisement in which a plaintiff look-alike was seen as "a satisfied holder of National's movie rental V.I.P. Card."¹⁹⁶ In the ad, a sort of look-alike—Boroff was his name—was seen standing at a counter, renting videotapes of Allen's movies.¹⁹⁷ The defendants conceded that Boroff looked like the plaintiff but disagreed that "they intended to imply that the person in the photograph was actually Plaintiff or that Plaintiff endorsed National":

[T]he photograph does not depict Plaintiff. According to defendants, the idea of the advertisement is that even people who are *not* stars are *treated* like stars at National

¹⁹³ See National Institute of Mental Health, *The Invisible Disease: Depression*, at <http://www.nimh.nih.gov/publicat/invisible.cfm> (last visited Oct. 25, 2001) ("Major depression is the leading cause of disability in the U.S. and worldwide. Depressive disorders affect an estimated 9.5 percent of adult Americans ages 18 and over in a given year, or about 18.8 million people in 1998.").

¹⁹⁴ This line of reasoning may explain *Finger v. Omni Publ'n Intern., Ltd.*, 566 N.E.2d 141, 144, where the Court held that use of the Plaintiffs' picture in an article on experimental fertilization techniques did not infringe their right of publicity. Of course, a Plaintiff may still have a remedy under the law of defamation, or in privacy.

¹⁹⁵ See *supra* note 33 (discussing *White v. Samsung Elecs. Am., Inc.*); and *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985).

¹⁹⁶ *Allen*, 610 F. Supp. at 617.

¹⁹⁷ *Id.* at 618.

Video. They insist that the advertisement depicts a “Woody Allen fan,” so dedicated that he has adopted his idol’s appearance and mannerisms, who is able to live out his fantasy by receiving star treatment at National Video. The knowing viewer is supposed to be amused that the counter person actually believes that the customer is Woody Allen.¹⁹⁸

Not having seen the advertisement, it is difficult to assess whether the Defendants’ interpretation was credible or not. Nonetheless, had it featured an adequate disclaimer, the ad may very well have been an appropriate transformative use of Woody Allen’s likeness.¹⁹⁹

The rules presented here resemble what others have proposed for the right of publicity. For example, drawing on trademark law, some scholars have argued that unauthorized uses of persona that are purely generic or nominative should be allowed.²⁰⁰ Applying this distinction, many have claimed that *White v. Samsung Electronics* had been wrongly decided because the manufacturer’s use of White’s identifying characteristics was nominal rather than an appropriation of her goodwill.²⁰¹ These views will often yield similar results to the

¹⁹⁸ See *id.* The court also noted that Boroff was not perfectly identical to the plaintiff. See *id.* at 624 .

¹⁹⁹ For the same reasons, *Carson v. Here’s Johnny Portable Toilets*, 698 F.2d 831 (6th Cir. 1983) is almost certainly wrong. *Motschenbacher v. R.J. Reynolds Co.*, 498 F.2d 821, 822 (9th Cir. 1974), on the other hand, may not be, because the defendant’s use falsely suggested that the race driver endorsed its products.

²⁰⁰ See Kaplan, *supra* note 50, at 67-68 (“the nature of the appropriation (i.e., was the use deceptive or so extensive as to be a theft, or, alternatively, was the use informational or transformative?) is more important than simply applying the commercial/non-commercial test to any use.”). About generic use in trademark law, see, e.g., *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302 (9th Cir. 1992); *WCVB-TV v. Boston Athletic Ass’n*, 926 F.2d 42 (1st Cir. 1991). To the same effect, an author has advocated submitting the right of publicity to the condition found in the *Restatement of Unfair Competition* that the defendant’s use not only “conjures up the celebrity to the viewer,” but also “projects a star quality association between the celebrity and the advertised product.” See David S. Welkowitz, *Catching Smoke, Nailing Jell-O to a Wall: The Vanna White Case and the Limits of Celebrity Rights*, 3 J. INTELL. PROP. L. 67, 93 (1995); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, statutory note at 536 (1995).

²⁰¹ See Welkowitz, *supra* note 200, at 79-82 (arguing that the Ninth Circuit “confused the means of appropriation — i.e., whether an actual likeness was used — with the purpose of appropriation”); Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853,

ones I advocate in this paper, particularly because the supporters of “genericide” recognize that recoding uses do not prevent celebrities from endorsing goods and services. My approach probably also comes close to the proposals that have been made to import the copyright doctrine of fair use into right of publicity analysis.²⁰²

Finally, Dean Alice Haemmerli has suggested distinguishing between uses that identify a plaintiff and those that indirectly evoke or remind the public of him.²⁰³ Although Dean Haemmerli’s characterization is fully consistent with her impressive Kantian analysis of the right of publicity, it ignores somewhat the economics of celebrity marketing. From an economic standpoint, there is no need for consumers to reach the conclusion that a “person is there,” or that “this is X” rather than “this reminds me of X” for the desired associations to make their way into their mind. The effectiveness of goodwill transfer may not follow Dean Haemmerli’s Kantian logic.²⁰⁴

864-66 (1995) (arguing that Samsung had not used White’s characteristics in advertisement to identify her and appropriate her goodwill as much as to depict a generic game show letter turner). Support for the position that celebrity identity may become generic has been found in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). In that case, the persona of Ginger Rogers and Fred Astaire were clearly evoked by the title of the defendant’s film, *Ginger & Fred*. *Id.* at 1001. Nonetheless, the Court held that First Amendment values protected the defendant’s use of the celebrities’ names as it was not “wholly unrelated” to the movie” or “disguised commercial advertisement.” *See id.* at 1004.

²⁰² *See* Haemmerli, *supra* note 13, at 464-76. *See also* *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 971 (10th Cir. 1996); *Comedy III Prods. v. Gary Saderup, Inc.*, 21 P.3d 797, 807-8 (Cal. 2001) (although rejecting the “wholesale importation of the fair use doctrine”); *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1449 (11th Cir. 1998).

²⁰³ *See* Haemmerli, *supra* note 13, at 459-64. Dean Haemmerli’s careful argument focuses on the plaintiff rather than on the extent of the social use of a celebrity’s identity because she develops a personality-based right of publicity.

²⁰⁴ To the extent that evocation of a celebrity allows a third party to appropriate her magnetism, there is no *a priori* economic basis for distinguishing between identification and evocation. Imagine, for example, that an advertiser used the words “*Is that your final answer?*”: Whether this sentence merely evokes the personality of a game show host or identifies him, the advertiser is attempting to benefit from Mr. Philbin’s popularity. Thus, from an economic viewpoint, Dean Haemmerli’s argument embraces an overly restrictive definition of celebrity persona, and ignores that modern day celebrities cast a halo much wider than their Kantian person.

IV. DISTRIBUTIVE CONSIDERATIONS AFFECTING THE DEFINITION OF THE RIGHT OF PUBLICITY

Obviously, the right of publicity described here leaves celebrities with less control over their identity; this outcome may hurt our sensibilities. The allusions to fair rewards, unjust enrichment or theft that abound in right of publicity cases²⁰⁵ show that we are generally concerned with rewarding celebrities for the ways in which they enliven our lives. Yet, if, as media theorists argue, celebrities, their publicists, the media, the public and third-party “recoders” jointly produce fame,²⁰⁶ the law should consider how its rewards are distributed among all of these parties. For example, legalizing commercial recoding uses would not only allow individuals to enjoy more mass-produced celebrity goods and services; it would also allow commercial third parties to turn a profit at the expense of celebrities.²⁰⁷ Would this result be acceptable?

Few things might seem as personal as one’s fame, and celebrities generally see themselves as the sole party entitled to its rewards.²⁰⁸ I admit to being skeptical about this distribution of the rewards of fame, which I believe to be a social trust. I also share Michael Madow’s concerns for what he perceived to be the courts’ privatization of popular culture through the commodification and appropriation to celebrities of socially constructed meanings.²⁰⁹ In economic terms, however, concentrating the rewards of celebrity in the exclusive hands of celebrities also imposes significant rent-seeking costs.

²⁰⁵ See *supra* note 3 and accompanying text.

²⁰⁶ See *supra* note 81 and accompanying text.

²⁰⁷ McCarthy dismisses the recoding literature on this very basis. See MCCARTHY, *supra* note 1, § 7.6[B], at 7-29 and § 7:21-22.

²⁰⁸ See generally JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996) (describing a certain myth of romantic authorship).

²⁰⁹ See Madow, *supra* note 12, at 137-43. In this respect, a key argument of those who favor recoding is that fame is not exclusively the result of a celebrity’s work: it crucially depends on the public’s favor. *Id.* at 181-96.

A. *The Problem of Rent-Seeking*

Economic rent is defined as “payments made to a factor of production in excess of what is required to elicit the supply of that factor.”²¹⁰ Economic rent imposes social costs because it creates incentives for third parties (“rent-seekers”) to engage in a costly race to capture the apparent windfall. The larger the economic rent, the larger the number of people who will engage in rent-seeking, and the greater the sum of money they will expend in doing so.²¹¹

Quite plainly, many celebrities receive substantial economic rent. For example, a professional baseball player’s rent is very large because his next most lucrative occupation, as a coach, for example, pays much less.²¹² Most right of publicity plaintiffs are celebrities and come from fields of endeavors—the sports, the arts, the entertainment industry—where few successful individuals command a disproportionate share of the income of their calling.²¹³ Indeed, it is not uncommon for successful actors and athletes to earn hundreds of times the lowest, if not the median, income in their field.²¹⁴ The

²¹⁰ See STIGLITZ, *supra* note 84, at A3.

²¹¹ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 41 (5th ed. 1998) (discussing the case of salvage at sea). Economic rent also transfers wealth from consumers to producers, in this case celebrities. This transfer, however, could be justified on the basis of some distributive goal or for the purpose of offering greater incentives to stars to perform and increase the positive externalities of their activity.

²¹² In fact, it is probable that aspiring celebrities would remain engaged in their field of endeavor even if their wages fell *below* the wages they would receive in their second best occupation. Indeed, athletes, artists, actors and musicians may value fame itself and always consider it rewarding to stay in the public eye. Stated differently, celebrities’ utility functions may incorporate a “lexical preference” for public consideration; much of their motivation may derive from a desire for public consideration rather than from monetary rewards. To this extent, celebrities’ utility functions of income may be particularly flat upward sloping. See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 833 (1994) (discussing lexical ordering of preferences).

²¹³ Economist Sherwin Rosen has described this superstars phenomenon “wherein relatively small numbers of people earn enormous amounts of money and seem to dominate the fields in which they are engaged.” See Sherwin Rosen, *The Economics of Superstars*, AM. SCHOLAR 449 (Autumn 1983). See also Lex Borghans and Loek Groot, *Superstardom and Monopolistic Power: Why Media Stars Earn More Than Their Marginal Contribution to Welfare*, 154 J. INST. AND THEORETICAL ECON. 546 (1998).

²¹⁴ For hard figures from a number of superstar markets, see FRANK & COOK, *supra* note 125, at 61-99; Peter Kafka, *The Power 100*, FORBES, Mar. 20, 2000, at 196.

flip side of this phenomenon is that superstars also account for an unusually large percentage of the output of their respective industry. Indeed, the ease of reproduction of images and sounds in the electronic media, the definition of success in relative rather than absolute terms, and the fact that greater and lesser talents are imperfect substitutes all contribute to superstars dominating their respective market.²¹⁵

Rent-seeking costs imply that society is worse off even if a baseball player's economic rent is *smaller* than the increase in social welfare due to his glamorous activity. In addition, behavioral studies have shown that rational persons (let alone celebrity-aspiring youth) systematically overestimate *ex ante* their chances of success in activities where odds of winning are slim.²¹⁶ In these settings, psychological biases, in particular availability heuristics, distort what would otherwise be rational calculations about one's expectations of success. To the extent that the right of publicity creates additional incentives for individuals to enter into crowded lines of work,²¹⁷ it draws a sub-optimally large number of persons to enter into winner-take-all markets, and it fosters wasteful investment in skills that are not scarce.²¹⁸ In this light, the right of publicity's rent-seeking costs

²¹⁵ See Rosen, *supra* note 213, at 449, 454 (explaining that stars have no perfect substitutes); and FRANK & COOK, *supra* note 125, at 32-44.

²¹⁶ See Jolls et al., *supra* note 155, at 1477; FRANK & COOK, *supra* note 125, at 104-5 (citing a survey of college basketball starters about their chances of success in the professional market). The right of publicity is invoked most often in fields such as sports and the arts where the chances of "making it" are slight.

²¹⁷ For example, the right of publicity contributes to making endorsement contracts profitable; as a result, athletes, artists and entertainment figures continue to derive a substantial part of their income from the merchandizing of their identity. Thus, curtailing the right of publicity would probably result in lower income for superstars, even if they tried to make up by performances what they currently earn in endorsements. See Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 107-12 (1994). Obviously, how much the right of publicity contributes to overcrowding depends on the income elasticity of celebrity supply. If merchandizing dollars are concentrated in the hands of a few top earners, however, the decreasing marginal utility of money may imply that curtailing the right of publicity would not significantly affect the supply of fame.

²¹⁸ To put things more crudely, the right of publicity may dupe teenagers into registering for night drama classes because they overestimate their chances of becoming the next Tom Hanks. With its lure of millions of dollars in sponsorship down the road to success, the right of publicity may be a cost-effective way to get potential Tom Hanks to work on their

are probably important because of the high revenues that superstars earn today, the unrelenting media attention that they command,²¹⁹ and the common perception that success, if not fame, is not impossible for most of us. Thus, a right of publicity that concentrates the rewards of fame in the hands of celebrities entails inefficiencies.

B. Liability Rules as a Solution to Distributive Concerns

The rules presented in this paper would limit the circumstances under which well known celebrities recover, with the consequence that others would pocket some of the rewards of fame that were previously inaccessible to them. Moral views about human worth and integrity, which I have ignored thus far, may suggest that the rewards of fame should rest with right of publicity plaintiffs rather than some corporate defendants. These views are not sufficient to reject the rules presented in this paper, however, if protecting celebrities with liability rather than property rules can both efficiently protect celebrity identities and give celebrities rewards that may be thought to be naturally theirs.

Thirty years ago, Guido Calabresi and Douglas Melamed argued that the common law preferred to protect valuable resources with property rather than liability rules, a proposition that seems to apply to the modern protection of human persona.²²⁰ But Calabresi and

acting skills (at least in comparison to a massive investment in drama programs in elementary schools.).

²¹⁹ Thus, races to stardom no doubt capture the public's attention more than other rent-seeking opportunities that have attracted the attention of economists, such as patent races and salvage at sea.

²²⁰ In their landmark article, the authors argued that entitlements to economic resources could be protected with property, liability or inalienability rules. Thus, whereas property rules required state involvement for the purpose of protecting entitlements, they did not involve the state in assessing the value of assets. Property entitlements could only be transferred voluntarily, implying that only their owners could determine their worth. By contrast, entitlements protected by liability rules necessitated state involvement not only in their defense, but also in their valuation when courts were called upon to order the payment of damages. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

Melamed also showed that liability rules were sometimes preferable to property ones, for example, when a large number of buyers collectively valued an asset more than its owner but transaction and coordination costs were prohibitively high. This set of circumstances is exactly what we have when a celebrity achieves significant fame; she becomes a “cultural icon” venerated by many who may seek to recode her.²²¹ In these circumstances, then, liability rules would allow celebrities to be compensated for third parties exploiting their fame while at the same time allowing socially beneficial expression to take place.

Consider, for example, the case of *Martin Luther King, Jr., Center for Social Change* where the estate of Rev. King and related parties sought to enjoin the defendant from selling plastic busts of the civil rights leader.²²² One might think that the public might have valued a memento of the remarkable pastor. Yet, because the market for these busts consisted of a large number of individuals who were probably not willing to pay very much for them, the only commercially viable exploitation of Rev. King’s profile consisted in plastic statues. Where a celebrity has no clear substitutes, as Rev. King probably does not, a celebrity has the power to prevent resources from reaching their efficient use. Embracing a liability rule in the *King* case would have allowed the defendant to obtain use of Rev. King’s identity if it compensated the plaintiffs for lost incentives,²²³ for

²²¹ Indeed, it has been observed that “[b]ecause property rules give one person the sole and absolute power over the use and disposition of a given thing, it follows that its owner may hold out for as much as he pleases before selling the thing in question.” See Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091 (1997). In many cases, this situation does not entail significant consequences because “a potential buyer can play one seller against another until a competitive price is reached.” See *id.* at 2092. But this is not the case for most stars who have no perfect substitutes.

²²² *Martin Luther King, Jr., Ctr. for Soc. Change, Inc v. American Heritage Prods., Inc.*, 694 F.2d 674 (11th Cir. 1983).

²²³ The administratrix of the estate could have argued that the proposed use was degrading, although the economic significance of this argument is unclear given that Rev. King had passed away. Is the risk of distasteful commercial exploitation of one’s persona after death likely to reduce significantly *ex ante* the incentives to market her identity?

interference with their identity management,²²⁴ or for any other harm they might have suffered.²²⁵

Similarly, a liability principle would best address cases where a celebrity may seek to hold-out because the proposed use, like parody, is not flattering although it may be socially valuable. Consider also the *Hoffman* case where a federal district court awarded \$1.5 million in damages against a fashion magazine for publishing a movie star's picture digitally modified to model clothes, without commentary or information. The District Court held that the defendant's behavior was not protected by the First Amendment, suggesting that the article was an advertisement in disguise because many featured pieces of clothing has been designed by major advertisers in the magazine.²²⁶ The Ninth Circuit reversed, however, holding that the magazine's use was entitled to First Amendment protection.

From an economic standpoint, *Hoffman* is a difficult case. On the one hand, the defendant's digital mutilation of the plaintiff's likeness may have cheapened his identity, and caused him such moral outrage as to affect his incentives. On the other hand, the public does derive value from the juxtaposition of the cultural symbols that inheres in dressing up Dustin Hoffman in the latest chic; preventing such a recoding use is not costless.²²⁷ A way to ease a controversy like

²²⁴ One measure of damages in that case would be to afford to the Plaintiff the means to correct whatever damage has been caused to its management of Rev. King's image. This measure of damages has been allowed in unfair competition cases. *See, e.g.,* *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365, 1374-6 (10th Cir. 1977).

²²⁵ *See also* *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods.*, 508 F. Supp. 854, 865 (N.D. Ga. 1981), where the plaintiffs found "the defendants' bust of Dr. King to be tasteless, and the manner in which it was marketed to be as offensive as it is illegal." Should this be sufficient ground to prevent public use? As the District Court observed, "an opposing argument, at least equally as strong, can be made that public policy requires instead that the name and likeness of Martin Luther King, Jr. be protected as part of the public domain."

²²⁶ This inference was somewhat speculative, however, as the New York Court of Appeals found in *Stephano v. News Group Publ'ns, Inc.*, 474 N.E.2d 580, 582-83, 586 (N.Y. 1984) (where the defendant magazine ran the plaintiff model's picture a second time in a "Best Bets" column which featured products of the magazine's advertisers).

²²⁷ The commentary that accompanied Hoffman's picture stated, tellingly: "What do you get when you cross a hopelessly straight starving actor with a dynamite red sequined dress?" and "You get America's hottest new actress." The editor-in-chief also commented on the feature in these terms: "... The movie stills in our refashioned spectacular, 'Grand

Hoffman would have been to give the plaintiff some measure of profits from the defendant's activity while denying Hoffman the right to enjoin the infringing expression.²²⁸

Liability rules are sometimes criticized on the ground that it is difficult for a court or a jury to assess accurately the value of the asset in contention, particularly if it is intangible. As true as this may be, a court's glib evaluation is equally likely to underestimate the worth of an infringing use. Furthermore, the difficulty *ex ante* of determining the value of an infringing use does not necessarily mean that the task is arbitrary *ex post*.²²⁹ Thus, without undermining the seriousness of this argument, a limited application of a liability rule may turn out to be useful.

Roberta Kwall has also suggested protecting human identity with liability rather than property rules.²³⁰ Our inquiries differ, however, in so far as Professor Kwall strives first and foremost to reconcile the right of publicity with the First Amendment. I have reached a similar result by focusing on what types of circumstances are likely

Illusions' (Page 104), have appeared before – in fact, they're some of the most famous images in Hollywood history. But you've never seen them quite like this." See *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 870-71 (C.D. Cal. 1999). Note that the digitally-altered actors appeared in scenes that had made them famous: on the one hand, these images had reached iconic status; on the other, they also had been used extensively to advertise the actors' work.

²²⁸ As *Hoffman* shows, a liability rule would promote First Amendment values. Indeed, no matter how much sympathy the District Court had for Hoffman, it dismissed First Amendment considerations too summarily. Its view that the defendant's use was commercial and was not privileged because it was false ("Los Angeles Magazine fabricated an image of Dustin Hoffman using computer digitalization techniques, and then published that image knowing it was false") is not convincing. On the one hand, the Ninth Circuit's opinion left Hoffman without any compensation for what appears to be a wholesale appropriation of his traits. As the concurrent opinion in *Zacchini* observed, it is relevant to First Amendment balancing whether the plaintiff seeks to repress speech or simply to be paid for it. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573-74 (1977). Furthermore, protecting human identity with a liability rule is consonant with the First Amendment's dislike for prior restraints on speech while offering some compensation to the subject of identity appropriation, when it occurs in the entertainment media. See Kwall, *Liability Rule*, *supra* note 19, at 64.

²²⁹ See generally Hon. Alex Kozinski, *What's So Fair About Fair Use?*, Brace Memorial Lecture (Nov. 11, 1999) (proposing the application of this rule to the current fair use doctrine).

²³⁰ See Kwall, *supra* note 19.

to give rise to market failures justifying the adoption of liability rules. Professor Kwall's project is also more circumscribed because she does not seek to justify the right of publicity in economic terms.²³¹ Nonetheless, I certainly approve of Professor Kwall's effort to infuse greater flexibility into the law of publicity.

CONCLUSION

I have presented an economic analysis of the law of publicity in the hope of clarifying the debate between economic and moral arguments which I see as the central issue plaguing the development of the right of publicity. The Supreme Court's view in *Zacchini* that the central policy underlying the right of publicity is to offer incentives to people to market their persona further supports the view that economic analyses of this legal right are overdue.

Although the analysis I have proposed does not offer definitive answers about what form the right of publicity should take, it casts serious doubts on a number of oft-quoted propositions about the merit and ideal scope of this legal institution. Economic analysis also suggests that the current right of publicity is overbroad because the law ignores that many unauthorized uses of human identity result in positive network effects rather than negative externalities. Nonetheless, the law should protect celebrity identity because it is a repository of social meaning. Thus, I have argued that a person's right in her identity should be limited to enjoining uses that are deceptive or that directly compete with the exploitation of her persona, without being transformative. These rules would go a long way towards recognizing the social value of recoding, as a creative process, as an activity essential to individual identity formation, and as an activity essential to the upkeep of fame.

One could object that my analysis is deficient because it ignores moral arguments in favor of the right of publicity, especially those about the just desert of plaintiffs and the unjust enrichment of defendants. It is true that moral views about human worth and

²³¹ See *id.* at 48.

integrity have a role to play in right of publicity cases. The task I set for myself, however, has been to clarify one inescapable class of arguments—economic arguments—about right of publicity cases in order to show that their treatment by courts and commentators is most often unsatisfactory. I have only argued that the ongoing “propertization” of human personae²³²—which parallels a more general phenomenon affecting intellectual property rights²³³—merits scrutinization in light of its economic effects. To this extent, I hope that my work will be useful even for those who abhor consequentialist analysis.

One might object that this article has focused unduly on celebrities, ignoring cases where the personae of less well known people are exploited without their consent. In the market for attention, however, the right of publicity is primarily that of celebrities. Furthermore, to the extent that the most cogent distinction between the rights of privacy and publicity consists in their different policy rationales (protecting human integrity vs. offering incentives to market identity), I would venture that most cases involving ordinary people’s likeness are best analyzed as breaches of privacy.

That I have not analyzed moral arguments supporting the right of publicity does not imply any opinion about their merit. Quite to the contrary, I share the view that “the current application of economic analysis to law should be regarded as an interim step toward the

²³² The descriptions of theft and piracy that abound in the case law confirm that judges consider the right of publicity to be a form of property. *See, e.g.*, *Zacchini*, 433 U.S. at 576 (“The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will” quoting from Harry Kalven, Jr., *Privacy in Tort Law — Were Warren and Brandeis Wrong?*, 31 *LAW & CONTEMP. PROB.* 326, 331 (1966); *Midler v. Ford Motor Corp.*, 849 F.2d 460, 462 (9th Cir. 1988) (Defendants were no better than the “average thief”); *Cardtoons, L.C. v. Major League Baseball Players’ Ass’n.*, 95 F.3d 959, 976 (10th Cir. 1996) (“Indeed, allowing MLBPA to control or profit from the parody trading cards would actually sanction the theft of Cardtoons’ creative enterprise.”).

²³³ *See, e.g.*, Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 *TEX. L. REV.* 873, 895-904 (1997) (reviewing JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1996)); Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 *CATH. U. L. REV.* 365 (1989).

integration of law with the behavioral, natural, and social sciences.”²³⁴ In this respect, I hope to have shown that economics only questionably supports the current expansive scope of the right of publicity. The implication of this view, if it is correct, is that courts must begin articulating what moral views lurk behind their decisions. The right of publicity must evolve beyond a jurisprudence of fair rewards and embrace explicit standards of adjudication.

²³⁴ Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309, 1314 (1986).