

# PUBLICITY RIGHTS AS PROPERTY RIGHTS

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## ABSTRACT

Recent legal history has witnessed the creation of a large number of new forms of property. Consequently, judges and legislators have generally been willing to imbue these new forms of property

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with all or most of the attributes of traditional property. In this article we try to explain this trend by examining one important new kind of property, the publicity right. Publicity rights initially emerged in response to functionalist considerations: transferable rights were needed to keep pace with commercial custom. As time went on, courts began to expand the attributes of the right to new frontiers, such as inheritability. In taking this leap, courts generally relied on the following chain of reasoning: “since the right is assignable, it must be property, and since it is property, it must have attribute X (which is shared by all property).” This type of reasoning continues to dominate many cutting-edge publicity rights debates in the courts and commentaries today, such as the debates over the treatment of publicity rights as full-fledged property upon divorce and bankruptcy. Our aim here is twofold: 1) to propose a new, ideological/conceptual explanation for part of the explosion in new forms of property: once an article acquires one of the attributes of property, legal actors will label it property and thus it will tend to acquire the other traditional attributes of property as well; and 2) to criticize this sort of conceptualist reasoning with respect to publicity rights and elsewhere and to reorient the debate back down to the rich, ground-level policy issues.

#### INTRODUCTION

The century just ended witnessing a continuing expansion both in governmental protection of different entitlements in property and in judicial and legislative willingness to treat such recognition as carrying with it the familiar attributes that older forms of property enjoy, such as descendability and transferability. Agricultural allotments, broadcast licenses, and taxi medallions are earlier examples. More recent additions are airport landing slots, domain names on the web, and pollution permits.

In dealing with these newer forms of property, courts and legislatures could have chosen a functionalist approach, determining whether an interest should be treated as property for a particular purpose in the light of the policies that its recognition serves. Alternatively, a formalist approach would treat labeling an interest “property” as automatically carrying with it an unvarying package of attributes without regard to the reasons the interest was given governmental protection in the first place. Our chief thesis here is that the formalist approach has been dominant in judicial and legislative treatment of a variety of new kinds of property, including the subject of this essay: publicity rights—the right of an individual

to control the commercial use of her identity.<sup>1</sup>

Publicity rights were first judicially recognized in New York in 1953,<sup>2</sup> and they have been growing (both geographically and in their scope) ever since. Today, such rights are recognized, either under the common law or by statute, in twenty-eight states,<sup>3</sup> and there has been a monumental amount of scholarship on the subject. Nonetheless, little ink has been expended in showing why the right has experienced such startling expansion. One scholar, Michael Madow, attributes this expansion to interest group pressure,<sup>4</sup> while another, George M. Armstrong, Jr., credits some deep urge generated by the capitalistic system towards commodification.<sup>5</sup>

More general explanations of the evolution of new forms of property similarly focus on large-scale political and socio-economic trends. One prominent strain of scholarship argues that property law responds to the dictates of economic efficiency: new forms of property therefore emerge when they will help to maximize wealth.<sup>6</sup> Richard A. Epstein is in this camp to some extent when he stressed that new forms of property rights tend to emerge out of custom, with custom often being a better indicator of efficiency

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<sup>1</sup> See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1.3 (2d ed. rev. 2003).

<sup>2</sup> See *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.*, 202 F.2d 866 (2d Cir. 1953).

<sup>3</sup> See MCCARTHY, *supra* note 1, § 6.3. The amounts of money hovering around the exploitation of these rights appears to be quite substantial. For example, "star tennis players and golfers earn three to five times their prize money from endorsements and other nontournament sources." ROBERT H. RUXIN, *AN ATHLETE'S GUIDE TO AGENTS* 131 (4th ed. 2003) (noting, though, that athletes in team sports earn a lower percentage of their total income from exploiting publicity rights).

<sup>4</sup> See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 177-78 (1993).

[A]s the "celebrity industry" has grown in power, organization, and sophistication, and as the costs involved in celebrity production have soared, the pressure for legal commodification of personas has intensified. This is pressure that would-be appropriators (and consumers who might share their interests in free use) have had neither the cohesion, lawyering skill, nor lobbying muscle to counter this pressure effectively. The result has been a steady stream of judicial decisions and statutes recognizing a property-like right of publicity and expanding its scope.

*Id.* (citations omitted).

<sup>5</sup> See George M. Armstrong, Jr., *The Reification of Celebrity: Persons as Property*, 51 LA. L. REV. 443 (1991).

<sup>6</sup> See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 79 AM. ECON. REV. PROC. 347 (1967) (arguing that property rights will form and grow as economic scarcity increases, using as an example Native-American rights to fur); Anderson & Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163 (1975) (testing Demsetz's theory on resource and water rights in the American West); Symposium, *The Evolution of Property Rights*, 31 J. LEGAL STUD. 331 (2002) (devoting itself largely, although not entirely, to testing, refining, and reworking the Demsetz thesis).

than economic analysis.<sup>7</sup> Carol M. Rose suggested that property law responds to some idea of general welfare that encompasses, but is larger, than economic efficiency. For example, the enhancement of sociability is included in her notion of welfare.<sup>8</sup> The whole idea that property law responds primarily to efficiency has been challenged by another group of scholars, who have argued, like Madow, that political considerations and the power of certain interest groups may entrench new forms of property even if they are inefficient.<sup>9</sup>

In contrast to all of this work, which focuses on broader social movements, our explanation of the evolution of publicity rights stays squarely within the realm of law and legal discourse. We stress the nature of legal reasoning and the ideological constructs that it places on actors within the legal world, both courts and commentators.

In Part I, we trace the history of publicity rights, showing how the right initially emerged for the narrow, functionalist purpose of permitting assignability, thus serving as an example of Epstein's thesis that property law will tend to acquiesce in developing commercial customs. However, publicity rights later went well beyond custom and grew to include inheritability as well. The expansion of the right beyond assignability was driven largely by a form of reasoning that we call the "property syllogism." This reasoning started with the premise that because publicity rights had certain attributes of property, like assignability, they were a form of property, and then moved from this premise to the conclusion that because publicity rights are property, they must be fully inheritable.<sup>10</sup>

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<sup>7</sup> See Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85 (1992); but see Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. 515 (2002) (noting that "top-down" politics can sometimes get in the way of this process and lead to inefficiency).

<sup>8</sup> See Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) (using beaches and roads as support for her thesis that courts consider sociability, in addition to wealth maximization, as one element of social welfare).

<sup>9</sup> See, e.g., DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* 13-44 (1981) (noting that while property rights regimes will have some tendency to push towards efficiency, politics can and often does warp this process); Saul Levmore, *Two Stories about the Evolution of Property Rights*, 31 J. LEGAL STUD. 421 (2002) (stating that against the optimistic, efficiency-based story of property rights evolution, one must also be aware that property rights are often the result of inefficient capture by interest groups); Robert H. Nelson, *Private Rights to Government Action: How Modern Property Rights Evolve*, 1986 U. ILL. L. REV. 361 (arguing that the first steps towards institutionalizing new forms of property are often taken by judges for reasons of efficiency, but that as the legislature gets involved in later stages, political pressures become paramount and inefficiency often results).

<sup>10</sup> The story that we tell about publicity rights here could, we think, also be told about many other new forms of property, such as broadcasting rights. Spectrum itself has always been considered property of the United States government, with the FCC assigning broad-

Thus, once publicity rights acquired one of the attributes of property, they were held to be property and moved towards acquisition of all of the attributes traditionally associated with property.

In Part II, we explain why the scope of the right has also changed dramatically. While initially, publicity rights protected only an individual's name and likeness, it has grown to encompass virtually any indicia of identity. Our explanation of this development focuses on the deep-seated urge of judges, as well as commentators, to be consistent and logical, and to avoid arbitrary lines at almost any cost. There simply is no clear line, nor any strong countervailing principle, stopping protection at name and likeness.

Part III deals with two cutting-edge issues with respect to the right of publicity: treatment as property upon divorce and treatment as property upon bankruptcy. In both cases, we show that the property syllogism has continued to ring loudly in the heads of both courts and commentators, structuring the early treatment of those issues. We try to steer the debate back to the underlying policy issues raised by each context.

Finally, this article concludes by undertaking a normative evaluation of the right of publicity in light of the distortions of judicial reasoning that we have identified in the first three parts. Because the right itself should be neither strongly supported nor strongly opposed, we conclude that the chief area of controversy with respect to publicity rights in the future will probably relate to its precise contours. Here, we hope that our critique of judicial and scholarly reasoning, particularly the property syllogism, can play a large role in forcing legal actors to go beyond conceptualism and to examine the ground-level policy issues involved in each area of concern. Our analysis also offers a stern warning against imbuing other rights or privileges with some, but not all, of the attributes of property for some narrow functionalist purpose. The modes of judicial reasoning that we have identified in this article make it likely

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cast rights over a particular range of spectrum to companies after public interest hearings. In return, these companies were supposed to use their assigned spectrums for public purposes, and if they failed to do so, the FCC could refuse to renew the license. See, e.g., Lawrence J. White, "Propertyizing" the Electromagnetic Spectrum: Why It's Important, and How to Begin, 9 MEDIA L. & POL'Y 19, 22-24 (2000). But as the assigned rights began being renewed virtually automatically, the public interest requirements began to fall away, and lotteries began to be used to distribute spectrum; FCC bureaucrats, legislatures, and courts began seeing these broadcast rights as a form of property. And this, in turn, has often had interesting results consistent with our general thesis: several courts have recently overruled the FCC and held that broadcast rights must be usable as security for credit, because broadcast rights have clearly become a form of property (despite explicit statutory language to the contrary!), and one attribute of property is that it may be used to secure a debt.

that expansion of the right towards other, less desirable traditional aspects of property will occur.

## I. FROM FUNCTIONALISM TO FORMALISM: THE HISTORY OF PUBLICITY RIGHTS

### A. *Haelan's Functional Approach*

In 1953, the *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* court, coined the term "right of publicity,"<sup>11</sup> though it was protected in several distinct forms well before *Haelan*. An older line of cases protected publicity based on a natural copyright theory—a person had a natural property right in her name and likeness.<sup>12</sup> A second line of cases that became dominant after the publication of Warren and Brandeis' famous privacy article<sup>13</sup> emphasized instead that the appropriation of someone's identity for a newspaper advertisement or similar use was a violation of her privacy rights.<sup>14</sup> Sometimes well-known plaintiffs were barred from recovery under this privacy theory because, by virtue of their fame, they were considered to have waived their privacy rights.<sup>15</sup> If the waiver defense was not accepted, both theories could enable famous plaintiffs to recover for unauthorized commercial use of their likenesses. In other words, pre-*Haelan* law gave celebrities the right to *use* their likenesses for making money and it also gave them the right to *exclude* others from making such uses.

In this context, what *Haelan* really did was to make the right of publicity *alienable* via assignment or license. In *Haelan*, a famous baseball player signed an exclusive baseball card contract with one company, *Haelan*.<sup>16</sup> A rival company, *Topps*, printed cards with pictures of the same player.<sup>17</sup> Perhaps the player could have sued

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<sup>11</sup> 202 F.2d 866 (2d Cir. 1953). In *Haelan*, a diversity case, the court applied the common law of New York. Ironically, three decades later, New York rejected *Haelan* and its common law right of publicity, holding that the only relevant law in force in the state was a much more limited statute protecting a right to privacy (which, for example, is non-descendible). See *Stephano v. News Group Publ'ns, Inc.*, 474 N.E.2d 580, 584 (N.Y. 1984). But by then, the right of publicity had been widely recognized in other states.

<sup>12</sup> See Robert Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 648 (quoting *Munson v. Harris*, 134 S.W. 1076, 1079 (Mo. App. 1911)); see also *Edison v. Edison Polyform & Mfg. Co.*, 67 A. 392, 395 (N.J. Ch. 1907) (granting relief to Thomas Edison based on such a theory).

<sup>13</sup> Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 5 HARV. L. REV. 220 (1890).

<sup>14</sup> See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

<sup>15</sup> See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 204-06 (1954). Even when the waiver defense was not accepted, famous plaintiffs sometimes were awarded only minor damages on the theory that famous people could not have suffered much mental anguish from having their likenesses publicized. See *id.* at 207-09.

<sup>16</sup> *Haelan*, 202 F.2d at 867.

<sup>17</sup> See *id.*

Topps himself for a breach of his right to privacy, if he had not also given permission to Topps to print cards. The real question, though, was whether Haelan, the baseball player's assignee, could sue Topps directly.<sup>18</sup> Without much discussion, the court answered in the affirmative, and in the process coined the term "right of publicity."<sup>19</sup>

A few things stand out about Judge Frank's opinion in *Haelan*. First, he avoided giving any reason why recognition of the right of publicity was necessary.<sup>20</sup> There is no discussion of whether an alternative approach, such as reinterpreting and broadening federal unfair competition law, could achieve most of what he was trying to accomplish by creating a brand-new right under the common law of New York.<sup>21</sup> The right to publicity, in other words, was created in a somewhat ad hoc manner.

But a second key point with respect to Judge Frank's reasoning is that it was eminently functionalist. Frank's new right arose out of the older idea of the right to privacy, but the Judge clearly felt that he was creating an "independent" right that was not constrained by the old parameters of a privacy rights claim.<sup>22</sup> What Judge Frank was doing by creating a new right was to respond to a pre-existing business practice: baseball card companies had been signing exclusive contracts with players for some time prior to the decision.<sup>23</sup>

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<sup>18</sup> See *id.*

<sup>19</sup> *Id.* at 868.

<sup>20</sup> See Madow, *supra* note 4, at 173-74.

He made no attempt . . . to explain why this should be cause for judicial concern. Indeed, he offered no rationale whatsoever for the new right beyond the fact that, without it, celebrities would be denied image revenues . . . . Most importantly, the *Haelan* opinion contained not a trace of moral or conceptual uneasiness about the commodification of personality.

*Id.*

<sup>21</sup> In Canada, publicity rights arose historically from the "passing off tort," although recent trends in Canadian law have been influenced by American jurisprudence. Robert G. Howell, *Publicity Rights in the Common Law Provinces of Canada*, 18 *LOV. L.A. ENT. L.J.* 487, 489, 490 (1998). In the United States, some publicity actions can also be brought as unfair competition actions under § 43(a) of the Federal Lanham Act, 15 U.S.C.A. § 1125(a) (2004), where the offending use of name or likeness would be likely to create a false sense of endorsement in the public's mind. See, e.g., *White v. Samsung Elecs. Am. Inc.*, 971 F.2d 1395 (9th Cir. 1992) (allowing such a Lanham Act claim to survive summary judgment). However, the basic state law publicity claim does not require an allegation of false endorsement.

<sup>22</sup> See *Haelan*, 202 F.2d at 868 (stating

[w]e think that, in addition to and independent of that right of privacy . . . a man has a right to the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else).

<sup>23</sup> See J. Gordon Hylton, *Baseball Cards and the Birth of the Right of Publicity: The Curious*

Similar practices were occurring in other areas of the entertainment industry.<sup>24</sup> They were doing so despite the fact that such agreements were often held unenforceable.<sup>25</sup> The newfound popularity of these contracts was probably rooted in changes to American culture, particularly in notions of fame.<sup>26</sup> The fact that such agreements continued, despite being frowned upon legally, should have been strong evidence that they were efficient and useful ways to organize entertainment-based endorsements in the modern world; it is often more efficacious for legal norms to reflect business usage than to try and reshape it.<sup>27</sup> Thus, in resting on prior business practices, Judge Frank was on solid ground in endowing publicity with the property-like characteristic of assignability.<sup>28</sup> But Judge Frank was adamant that he was only creating an

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*Case of Haelan Laboratories v. Topps Chewing Gum*, 12 MARQ. SPORTS L.J. 273, 279-81 (2001).

<sup>24</sup> See Madow, *supra* note 4, at 166. Madow notes that, prior to *Haelan*:

[C]ertain key economic actors had already begun to behave as if celebrity images were garden variety “commodities.” Movie studios were routinely licensing the images of their players to advertisers and merchandisers in exchange for money payments, favorable publicity for their own ventures, or free supplies or props. A number of licensing companies were even formed for the specific and sole purpose of marketing the names and faces of famous persons. The law, however, had not yet caught up with these new commercial practices.

*Id.*

<sup>25</sup> See, e.g., *Hanna Mfg. Co. v. Hillerich & Bradsby Co.*, 78 F.2d 763, 767 (5th Cir. 1935) (holding that such an assignment acted only as a waiver of the assignor’s privacy rights and not a right to sue a third party infringer). *Haelan* expressly disagreed with *Hanna* on this point. See *Halean*, 202 F.2d at 869.

<sup>26</sup> One major factor, of course, was the rise of the mass media and the shift from a print-based media to a photographic, movie and television-based media. See Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 27-34 (1997); Madow, *supra* note 4, at 160-64. Another factor was a shift from an older view that having one’s face exploited commercially was degrading to the subject to a newer idea that this form of marketing was morally acceptable and even desirable. See Armstrong, Jr., *supra* note 5, at 459. The expansion of the advertising market also played a role. See *id.* at 457-61; Madow, *supra* note 4, at 164-65.

<sup>27</sup> An underlying purpose of the Uniform Commercial Code is “to permit continued expansion of commercial practices through custom, usage, and agreement of the parties . . . .” U.C.C. § 1-102(2); see also *supra* note 7 and accompanying text (exploring Epstein’s view that new property tends to be created from custom, although this process is sometimes distorted by politics).

<sup>28</sup> Further evidence of the importance, from a business standpoint, of having an assignable right of publicity comes from German and French law. Germany has a right of publicity that is considered wholly personal and is not considered at all property-like. See Susanne Bergmann, *Publicity Rights in the United States and in Germany: A Comparative Analysis*, 19 LOY. L.A. ENT. L.J. 479, 513 (1999). Nonetheless, when faced squarely with the question of whether an assigned publicity right could be enforced by the assignee against a third party competitor, a high-ranking German court allowed the assignee to recover its usual licensing fee by using a convoluted legal theory. *Id.* French courts have also made publicity rights essentially assignable despite the theoretically personal nature of the right, thus allowing “the development of image licensing and marketing.” Elisabeth Logeais & Jean-Baptiste Schroeder, *The French Right of Image: An Ambiguous Concept Protecting the Human Persona*, 18 LOY. L.A. ENT. L. REV. 511, 532-35 (1998). Notably, German law does not make publicity rights descendible as such, although next-of-kin do have a right, as an assertion of their own independent interests, to prohibit unconsented displays of the de-



assignable right, not a right that was necessarily property or one that was endowed with all of the characteristics of property.<sup>29</sup>

B. *The Taxation of Income from Transfers of Publicity Rights: An Example of Functionalist Reasoning*

In 1962, one of the early courts to deal with the right of publicity<sup>30</sup> had to face a novel question: whether a license by Glenn Miller's widow of a publicity right to a movie production company constituted the transfer of a capital asset, and thus subject to the lower capital gains tax rate, or merely ordinary taxable income.<sup>31</sup> Since the Internal Revenue Code generally defines a "capital asset" as "property held by the taxpayer," subject to specified exclusions, the question was whether the interest she transferred was property for income tax purposes.<sup>32</sup> The court refused to hold that it was.<sup>33</sup> In reaching that conclusion, the court first emphasized that while some courts had recognized the publicity rights of a live celebrity, these rights were not necessarily "property rights," and, in fact *Haelan* "carefully avoided terming" publicity rights as property rights, "no doubt in order to avoid the unintended consequences which might follow from such classification."<sup>34</sup> Not everything that one pays for, the court noted, is property.<sup>35</sup> Further, the court stressed that no court had held publicity rights to be inheritable, and it

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ceased's image for a period of ten years. This seems to have some kinship with the notion of moral rights in continental law. See Bergmann, *supra* note 28, at 514-15. The majority and traditional view under French law is similar—personality or publicity rights are not inheritable, although next of kin have some right to object to uses that would offend the deceased's memory. See Logeais & Schroeder, *supra* note 28, at 535-36. Some French courts seem to be moving towards descendibility, although this remains very much the minority view. *Id.* at 537-38. Interestingly, like American courts, the French courts that have held persona rights descendible have done so by separating the right into moral (like the American right to privacy) and economic (like the American right to publicity) components, holding the former component wholly personal and thus non-descendible but the latter naturally "patrimonial" and thus descendible. *Id.* At any rate, German and French law suggests that there is not as much functionalist pressure to make publicity rights descendible as there is to make these rights assignable.

<sup>29</sup> See *Haelan*, 202 F.2d at 868 ("Whether it be labeled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth."). The current state of the law is that publicity rights are both freely assignable and freely licensable, even without any transfer of underlying assets or goodwill (contrary to trademark law). See MCCARTHY, *supra* note 1, Ch. 10.

<sup>30</sup> See *Miller v. Comm'r*, 299 F.2d 706 (2d Cir. 1962).

<sup>31</sup> *Id.* at 707-08.

<sup>32</sup> *Id.* at 708.

<sup>33</sup> *Id.* at 711.

<sup>34</sup> *Id.* at 708-09 & n.4.

<sup>35</sup> *Id.* at 709-10 (stating that, for example, one can sell time and experience). The court also noted that the payment involved in this case's contract could have been a hedge against the recognition of an inheritable property right, a release from any possible liability, rather than a payment for such a right. *Id.* at 710. "One can easily find wisdom in this payment by Universal without finding that it paid for property." *Id.* at 710 n.8.

suggested that any court should be extremely cautious before doing so.<sup>36</sup>

Finally, the court stated that the case should not be decided wholly according to general conceptions of property: one should look at the taxation context on its own merits.<sup>37</sup> In reaching its decision, the court relied on the social policy against giving preferential treatment under the tax code too freely.<sup>38</sup> The approach in *Miller v. Commissioner* represents a continuation of the functionalist reasoning stressed in *Haelan*—the parameters of publicity rights should be determined on a case-by-case basis, looking to policy considerations and not via the simple act of labeling the rights “property.” However, about the same time that *Miller* was decided, several important commentators were moving the concept of a publicity right toward full-fledged property.

### C. *The Shift from Functionalism to Formalism*

The evolution toward a property-based view of publicity occurred in the 1950s and 1960s, primarily in the academic commentaries, because most courts remained hostile to the right during this early period.<sup>39</sup> As a result, in the 1970s, when courts began viewing it more favorably,<sup>40</sup> publicity had already been labeled as “property” by the commentators.

Prosser, writing in 1960, pigeonholed publicity rights into his four-pronged privacy tort test, calling it the tort of “appropriation.”<sup>41</sup> He echoed Frank in insisting that “[i]t seems quite pointless to dispute over whether such a right is to be classified as property.”<sup>42</sup> At the same time, however, he emphasized that “appropriation” was very different from the other three prongs of his privacy tort: intrusion, public disclosure of private facts, and false light; “[t]he interest protected is not so much a mental as a proprietary one.”<sup>43</sup> Because the right is “proprietary,” Prosser continued,

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<sup>36</sup> *Miller*, 299 F.2d 706.

<sup>37</sup> *Id.* at 710-11.

<sup>38</sup> *Id.* at 711. The court noted that if limits were not found, every exchange of money could be seen as the sale of a capital asset. *Id.* at 711 n.9.

<sup>39</sup> See Madow, *supra* note 4, at 176 & n.247 (noting that “courts were initially reluctant to embrace the new right.”).

<sup>40</sup> See McCARTHY, *supra* note 1, § 1.32 (noting that in the 1970’s, “a deluge of litigation and commentary marked the coming of age of the Right of Publicity.”).

<sup>41</sup> William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 401-07 (1960).

<sup>42</sup> *Id.* at 406.

<sup>43</sup> *Id.* A less influential commentator strongly disagreed with Prosser, insisting that the single unifying strand underlying all of Prosser’s four torts was the protection of human dignity. See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1000-03 (1964). Thus, Bloustein saw the commercial tort not as protecting pecuniary interests, but rather dignity interests like the avoidance of

it ought be assignable, and thus *Haelan* was correctly decided.<sup>44</sup> The thrust of Prosser's reasoning seems to focus on the type of damage that is done (monetary vs. intangible mental harm), rather than the underlying object protected (name or face), and to suggest that there is something different when the harm being avoided is lost money rather than damaged feelings.<sup>45</sup> Such a right, Prosser implied, should be given stronger, more property-like forms of protection than the other aspects of the right to privacy, although he seemed to think that the content of these protections should be decided on a policy-centered, case-by-case basis.<sup>46</sup>

Prosser's reasoning was very influential and was codified in the *Second Restatement of Torts*, for which he was Chief Reporter.<sup>47</sup> The *Restatement* preserved Prosser's four-pronged approach but made some subtle changes, which took the appropriation tort a few steps further toward full-fledged recognition as property. For example, the *Restatement* noted that while "protection of personal feelings against mental distress" is one factor leading to the right of publicity, nonetheless the right created "is in the nature of a property right."<sup>48</sup> Further, it stated that the publicity right is clearly assignable and may also be inheritable, given that its infringement "is similar to impairment of a property right."<sup>49</sup> Thus, what appears to

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"turn[ing] a man into a commodity and mak[ing] him serve the economic needs and interest of others . . . against his will." *Id.* at 988. He rejected the view that the right of publicity should be called property, asserting that the right basically protected the same interests as the other privacy torts, which clearly were not (and are not) seen as species of property. *Id.* at 990-91. He thought that if publicity rights were labeled "property," it would be harder to find "the common ground" between Prosser's four torts. *Id.* In this view, Bloustein was somewhat prophetic. If he had been a more prominent commentator than Prosser, the propertyization of publicity rights might not have occurred.

<sup>44</sup> See Prosser, *supra* note 41, at 406-07.

<sup>45</sup> The characterization of damages as economic or commercial rather than mental seems to make a difference in the eyes of courts and commentators. For example, French law has begun to separate the moral component of persona rights from the economic or commercial component and to hold that the latter is inheritable while the former is not. There is something inherently "patrimonial," one court suggested, about the commercial aspect of persona. See Logeais & Schroeder, *supra* note 28, at 537-38.

<sup>46</sup> The Supreme Court itself suggests this kind of thinking in its only case dealing with the right of publicity. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 566 (1977). In *Zacchini*, the Court noted that the right to publicity protected "proprietary interests" and analogized the right to intellectual property rights like patent and copyright. In the process, it seems to suggest that a proprietary right like the right to publicity may be entitled to more protection against free speech challenges than other tort claims like a right to privacy claim or a defamation claim. It is difficult to generalize with any confidence about *Zacchini*, however, because the facts involved are so strange—normally, right to publicity claims are about advertisers using the identities of celebrities, not about a news station stealing a performer's entire act, as in *Zacchini*. Thus, the *Zacchini* case was essentially about "performance value" rather than the typical "persona value" case. See Madow, *supra* note 4, at 208 n.395.

<sup>47</sup> See RESTATEMENT (SECOND) OF TORTS § 652C (1977).

<sup>48</sup> *Id.* § 652C cmt. a.

<sup>49</sup> *Id.* § 652I cmts. a & b.

have occurred in the *Second Restatement* involves the transformation of Prosser's arguments, based on the contrasting interests underlying his four prongs of privacy tort, into the simplistic syllogism that the appropriation tort is property, and therefore various attributes, such as inheritability, must follow.

If Prosser nudged publicity away from its functionalist roots and towards a more formalist view as "property," Melville Nimmer shoved it in the same direction. Troubled by the limitations of the traditional privacy rights (including, but not limited to, waiver, non-assignability, damages only for mental distress and not for profitability and the requirement that the use be offensive), he insisted without qualms that "[t]he right to publicity must be recognized as a property (not a personal) right."<sup>50</sup> To cement his property-based theory even further, he linked publicity rights with Locke's labor-based rationale for property.<sup>51</sup> Interestingly, it seemed to have never occurred to Nimmer that one could have assignability without all the other traditional attributes of property. Indeed, he seems to see the issue as an all or nothing choice between a totally personal privacy right in one's likeness, such as exists in several European countries,<sup>52</sup> and a completely property-like right of publicity.

Nimmer's view of publicity rights was closely followed by another influential commentator. In 1960, Harold Gordon wrote that despite Judge Frank's words in *Haelan*, publicity must be deemed property; "the tag 'property'" is "material as furnishing a firm basis for distinguishing between claims which have a solid pecuniary basis and those involving injured feelings."<sup>53</sup> Further, Gordon went beyond Nimmer to state explicitly that the fact that

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<sup>50</sup> Nimmer, *supra* note 15, at 216. Interestingly, to make his theory more palatable, Nimmer misstated the holding of *Haelan*, claiming that the *Haelan* court "clearly held that the right of publicity, unlike the right of privacy, is a property right . . ." *Id.* at 222. In fact, the Court in *Haelan* held that the issue of whether publicity was property "immaterial." *Id.*

<sup>51</sup> *Id.* at 216 (stating:

[i]t would seem to be a first principle of Anglo-American jurisprudence . . . that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations. Yet, because of the inadequacy of traditional legal theories . . . , persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity.)

<sup>52</sup> See JULIUS C.S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA: THE RIGHT OF PUBLICITY (UNITED STATES) AND PORTRAIT LAW (NETHERLANDS) BALANCED WITH FREEDOM OF SPEECH AND FREE TRADE PRINCIPLES 6-14 (1996) (no publisher listed).

<sup>53</sup> Harold R. Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 Nw. U. L. REV. 553, 607 (1960). Gordon seemed particularly concerned that the proper measure of damages be used: the damages for this new property right should be based on the "profit-making of the appropriation," rather than "compensation for injured feelings." *Id.*

publicity rights are a form of property means that they must be inheritable.<sup>54</sup> Thus, by the 1960s, the commentators had made a strong push towards re-characterizing the right of publicity as a full-fledged intangible property right.<sup>55</sup>

D. *The Descendibility Issue and the Triumph of Legal Formalism*

Today, the question of the descendibility of publicity rights is essentially settled. Either by common law or statute, the vast majority of states that have recognized publicity rights allow them to be asserted after the death of the celebrity,<sup>56</sup> although at least one state statute provides for termination of the right if the celebrity did not transfer it inter vivos or by will and left no surviving spouse, parents, children, or grandchildren.<sup>57</sup> However, about two decades ago, there was a raging debate, both in courts and in law reviews, as to whether the right should be descendible.<sup>58</sup> The courts that dealt with the issue were heavily influenced by the conception, forged in the commentaries listed above, that publicity rights are “property”; hence, according to the reasoning in its most

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<sup>54</sup> *Id.* at 612 (stating:

Recognition of property rights in this area also clarifies the rights of a personal representative and next of kin of deceased persons. If any individual, public figure or not, possesses a property right in such intangibles as his name and likeness, these rights do not pass into the public domain after death, but rather, accrue to the deceased’s estate . . . .).

<sup>55</sup> Perhaps one clue as to the significant influence these commentators had on the courts is that one of the few important decisions from the end of the 1960s was able to state confidently that there was no disputing the fact that “plaintiff has a valuable property right in his name, photograph and image.” *Cepeda v. Swift & Co.*, 415 F.2d 1205, 1206 (8th Cir. 1969). Similarly, the court in *Uhlaender v. Hendrickson*, 316 F.Supp. 1277 (D. Minn. 1970) confidently described the right of publicity as a “type of property,” based on the labor justification given in *Nimmer. Id.* at 1282.

<sup>56</sup> See MCCARTHY, *supra* note 1, § 9.17 (“The overwhelming majority rule under either statute or common law is that the right of publicity is descendible property . . . .”). The Third Restatement of Unfair Competition also clearly states that the majority rule is that the right to publicity is descendible, although noting that many jurisdictions have not considered the question. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. h (1995) [hereinafter THIRD RESTATEMENT]. Most European countries hold the right to be personal and thus non-descendible, although next of kin may have some right, for a period of time, to stop publication of the deceased’s name or likeness, at least if the use is offensive to the deceased’s memory. See PINCKAERS, *supra* note 52, at 6-14; see also *supra* note 29. There has been considerable confusion about the descent issue in recent years in many European countries. See PINCKAERS, *supra* note 52, at 7.

<sup>57</sup> See 765 ILL. COMP. STAT. 1075/15 (West 2002). In contrast, the Virginia statute provides that a consent or license may be obtained from the “surviving consort,” or if none, from the next of kin, suggesting that the right passes under the statute and the celebrity may not dispose of it by will. See VA. CODE ANN. § 8-650.

<sup>58</sup> For two of the best contributions on opposite sides of this now dead debate, see Peter L. Felcher and Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?* 89 YALE L.J. 1125 (1980) (in favor of descent); Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC’Y 111, 133-39 (1980) (opposed).

simplistic and formalistic form, they must be descendible.<sup>59</sup>

In one of the first cases to deal with this question and one that has been cited by virtually all later cases dealing with the issue, *Price v. Hal Roach Studios*,<sup>60</sup> the court emphatically embraced the idea that the right of publicity is descendible, stating:

Since the theoretical basis for the classic right to privacy, and of the statutory right in New York, is to prevent injury to feelings, death is a logical conclusion to any such claim. In addition, based upon the same theoretical foundation, such a right to privacy is not assignable during life. When determining the scope of the right of publicity, however, one must take into account the purely commercial nature of the protected right. Courts and commentators have done just that in recognizing the right of publicity as assignable. There appears to be no logical reason to terminate this right upon death of the person protected. It is for this reason, presumably, that this publicity right has been deemed a "property" right.<sup>61</sup>

The *Price* court echoed both Prosser's point about pecuniary and commercial interests being entitled to more and different protection than nonpecuniary interests and Nimmer's assumption that the right to publicity should be seen as property in all of its aspects. Importantly, the court cited both Nimmer and Gordon in arriving at its conclusion that the right of publicity is a property right.<sup>62</sup> The "publicity is property, hence it is descendible" idea, a subset of the property syllogism, was taken to its greatest extreme in *Price*—no policy reasons at all were given in favor of inheritability.<sup>63</sup>

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<sup>59</sup> At least two commentators have noticed, in passing, the syllogistic quality of the arguments made by some judges in favor of descendibility. See Ben C. Adams, *Recent Development, Inheritability of the Right of Publicity Upon the Death of the Famous*, 33 VAND. L. REV. 1251, 1260-61 (1980); Hoffman, *supra* note 58, at 134 ("Deciding a right of publicity issue by applying property law opens the door to questionable syllogisms." Having given the right of publicity the conclusory label "property," the court then reaches the result that flows from its conclusory characterization "the right of publicity is a property right; property is inheritable; ergo, the right of publicity is inheritable.") (citing *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978)).

<sup>60</sup> 400 F. Supp. 836 (S.D.N.Y. 1975).

<sup>61</sup> *Id.* at 844.

<sup>62</sup> See *id.*

<sup>63</sup> Basically the same approach was taken, some years later, by the first New Jersey court to hold publicity rights to be descendible:

In deciding whether this right of publicity survived Presley's death, we are persuaded by the approach of other courts which have found the right of publicity to be a property right. These courts have concluded that the right, having been exercised during the individual's life and thus having attained a concrete form, should descend at the death of the individual "like any other intangible property right."

*Presley's Estate v. Russen*, 513 F. Supp. 1339, 1355 (D.N.J. 1981). Notably, the court cited Gordon, as well as some more recent commentators like Felcher & Rubin. *Id.* at 1355 n.9.

In other cases, the same syllogism was used, buttressed by a few weak and poorly explained policy reasons. In *Factors Etc., Inc. v. Pro Arts, Inc.*, one of the myriad postmortem cases involving Elvis Presley, the Second Circuit wrote:

There can be no doubt that Elvis Presley assigned [the licensee] a valid property right, the exclusive right to print, publish, and distribute his name and likeness . . . . The identification of this exclusive right belonging to [the licensee] as a transferable property right compels the conclusion that the right survives Presley's death."<sup>64</sup>

The court then supported this assertion with the policy observation that extinguishing the right at Presley's death would "grant competitors" of the licensee "a windfall."<sup>65</sup> However, it is virtually impossible to give any real normative content to this statement—what is the standard to determine which gains in this type of situation are unjust, or ill-gotten, or windfalls? It seems equally plausible that the heirs or legatees of the deceased would gain a windfall if they were able to charge for use of the deceased's name and likeness.<sup>66</sup>

A similar syllogism plus policy approach was applied by *State ex. Rel. Elvis Presley Int'l Mem'l Found. v. Cromwell*, the Tennessee Court of Appeals case that recognized descendibility.<sup>67</sup> The court first emphasized that property usually possessed a fixed bundle of attributes including descendibility,<sup>68</sup> and then, citing *Hal Roach*,

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<sup>64</sup> 579 F.2d 215 (2d Cir. 1978). In this case, the court saw itself as applying New York law. *See id.* at 220. In a later case dealing with virtually the same subject matter, the court realized that it should be applying Tennessee law, and it held on the basis of Sixth Circuit precedent that Tennessee would not allow the right to publicity to be descendible. *See Factors, Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981).

<sup>65</sup> 579 F.2d at 221. The same basic argument was used in Chief Justice Byrd's earlier dissent in the famous Bela Lugosi case. *See Lugosi v. Universal Pictures*, 600 P.2d 425 (Cal. 1979). Chief Justice Byrd, disagreeing with the majority, argued that the right of publicity should be descendible primarily because it was a property right and not a personal right. She also compared publicity rights to copyrights, and noted that publicity like copyright should be protected even after death because of the labor theory of property. *Id.* at 445-46. This type of unreflective analogy to copyright and Lockean labor theory seems very similar in form and depth to the property syllogism itself. Finally, Chief Justice Byrd noted, as a policy concern, the windfall argument.

<sup>66</sup> If descendibility is governed by a state statute rather than the common law, a celebrity may not have the power to dispose of the right by will if it passes to statutory designees on her death. *See supra* note 57.

<sup>67</sup> *See State ex. rel. Elvis Presley Int'l Mem'l Found. v. Cromwell*, 733 S.W.2d 89 (Tenn. App. 1987). This Tennessee decision resolved an earlier split in lower Tennessee courts. For a good overview of the convoluted Tennessee story, *see* David C. Bodette, Note, *Use It (Every Two Years) or Lose It (Forever) – Tennessee's Rights Protection Act and the Post-Mortem Right of Publicity*, 33 U. MEM. L. REV. 83 (2002). In Tennessee the issue has been foreclosed by a statute providing for descendibility. TENN. CODE ANN. §§ 47-25-1101-1108 (2001).

<sup>68</sup> *See* Bodette, *supra* note 67, at 96-97.

emphasized that “[i]f a celebrity’s right of publicity is treated as an intangible property right in life, it is no less a property right at death.”<sup>69</sup> The court then added several policy justifications.<sup>70</sup>

There were a few dissenting voices in the chorus. Several courts refused to extend publicity rights to the postmortem period. Sometimes, the reasoning of these courts was just as syllogistic as the reasoning of those courts that allowed descendibility—publicity rights are personal and not property rights, hence they are not descendible.<sup>71</sup> However, the two most cited and important anti-inheritability decisions—*Lugosi v. Universal Pictures*<sup>72</sup> and *Memphis Development Foundation v. Factors, Inc.*<sup>73</sup>—both contained searching analyses of the policy issues involved. These decisions emphasized the following concerns: (1) the exploitation of fame for the benefit of one’s heirs is at best a weak motivation for effort;<sup>74</sup> (2) that fame itself is often a product of luck or the actions of the public and press more than those of the celebrity and can be acquired by bad actions as well as good;<sup>75</sup> (3) that making the right descendible via common law creates durational line-drawing problems;<sup>76</sup> (4) that the right seems increasingly to conflict with free expression principles the longer it lasts;<sup>77</sup> (5) that the right, whether property or not,<sup>78</sup> (6) seems very personal and therefore the power of exploita-

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<sup>69</sup> *Id.* at 97-98.

<sup>70</sup> Prominent among these was the same rather specious windfall/unjust enrichment argument made in *Factors, Etc. Id.* at 98. However, the court also touched on a few other policy justifications, including protecting the expectations of the deceased and the contracting party and avoiding false endorsement claims to protect the public. *Id.* at 98-99. None of these justifications are particularly strong: the expectations of the actors involved seem, in this case, to be heavily influenced by the choice of legal rule, and the false endorsement issue (which of course arises also during the life of the celebrity) could be taken care of through a much less expansive system of rights, like those in the federal Lanham Act.

<sup>71</sup> See, e.g., *Reeves v. United States*, 572 F. Supp. 1231 (N.D. Ohio 1983) (“In light of the Ohio Supreme Court’s clear language linking the right of publicity more closely to the right of privacy than to a property right, this Court must conclude that under Ohio law, the right of publicity, like the right of privacy, is not descendible.”), *aff’d*, 765 F.2d 79 (6th Cir. 1985).

<sup>72</sup> 603 P.2d 425 (Cal. 1979). *Lugosi* is a somewhat confusing decision; some have interpreted it as only foreclosing inheritability in cases where the deceased celebrity never exploited the publicity rights during his lifetime, see, for example, 2 MCCARTHY, *supra* note 1, § 9.13; Adams, *supra* note 59, at 1260, but it is difficult to say whether recovery would have been denied even with exploitation because the opinion is very vague. At any rate, the policy reasons that are given apply across the board to the inheritability issue.

<sup>73</sup> 616 F.2d 956 (6th Cir. 1980).

<sup>74</sup> See *id.* at 958-59.

<sup>75</sup> See *id.* at 959.

<sup>76</sup> See *id.*; *Lugosi*, 603 P.2d at 430.

<sup>77</sup> See *Memphis Development*, 616 F.2d at 959-60; *Lugosi*, 603 P.2d at 430-31.

<sup>78</sup> See *Lugosi*, 603 P.2d at 431 (“[W]hether or not the right sounds in tort or property, and we think with Dean Prosser that a debate over this issue is pointless, what is at stake is the question whether this right is or ought to be personal.”).



tion should not be passed on to heirs for moral reasons;<sup>79</sup> (7) and the problems that would arise if the right were subject to estate tax.<sup>80</sup>

Despite the well-reasoned nature of these decisions, they were few in number and were not widely followed. Instead, most later courts unquestioningly relied on the reasoning of the earlier courts that had favored inheritability. Many of these later courts, without any extensive reasoning, simply noted that descendibility had become the majority rule in American jurisdictions and therefore should be followed.<sup>81</sup> Thus, courts carved out a descendible right of publicity without much thought to the policy issues lying behind such a right—earlier courts relied primarily on the conclusion that the publicity right was a species of property, and later courts relied primarily on the earlier court decisions as precedent.

The only important court decision coming out in favor of descendability that did not seem to rely on the property syllogism was the Georgia Supreme Court's in *Martin Luther King Jr. Ctr. V. American Heritage Products* case.<sup>82</sup> The majority did note that most commentators recognized that if the right was assignable, it must also be descendible,<sup>83</sup> but it purported to rest its decision primarily on policy considerations. First, the right encourages effort and creativity (like copyright) and cutting it off at death would seriously impair its value during life and erode commercial certainty as

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<sup>79</sup> See *Memphis Development*, 616 F.2d at 959; *Lugosi*, 603 P.2d at 430. One problem hinted at by the *Lugosi* court is that many celebrities may choose not to exploit their publicity rights for reasons of taste or judgment; these wishes should be honored and yet may be breached post mortem by greedy heirs. See *id.* at 430.

<sup>80</sup> See *Memphis Development*, 616 F.2d at 959. At least one court has held that publicity rights, if descendible under state law, are subject to estate tax. See *Estate of Andrews v. United States*, 850 F. Supp. 1279 (E.D. Va. 1994). The *Memphis Development* court did not get into these issues, but one problem that would arise if the right were subject to estate tax at fair market value is that the tax would effectively pressure the heirs into exploiting the publicity rights as much as possible (selling lots of advertising and merchandising), even if they or the deceased celebrity would prefer not to exploit the rights for dignity or other reasons (think, for example, of Martin Luther King, Jr.). See Note, *Federal Estate Tax and the Right of Publicity: Taxing Estates for Celebrity Value*, 108 HARV. L. REV. 683, 692-93 (1995) (recommending that the right be subject to estate tax but also that heirs have a right to renounce the right's exploitive value upon death and thus avoid the tax); see also *infra* text accompanying notes 163-165, 173 (discussing similar pressures in divorce and non-Chapter 7 bankruptcy contexts).

<sup>81</sup> See *Jim Henson Prods. v. John T. Brady & Assoc.*, 867 F. Supp. 175, 189-90 (S.D.N.Y. 1994) (interpreting Connecticut law and holding that it would recognize a descendible right of publicity because of the policy reasons listed in *Crowell* and because descendibility was the overwhelming majority rule); *Nature's Way Prods. Inc. v. Nature-Pharma Inc.*, 736 F. Supp. 245, 252 (D. Utah 1990) (holding that the Utah Supreme Court "would follow what appears to be the majority and modern rule that the common law right of publicity survives the death of the subject person.").

<sup>82</sup> 296 S.E.2d 697 (Ga. 1982).

<sup>83</sup> See *id.* at 493.

licensees would be less willing to pay for a right that could be cut off suddenly at any time. The court also reasoned that competitors would be unjustly enriched if they could freely profit from someone else's identity (essentially, the windfall argument in a slightly different form).

These arguments are hardly overwhelming. We have already criticized the windfall argument as specious. The encouragement of creativity argument is problematic even during life because first, fame is not a product of labor nearly as directly as a copyrighted book,<sup>84</sup> and second, advertising and merchandising is usually an incidental and not a primary activity for the celebrity,<sup>85</sup> who often is already rich (despite the surprising number who have filed for bankruptcy).<sup>86</sup> Thus, it is doubtful if enhanced advertising and merchandising revenue will actually encourage the celebrity to work harder.<sup>87</sup> The idea that celebrities will work much harder so that they can pass enhanced publicity values on to their heirs seems particularly farfetched.<sup>88</sup> The commercial certainty idea—that licensees would favor rights with a more fixed duration and not an arbitrary cut-off date in case of a celebrities' untimely death—is perhaps the best policy argument for post-mortem publicity rights.

Commentators did pay considerably more attention than courts to the policy issues involved in making the right to publicity descendible. There are some thoughtful policy debates in the literature.<sup>89</sup> But ossification of publicity rights as descendible nevertheless proceeded inexorably, when many states codified their

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<sup>84</sup> See Madow, *supra* note 4, at 179-96.

<sup>85</sup> *But see supra* note 3.

<sup>86</sup> See Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1325-26 (2002) (reporting that a "casual search" turned up "dozens" of celebrity bankruptcies in the recent past).

<sup>87</sup> See Madow, *supra* note 4, at 208-15.

<sup>88</sup> See Hoffman, *supra* note 58, at 136.

<sup>89</sup> See, e.g., Adams, *supra* note 59 (favoring inheritability after rejecting the simple analogy to property and instead exploring various policy rationales); Felcher, *supra* note 58 (listing a number of policy arguments in favor of a descendible right and criticizing the analogy to property, adopting instead a somewhat more tailored analogy to copyright); Hoffman, *supra* note 58, at 133-39 (arguing strenuously on policy grounds that the right to publicity should terminate at death); Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity*, 17 U.C. DAVIS L. REV. 191, 228 (1997) (giving a comprehensive policy analysis explaining why the right of publicity should be descendible). Still, commentators, like courts, were not wholly immune from the property syllogism. See, e.g., Note, *The Right of Publicity - Protection for Public Figures and Celebrities*, 42 BROOK L. REV. 527, 545 (1976) ("Once the publicity right is accurately depicted as a property right, the conclusion that it passes on death flows as a matter of course."); Andrew B. Sims, *The Right of Publicity: Survivability Reconsidered*, 49 FORDHAM L. REV. 453, 497 (1981) (arguing that publicity rights should be inheritable by combining the property syllogism with policy arguments like avoiding unjust enrichment and providing career incentives for celebrities); Timothy P. Terrell & Jane S. Smith, *Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue*, 34 EMORY L.J. 1 (1985) (arguing the converse of the prop-

common law right of publicity and included inheritability provisions with various durational limits attached.<sup>90</sup> In this case, the statutes were not really breaking new ground; they were simply following a path already set by the common law decisions reviewed above.<sup>91</sup>

E. *The Lifetime Exploitation Requirement as a Symbol of Formalist Reasoning*

The lifetime exploitation requirement is another issue related to inheritability, which demonstrates the extraordinary grip of the property syllogism on the minds of judges. Many of the early decisions to recognize descendibility held that publicity rights could only be passed on if there was evidence that they had been exploited in some form during the life of the celebrity.<sup>92</sup> These decisions gave no policy grounds for the requirement, and yet for a number of years it proved to be remarkably persistent.<sup>93</sup> However, there are persuasive policy grounds against requiring lifetime ex-

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erty syllogism, that publicity rights should not be inheritable because they are not specific enough to be property rights).

<sup>90</sup> For an overview of these statutes by state, see 2 MCCARTHY, *supra* note 1, §§ 9.17-37. Further, the right was clearly recognized as a "property right" in the THIRD RESTATEMENT OF UNFAIR COMPETITION, see THIRD RESTATEMENT, *supra* note 56, § 46 cmt. g, and it was noted that the majority rule is that publicity rights are descendible, although interestingly some doubts were expressed about the strength of the policies lying behind this majority rule, see *id.* cmt. h ("As a general matter . . . the dignitary and proprietary interests that support the recognition of a right of publicity become substantially attenuated after death. Post mortem uses are also less likely to create a false suggestion of endorsement or sponsorship.").

<sup>91</sup> Doubtlessly, interest group pressure also played a role. See Madow, *supra* note 4, at 177 (noting the growing lobbying power of the "celebrity industry" and arguing that it has not been matched by interests on the other side of these issues). For example, in California, a statute passed in 1985 and expanded in 1999, created a descendible publicity right after the California Supreme Court in *Lugosi* refused to allow the state's common law publicity right to be inheritable. CAL. CIV. CODE § 3344.1 (Deering Supp. 2003). Interest group pressure seemed to play a large role in the enactment of this statute, at least in its revision. See Rhett H. Laurens, *Year of the Living Dead: California Breathes New Life in Publicity Rights*, 23 HASTINGS COMM. & ENT. L.J. 109, 123-30 (detailing the power that the celebrity/agent lobby had in shaping the 1999 "Astaire" revisions to the law, as well as the strength of lobbying groups like the ACLU and the Motion Picture Association of America on the other side).

<sup>92</sup> See, e.g., *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485, *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982); *Hicks v. Casablanca Records*, 464 F. Supp 426, 429 (S.D.N.Y. 1978). *Lugosi* is sometimes interpreted as hinging on a lack of lifetime exploitation by the celebrity because of certain language in the majority opinion. See *Lugosi*, 603 P.2d at 429-30. Good overviews of the lifetime exploitation requirement are given in 2 MCCARTHY, *supra* note 1, §§ 9.11-15; Kwall, *supra* note 89, at 217-26; and Sims, *supra* note 89, at 472-83.

<sup>93</sup> See 2 MCCARTHY, *supra* note 1, § 9.14 ("[T]he 'lifetime exploitation' requirement appeared out of nowhere in the case law and was parroted by courts thereafter. Neither at its genesis nor thereafter did a court bother to explain the why or wherefore of having such a requirement.").

ploitation as a condition of inheritability.<sup>94</sup>

The strongest contrary argument surely would not focus on exploitation as evidence that the deceased was motivated to achieve fame because of her hope for publicity rights, as some commentators have suggested.<sup>95</sup> The extensive publicity that has been accorded to the high potential financial stakes from successful exploitation, may have caused these hopes to motivate the decedent, even if she failed to exploit her rights during her lifetime. A sounder basis for requiring lifetime exploitation would be to use the decedent's willingness to have the right exploited during her lifetime as evidence that the decedent had no objection to post-mortem exploitation by others. Alternatively, a requirement that the right be specifically disposed of either inter vivos or by will would insure that exploitation would be carried on only by a person or institution that she had chosen (or the legatee's assignee) rather than by operation of a statute.<sup>96</sup> However, courts that continued to adhere to the lifetime exploitation requirement for so long, without addressing the policy concerns just referred to in any meaningful way, probably did so because it made publicity rights seem more tangible and specific, and thus more like property.<sup>97</sup> The more publicity rights seemed to be like property, the easier it

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<sup>94</sup> See, e.g., Note, *An Assessment of the Commercial Exploitation Requirement as a Limit on the Right of Publicity*, 96 HARV. L. REV. 1703, 1717-18 (1983) [hereinafter *Commercial Exploitation Requirement*]. This Note states that:

If the legal system is willing to recognize a survivable right of publicity, no rational justification exists for differentiating between public figures who marketed their names during their lifetimes and those who did not . . . . The individual who has a right of publicity possesses a property right in an image and should be entitled to sell that right or keep it, in accordance with her own determination of which use of the property is best for her. Given that property can be seen as a means of protecting individuals from economic exploitation by others, the legal system should not make such protection contingent upon a showing that the individuals engaged in activities that may have affronted their senses of dignity.

*Id.* (footnotes omitted).

<sup>95</sup> See Felcher, *supra* note 58, at 1130-31.

<sup>96</sup> See VA. CODE. ANN. § 8-650, discussed *supra* note 57. Of course a general intestacy statute could apply, in the absence of such a provision. In contrast, § 304(a)(1)(c) of the Copyright Act, 17 U.S.C. § 304(a)(1)(c), grants renewal rights for some copyrighted works of deceased authors to the author's "widow, widower, or children . . . [or if they are not living, to] the author's executors . . . or . . . the author's next of kin, in the absence of a will of the author." However, publication or other use of copyrighted works seems far less likely to be contrary to the wishes of the deceased author than exploitation of a right of publicity.

<sup>97</sup> See *Commercial Exploitation Requirement*, *supra* note 94, at 1114 (lamenting the urge to use the lifetime exploitation requirement to "physicalize" the right of publicity because, "[w]e should not hamper the birth and development of new attitudes about what property is and why it exists by remaining hypnotized by a vision of property grounded on the idea of physical possession."); see also Terrell, *supra* note 89, at 28-32 (noting that the term property implies some element of "specificity"); cf. Armstrong, Jr., *supra* note 5, at 464-65 (suggesting that judges used the lifetime exploitation requirement to justify inheritability of

was for courts to allow them to be inheritable.<sup>98</sup>

## II. TRENDS IN THE SCOPE OF PUBLICITY RIGHTS: EXPLAINING EXPANSION AND STABILITY

Publicity rights have shown a remarkable tendency to expand along some dimensions, while remaining basically static in other respects, and the reasons for both trends merit explanation. Our argument here, once again, stresses the power of concepts and the nature of judicial reasoning. The attributes of identity that are protected have undergone a dramatic if unsteady expansion from the original focus on name or picture.<sup>99</sup> The most important agent of this expansion, which has generally been followed by other jurisdictions, has been the Ninth Circuit in its interpretations of California law. We argue that courts greatly expanded the scope of publicity rights along this dimension because it lacks any obvious common sense stopping point, and judges dislike drawing arbitrary lines. However, where countervailing principles like free speech were clearly implicated in a much more problematic manner than heretofore (really, where the countervailing principle posed a new type of problem altogether, and not simply a somewhat more intense manifestation of an old problem), courts tended to refuse to expand the right.

### A. *Rapid Expansion in Protected Indicia of Identity*

California statutory law protects only name, voice, signature, photograph, and likeness.<sup>100</sup> Nevertheless, the Ninth Circuit has held that there is an independent California common law right of

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publicity rights until they became more comfortable with the notion of publicity as property).

<sup>98</sup> Eventually, the lifetime exploitation requirement did fizzle out, probably because its dubious rationale slowly became apparent even to judges who found it psychologically useful. See 2 McCARTHY, *supra* note 1, § 9.15. Currently, the lifetime exploitation requirement is the law in only one state, Utah. See *Nature's Way Prods. v. Nature-Pharma, Inc.*, 736 F. Supp. 245, 252 (D. Utah 1990) (mistakenly characterizing lifetime exploitation as "the majority and modern rule."). Tennessee, in contrast, has a post-mortem exploitation requirement. By statute, it expressly negates any lifetime exploitation requirement, see TENN. CODE ANN. § 47-25-1103(b) (2001), but provides that after an initial ten year post-mortem period of an exclusive right to commercial exploitation that is descendible to the individual's assigns, heirs, or devisees, the right can be "terminated by proof of non-use by an executor, assignee, heir or devisee to such use for a period of two (2) years subsequent to the initial ten (10) year period . . ." *id.* § 47-25-1104(b)(2); see also Bodette, Note, *supra* note 67, at 103-104 (criticizing the two-year exploitation requirement).

<sup>99</sup> See, e.g., Madow, *supra* note 4, at 177 & n.255; David W. Melville & Harvey S. Perlman, *Protection for Works of Authorship Through the Law of Unfair Competition: Right of Publicity and Common Law Copyright Reconsidered*, 42 ST. LOUIS U. L.J. 363, 392-93 (1998); Sudakshima Sen, Comment, *Fluency of the Flesh: Perils of an Expanding Right of Publicity*, 59 ALB. L. REV. 739, 748-49 (1995).

<sup>100</sup> CAL. CIV. CODE § 3344 (Deering Supp. 2003).

publicity that reaches beyond these enumerated attributes. First, it held in 1974 that the right of publicity could protect a famous race car driver whose distinctive looking car was used in an advertisement, even though the driver himself was not identifiable in the advertisement.<sup>101</sup> Then, it held in two decisions that although the statute only encompassed actual uses of a celebrity's voice, the common law would also protect sound-alike imitations.<sup>102</sup>

Finally, in a famous case, the court held that game show hostess Vanna White was protected, under California common law although not under the statute, from a robot that was identifiable as her (although it was clearly not a "likeness") because of its dress, pose, and the familiar "Wheel of Fortune" background.<sup>103</sup> The court suggested that celebrities would be protected from any use in which the celebrity was identifiable, because "[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."<sup>104</sup> Thus, "[i]t is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so."<sup>105</sup> Other courts have also expanded the scope of protected attributes to encompass Johnny Carson's catch phrase "Here's Johnny,"<sup>106</sup> Guy Lombardo's nickname as "Mr. New Year's Eve,"<sup>107</sup> and football star Elroy Hirsch's nickname "Crazylegs."<sup>108</sup> Indeed, it is clear that

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<sup>101</sup> *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974). The court did not specify whether it was relying on the California statute or the common law. *Id.* at 826-27.

<sup>102</sup> *See* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098-99 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463-64 (9th Cir. 1988).

<sup>103</sup> *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992).

<sup>104</sup> *Id.* at 1398. The court added:

Indeed, if we treated the means of appropriation as dispositive in our analysis of the right of publicity, we would not only weaken the right but effectively eviscerate it. The right would fail to protect those plaintiffs most in need of its protection. Advertisers use celebrities to promote their products. The more popular the celebrity, the greater the number of people who recognize her, and the greater the visibility for the product. The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice.

*Id.* at 1399.

<sup>105</sup> *Id.* at 1398 (emphasis added). A more recent, similar case was *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691-94 (9th Cir. 1998) where the court stated that there was a genuine issue of material fact as to whether the defendant, a beer company, appropriated a famous baseball pitcher's identity by stealing his distinctive stance. However, this case technically went forward under the "likeness" prong of California Code section 3344, not the common law "identity" test. *Id.* at 694 & n.3. Statutory stretching can thus be used to achieve the same result as expansion of the common law.

<sup>106</sup> *Carson v. Here's Johnny Portable Toilets*, 698 F.2d 831, 835-37 (6th Cir. 1983).

<sup>107</sup> *Lombardo v. Doyle, Dane, & Bernbach, Inc.*, 396 N.Y.S.2d 661, 664 (App. Div. 1977).

<sup>108</sup> *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137-38 (Wis. 1979). Yet another

the predominant standard in American jurisdictions for invasion of a plaintiff's right of publicity has become the vague, broad notion of "identifiability,"<sup>109</sup> despite the judiciary's initial focus only on "name and likeness,"<sup>110</sup> a plethora of statutes that claim to protect only a small specified set of attributes,<sup>111</sup> and a firestorm of protest from the commentators.<sup>112</sup>

How did this expansion evolve? Much of the answer springs from the vague principle initially underlying the right, which, as expressed in *Haelan*, was the idea that if one's image had value, and was going to be used to help sell a product, then one should be compensated for that use.<sup>113</sup> From this angle, as *White* noted, it seems arbitrary and illogical to stop the parameters of the right at

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strand of cases held defendants liable for using celebrity look-alikes in their advertisements. See, e.g., *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 624 (S.D.N.Y. 1985).

<sup>109</sup> See, e.g., THIRD RESTATEMENT, *supra* note 56, § 46 cmt. d. (essentially adopting the identifiability test, at least as long as the attribute is "so closely and uniquely associated with the identity of a particular individual that their use enables the defendant to appropriate the commercial value of that person's identity."); 1 MCCARTHY, *supra* note 1, § 3.18 (arguing that identifiability is the current state of the law).

<sup>110</sup> See, e.g., *Cepeda v. Swift & Co.*, 415 F.2d 1205, 1206 (8th Cir. 1969) (stating that the publicity right encompasses "name, photograph, and image"); *Haelan*, 202 F.2d at 868 (focusing solely on the right of a person "in the publicity value of his photograph" or his "likeness[ ]").

<sup>111</sup> For an overview of these statutes and the attributes they protect, see 1 MCCARTHY, *supra* note 1, § 6.8. All of the statutes protect at least "name and likeness," and some go beyond this to also protect one's photograph and/or voice. *Id.*

<sup>112</sup> See, e.g., *Melville & Perlman*, *supra* note 99, at 394-95, 408 (arguing that the further away from name and likeness one moves, the less celebrity interest there is, and thus it becomes more likely that this interest will be outweighed by public interests in free expression and free competition); Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 35, 45-48 (1998) (stating that the number of protected attributes within the right of publicity, along with other aspects of the right, must be cut back to avoid damaging free speech rights and impoverishing the public domain). The most withering critiques seem to have been reserved for the *White* case. See, e.g., Steven C. Clay, *Starstruck: The Overextension of Celebrity Publicity Rights in State and Federal Courts*, 79 MINN. L. REV. 485, 517 (1994) (arguing that *White* "continues a long line of state and federal cases that fail to adequately justify the right of publicity's existence, or to make any kind of accounting of the social costs imposed by the right of publicity in its current expansive form" and suggesting that the publicity right be replaced by a much narrower "performance right"—the right to prohibit others from stealing your persona to compete against you in your primary line of work); Sen, *supra* note 99, at 751-60 (claiming that the *White* decision in particular threatens important free expression values, particularly the social importance of a vibrant culture and the right to parody); Fred M. Weiler, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223, 268 (1994) ("The *White* decision . . . tips whatever balance the right of publicity had previously attained between the celebrity and the public in favor of the celebrity."). Much of this criticism of *White* was probably fed by Judge Kozinski's angry dissent from the denial of rehearing *en banc*. *White*, 989 F.2d at 1512 (Kozinski, C.J., dissenting). Judge Kozinski objected to the panel's decision on free speech, utilitarian, and copyright pre-emption grounds.

<sup>113</sup> *Haelan*, 202 F.2d 866. ("[I]t is common knowledge that many prominent persons . . . far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances . . .").

“name and likeness,” particularly if (as is clearly true) certain celebrity identities can be appropriated as effectively or even more effectively via other means.<sup>114</sup> Legislatures can be and often are arbitrary—that is why many legislatures included a short laundry list of actionable attributes in their statutes. But courts are constrained by logic—that is why courts keep using the common law to expand the list of attributes beyond those in the statutes. Identifiability, as broad as it is, strikes one as the most logical stopping point.<sup>115</sup> Further evidence of this is that the courts of many foreign countries, often despite theoretically being constrained by statute to protect only certain attributes like name, portrait, and signature, have developed similar notions of identifiability when determining infringement of publicity/privacy rights.<sup>116</sup>

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<sup>114</sup> Other courts that expanded the list of actionable attributes expressed similar sentiments to the *White* court. See *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

Why did [the defendants] studiously acquire the services of a sound-alike and instruct her to imitate Midler if Midler's voice was not of value to them? What they sought was an attribute of Midler's identity. Its value was what the market would have paid for Midler to have sung the commercial in person . . . . A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested . . . . The singer manifests herself in the song. To impersonate her voice is to pirate her identity.

*Id.*; see also *Carson*, 698 F.2d at 837 (finding that the

right of publicity has developed to protect the commercial interest of celebrities in their identities. The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity . . . . If the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his “name or likeness” is used . . . . It should be obvious . . . that a celebrity's identity may be appropriated in various ways).

<sup>115</sup> Melville and Perlman, although they do not really attack the identifiability standard, do argue that it may be logical to only protect a celebrity's name and likeness, and not other indicia of her identity, or at least to protect name and likeness more strongly than these other indicia. Melville & Perlman, *supra* note 99, at 392-93. They base this argument on the idea that publicity rights derive from privacy rights, which are fundamental to tort law, and that name and likeness are more “likely to be regarded within the personal sphere” than other aspects of identity. *Id.* at 393. There are two problems with Melville and Perlman's analysis. First, publicity rights may have stemmed from privacy rights, but they are clearly also independent of those rights—the right question to ask is not simply which aspects of plaintiff's identity are most personal but rather which aspects have value to an advertiser based on appropriating the celebrity's image. Publicity rights, according to most courts and commentators, seem to be based at least as much on pecuniary value as on human dignity concerns. See, e.g., text accompanying notes 31-44, and n.91 and accompanying text; see also *infra* Part III (evaluating the policy/philosophical justifications both for and against publicity rights). Second, it is not at all clear that name and likeness always are more personal than other attributes of someone's identity—someone's voice or nickname, for example, can be every bit as personal.

<sup>116</sup> See, e.g., Bergmann, *supra* note 28, at 512 (noting that German courts have analogized to and extended statutory protections in name and likeness to create a “general right of personality” that protects other aspects of identity, like voice); Silvia Martuccelli, *The Right of Publicity Under Italian Civil Law*, 18 *LOY. L.A. ENT. L. REV.* 543, 548-54 (1998) (describing the judiciary's creation, via a general power to reason by analogy, of a right to protection for a broad swath of attributes of identity (for example, a famous singer's dis-



A closely related problem is that there is no logical countervailing principle to halt the right from spreading to reach indicia of identity that were previously thought to be beyond the scope of the right. Many of the commentators who have complained about this expansion have emphasized freedom of speech concerns, but these complaints are vague in nature.<sup>117</sup> The real complaint is that an intellectual property right infringes more on free speech concerns as it gets broader in scope; there is no clear demarcation or logical reason why protecting a pose or nickname is any more of a violation of free speech rights than protecting a name or photograph. Compare this to two other areas where competing principles are clearly blocking the spread of the right because judges can see that these competing principles are obviously implicated. First, even the spread of protected indicia of identity has been basically halted when plaintiffs have tried to get protection for roles or characters that they have played in television shows, radio programs, or movies.<sup>118</sup> Surely a person can often be identified by the use of her character; however, courts have been somewhat cautious and reluctant to extend protection.<sup>119</sup> This seems to be largely because the

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tinctive hat and glasses), despite statutory protection only for name, pseudonym, photograph, and portrait).

<sup>117</sup> See *supra* note 112.

<sup>118</sup> Several commentaries have been written on this topic, with mixed recommendations. Compare, e.g., Michael A. Albano, Note, *Nothing to "Cheer" About: A Call for Reform of the Right of Publicity in Audiovisual Characters*, 90 GEO. L.J. 253 (2001) (arguing that actors should not generally be able to protect the characters they play because of copyright preemption), Melville & Perlman, *supra* note 99, at 402-04 (emphasizing that characters should not fall within the scope of publicity rights because an actor's roles are less personal than other aspects of her identity, there is a broad swath cut out of the public domain and free speech rights, and protection would be preempted by the federal copyright statute), and Peter K. Yu, Note, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*, 20 CARDOZO L. REV. 355, 408 (1998) (arguing that publicity rights are preempted if the basis of the claim is an evocation of a "fictional persona," and such a fictional persona exists "if an average lay observer can recognize from the audiovisual character a personality that is substantially different from the actor's human persona." (footnote omitted)), with Dawn H. Dawson, *The Final Frontier: Right of Publicity in Fictional Characters*, 2001 U. ILL. L. REV. 635, 662-67 (2001) (claiming that actors should have publicity rights in characters they portray so long as they are closely identified with their characters), and Kevin S. Marks, Note, *An Assessment of the Copyright Model in Right of Publicity Cases*, 70 CAL. L. REV. 786, 811-14 (1982) (calling for a joint right of publicity in characters shared by actor and studio in which either party can exploit the right unilaterally but profits are split evenly and in which third parties have no right to use the character without the consent of either actor or studio).

<sup>119</sup> See, e.g., *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 625-26 (6th Cir. 2000) (refusing to give an actor who played a character in the movie *Predator* protection from a small toy based on that character who bore little physical resemblance to the actor, noting that "[c]ourts have generally been careful . . . to draw the line between the character's identity and the actor's, siding with plaintiffs only when it is shown that the two personalities are inseparable in the public's mind" so as to avoid "upset[ing] the careful balance that courts have gradually constructed between the right of publicity and the First Amendment and federal intellectual property laws."); *Wendt & Ratzenberger v. Host Int'l, Inc. & Paramount Pictures Corp.*, 125 F.3d 806, 811 (9th Cir. 1997) (holding that two actors from

federal copyright implications are so evident: creating a strong right of publicity in these situations will weaken the ability of the copyright owners of television, radio, or movies to exploit their rights at full value (for example, third parties will not be willing to pay as much for use licenses if they also must buy the actors' publicity rights).<sup>120</sup> Copyright preemption thus lurks in the background of these cases.<sup>121</sup>

### B. *Expansion and Stasis in Mediums for Misappropriated Material*

A second example of an area of publicity law that has remained relatively stable because of a strong countervailing principle looks not at the indicia of plaintiff's identity that has been infringed, but at the use by the defendant that it is allegedly infringing. In this case, the First Amendment implications are obvious. Even before Peter Felcher and Edward Rubin proposed, in 1979, a tripartite division into informational, entertainment, and commercial uses of identity like advertising and merchandising, with the former mediums generally outside the scope of right of publicity claims and the latter medium generally left exposed,<sup>122</sup>

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the television show "Cheers" could not claim any rights in the characters they played on the show or the set of the show because such an assertion was preempted by copyright, although they could perhaps have a claim to the extent that robots used in Cheers bars and supposed to be Cheers characters bore a "physical likeness" to the actors and "it is the physical likeness to [the actors], not [the movie studio's] characters, that has commercial value to [the defendant]."); *McFarland v. Miller*, 14 F.3d 912, 920-21 (3d Cir. 1994) (stating that George "Spanky" McFarland could protect his film character "Spanky" only if that character had become "inextricably intertwined" with the actor's own identity, that is, only where it has become "so associated with him that it becomes inseparable from the actor's own public image."); *see also White*, 989 F.2d at 1517-18 (Kozinski, C.J., dissenting) (arguing that the majority was protecting Vanna White, not as herself, but her playing her role on "Wheel of Fortune," and thus that it fell afoul of copyright preemption).

<sup>120</sup> *See Albano, supra* note 118, at 267-76. In 1981, David Shipley tried to argue that the possible scope of federal copyright preemption of publicity rights was very broad; most publicity claims involving a work of authorship or something fixed in a tangible medium (like a photograph, poster, etc.) should be preempted. *See David E. Shipley, Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 736-37 (1981). However, this broad interpretation of preemption has never caught on with the courts. *See Erin S. Hansen, Note, The Right of Publicity Expands Into Hallowed Ground: Downing v. Abercrombie & Fitch and the Preemption Power of the Copyright Act*, 71 UMKC L. REV. 171, 191 (2002):

The courts have been all too willing to relinquish the rights of a copyright holder in cases in which the owner of the copyright is not even a party to the lawsuits. Moreover, the courts have greatly diminished the value of copyright holders without ever conducting a conflict analysis into whether the state right undermines the Congressional objectives of the Copyright Act.

(footnote omitted).

<sup>121</sup> *Albano, supra* note 118, at 267-76.

<sup>122</sup> Peter L. Felcher and Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1601-06 (1979). Felcher and Rubin were not absolute about these categories—they would sometimes refuse to protect informational and especially entertainment uses if the predominant purpose was to exploit the celebrities involved and

most courts followed this schema in a rough sense.<sup>123</sup> Today, this division generally continues to be followed,<sup>124</sup> although as always

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not to serve some social function, but there seemed to be a strong presumption, particularly in the case of informational (news media) uses, that publicity rights should not apply.

<sup>123</sup> For some of these early cases, see, for example, *Hicks v. Casablanca Records & Filmworks*, 464 F. Supp. 426, 433 (C.D.N.Y. 1978) (protecting film about Agatha Christie's life from publicity claim on First Amendment grounds, noting that just as newsworthy uses are outside the First Amendment, so too "the right of publicity does not attach . . . where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie, and in such novel or movie it is evident to the public that the events so depicted are fictitious."); *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 272 P.2d 177, 184 (Utah 1954) (interpreting the statute strictly to avoid applying it to company that made a musical show about a celebrity's life, thus avoiding First Amendment problems); *Frosch v. Grosset & Dunlap, Inc.*, 427 N.Y.S.2d 828, 829 (A.D. 1980) (protecting unauthorized book about the life of the deceased Marilyn Monroe and commenting that "[i]t is not for a court to pass on literary categories, or literary judgment. It is enough that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services."); *Current Audio, Inc. v. RCA Corp.*, 337 N.Y.S.2d 949, 955 (Sup. Ct. 1972) (refusing to hold magazine liable for publishing news conference and commentary on Elvis Presley, including his picture on the back cover, and noting that

[t]he scope of the subject matter which falls within the protected area of the 'newsworthy' or of 'public interest' extends far beyond the dissemination of news in the sense of current events and includes all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general).

In *Rosemont Enters., Inc. v. Random House, Inc.*, the court protected a biography of Howard Hughes, since

[t]he same requirement of commercial use which limits the New York right of privacy inheres in the "right of publicity." The publication of a biography is clearly outside the ambit of the "commercial use" contemplated by the "right of publicity" and such right can have no application to the publication of factual material which is constitutionally protected. Just as a public figure's "right of privacy" must yield to the public interest so too must the "right of publicity" bow where such conflicts with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.

294 N.Y.S.2d 122, 129 (Sup. Ct. 1968), *aff'd mem.*, 301 N.Y.S.2d 948 (App. Div. 1969). See *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 458-59, 461-62 (Cal. 1979) (Byrd, C.J., concurring) (noting in a lengthy exposition of the interaction between publicity rights and the first amendment that a fictionalized film about a deceased actor's life should be protected because "[o]ur courts have often observed that entertainment is entitled to the same constitutional protection as the exposition of ideas." Further,

while few courts have addressed the question of the parameters of the right of publicity in the context of expressive activities, their response has been consistent. Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression.

(footnotes omitted)). Some of the other important early cases, involving merchandising, are discussed *supra* note 113.

<sup>124</sup> See, e.g., *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 937-38 (6th Cir. 2003) (protecting a famous artist's painting of Tiger Woods playing the Masters, which was then mass produced by being made into a print, on First Amendment grounds); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184-89 (9th Cir. 2001) (holding that magazine's use of Dustin Hoffman's head on another costumed body, made to look like one of Hoffman's famous poses from the movie "Tootsie," was protected speech); *White*, 971 F.2d at 1401 (declining to protect humorous advertisement on First Amendment grounds, despite a parody defense made by the defendants, because "[t]his case involves a true advertisement run for the purpose of selling Samsung VCRs. The ad's spoof of Vanna White and Wheel of Fortune is subservient and only tangentially related to the ad's primary message: 'buy Samsung VCRs.'"); *Rogers v. Grimaldi*, 875 F.2d 994, 1004-05 (2d Cir. 1989) (refusing to

there are some hard cases that blur the boundaries.

One particularly hard type of case involves merchandising. Generally, merchandising (for example, a celebrity T-shirt) is considered to be a commercial use, lumped together with advertising. But if the merchandising is particularly creative or socially valuable for some reason, then it might be protected.<sup>125</sup> A second type of hard case involves imitations of live productions by the celebrity. While this is an entertainment use, most courts have held that it may not be protected absent some real transformation of the material, or some added social utility, by the defendant.<sup>126</sup>

The pattern that has emerged is not necessarily correct as a matter of constitutional law,<sup>127</sup> but it does reflect a consistent

apply publicity rights of Ginger Rogers to hold movie studio liable for movie titled "Ginger & Fred," which was an account about fictional imitators of the dancers); see also THIRD RESTATEMENT, *supra* note 56, § 47 (stating that the right to publicity applies if identity is "used in advertising the user's goods or services, or [is] placed on merchandise marketed by the user, or are used in connection with services rendered by the user," but does not normally include "use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.").

<sup>125</sup> Compare *Comedy III Prods Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 804-11 (Cal. 2001) (holding that artist's drawing of the Three Stooges used on mass-produced T-shirts was not protected from publicity rights claims because the use was not "transformative" in any real sense; it was just a copy of their likenesses), and *Factors, Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978) (preliminarily enjoining sale of posters of Elvis released after his death and containing the words "In Memory" under a publicity rights theory and rejecting a defense that the poster was privileged via the first amendment as "newsworthy"), with *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967-76 (10th Cir. 1996) (holding trading cards with caricatures of professional baseball players on the front and humorous depictions of these players on the back protected as parody), and *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 505-10 (Sup. 1968) (protecting unauthorized poster using a photograph of famous comedian and promoting his self-announced candidacy for President of the United States because his candidacy imbued the material with public interest, even though the candidacy was clearly intended as a joke).

<sup>126</sup> See, e.g., *Presley's Estate v. Russen*, 513 F. Supp. 1339, 1355-61 (D.N.J. 1981) (holding that a show imitating Elvis was not protected because it was not found to be creative, commentary, satire, or parody); *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485, 492-93 (S.D.N.Y. 1981) (holding a show imitating the Marx Brothers Act was not protected for the same reasons listed in *Presley Estate*). Part of the rationale underlying these decisions seems to be, as in *Zacchini*, that defendant is stealing plaintiff's main income generating activity, i.e., his performance, not merely associating a celebrity with a specific product in order to sell it. See *Zacchini*, 433 U.S. at 573 n.10; *Russen*, 513 F. Supp. at 1361. Perhaps, different rules should apply to performance value cases, as suggested in *Zacchini*; less first amendment protection may be appropriate. See *Zacchini*, 433 U.S. at 573 n.10; *Russen*, 513 F. Supp. at 1361. Finally, the Supreme Court has alerted the legal community that sometimes, albeit rarely, the news media may be liable for a right of publicity violation. See *Zacchini*, 433 U.S. at 575-78 (holding that news station was not exempt from a publicity claim where it taped and broadcast plaintiff's "entire act," i.e., being shot out of a cannon, although a news report of the event, including some video clips, would be protected by the first amendment).

<sup>127</sup> See, e.g., Stephen R. Barnett, *First Amendment Limits on the Right of Publicity*, 30 TORT & INS. L.J. 635, 643-49, 657-61 (1995) (arguing that under the Supreme Court's prevailing *Central Hudson* test, commercial speech, like advertising, actually receives significant protection, and suggesting a copyright-style use defense for advertisers to protect the right from first amendment challenge); Joshua Waller, Comment, *The Right of Publicity: Preventing Exploitation of a Celebrity's Identity or Promoting Exploitation of the First Amendment*, 9 UCLA

awareness of the free speech issue. The reasons for the consistency of the division are that the free speech implications are so obvious, and the harm to the First Amendment from blocking entertainment, especially informational uses, is clearly greater than the harm from blocking commercial uses.

### III. SOME CURRENT ISSUES WITH RESPECT TO THE RIGHT OF PUBLICITY AS PROPERTY

This section, aside from giving “cutting-edge” treatment to two important publicity rights’ issues—divorce and bankruptcy—that are likely to be litigated in coming years, is intended to show the remarkable continuing power of the property syllogism. The few courts and commentators that have analyzed these issues have relied largely on a form of impoverished reasoning, based ultimately around the property syllogism. We try to steer debate away from these considerations by focusing on what we see as the underlying policy issues involved in each area, rather than the classification of the right as “property” or something else.

#### A. *Divorce*

Despite the widespread characterization by commentators and courts alike of publicity rights as transferable and descendible “property,”<sup>128</sup> few commentators, and even fewer courts, have confronted the issue of whether publicity rights are property in the context of divorce. Courts have, however, faced two related issues: (1) in dividing marital property, whether one spouse’s earning capacity or goodwill, developed or increased during the marriage, can be treated as marital property without violating the principle that the other spouse’s claim on post divorce earnings arises only from a right to alimony—often referred to as maintenance; and (2) does a claim to alimony limit the obligor’s freedom to choose a less remunerative occupation, or retirement?

#### 1. Earning Capacity and Goodwill as Marital Property

Both courts and commentators have had difficulty in distinguishing earning capacity, which generally is viewed as a spouse’s separate property and hence not divisible on divorce, from business and professional goodwill, which are generally regarded as

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ENT. L. REV. 59, 79-84 (1998) (similarly noting that under the Supreme Court’s prevailing tests, commercial speech is substantially protected, thus courts are, perhaps, erring by holding that all advertisements and other types of commercial speech are automatically unprotected from publicity rights claims).

<sup>128</sup> See *supra* Part I.C. and I.D.

marital property if their value can be separated from spousal earning capacity and skills. The American Law Institute, which makes the distinction just described, and adds that occupational licenses and professional degrees are not marital property,<sup>129</sup> identifies three groups of cases dealing with whether professional goodwill is divisible marital property: (1) those giving an affirmative answer, even if the goodwill, as in the case of a law practice, cannot be sold;<sup>130</sup> (2) cases treating professional goodwill, at least in the absence of a sale, as always indistinguishable from earning capacity;<sup>131</sup> and (3) cases that recognize the possibility of goodwill but require considerable caution in its valuation.<sup>132</sup>

There is no such division of judicial authority on whether professional degrees and licenses acquired during marriage should be treated as divisible marital property on divorce. In *O'Brien v. O'Brien*,<sup>133</sup> the New York Court of Appeals held that a husband's medical license should be so treated, a position that has been rejected by every state high court to consider the issue.<sup>134</sup> The lower court cases in New York have treated celebrity goodwill as marital property in reliance on *O'Brien*. Thus in *Golub v. Golub*,<sup>135</sup> a New York trial court held that the enhanced earning capacity of a famous actress and model during marriage (celebrity goodwill), which was in part attributable to the efforts of her spouse, was marital property subject to equitable distribution.<sup>136</sup> The court first noted that the New York definition of marital property was quite broad, including "all sources of enhanced earnings capacity."<sup>137</sup> The court analogized celebrity goodwill to professional degrees and professional goodwill, two other assets that New York courts have held to be divisible property because they greatly enhance the recipient's earning power, and it is regarded as inequitable not to share that earning power with the other spouse.<sup>138</sup> But the court also relied on the important publicity rights case of *Price v. Hal*

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<sup>129</sup> See, PRINCIPLES OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.07, A.L.I. (2001).

<sup>130</sup> See *id.*, Reporter's Notes, cmt. d, at 708-09 (discussing *Dugan v. Dugan*, 457 A.2d 1 (N.J. Sup. Ct. 1983), which finds divisible goodwill in such a case, as well as in other cases following this approach).

<sup>131</sup> See A.L.I. § 4.07, *supra* note 129, at 709-10.

<sup>132</sup> See *id.* at 710. The A.L.I. endorses this view.

<sup>133</sup> 489 N.E.2d 712 (N.Y. 1985).

<sup>134</sup> See A.L.I. *supra* note 129, Reporter's Notes, cmt. a at 704.

<sup>135</sup> 527 N.Y.S.2d 946, 950 (Sup. Ct. 1988).

<sup>136</sup> See *id.*

<sup>137</sup> *Id.* at 949.

<sup>138</sup> See *id.* at 949-50.

*Roach Studios*,<sup>139</sup> commenting that the case, by holding that “the right to exploit a celebrity’s fame . . . descends to his heirs . . . exemplifies the property nature of a celebrity’s fame.”<sup>140</sup> The familiar property syllogism had reared its head once more.

In *Elkus v. Elkus*,<sup>141</sup> involving the divorce of a famous opera singer, the New York Appellate Division seconded *Golub*’s holding that celebrity goodwill is marital property subject to dissolution, to the extent it increased because of the efforts of the other spouse, but it seemed to abrogate some of the lower court’s reasoning. It agreed that under New York law, the scope of marital property is very broad.<sup>142</sup> In fact, however, contrary to the lower court’s suggestion, it is so broad that “[t]hings of value acquired during marriage are marital property even if they fall outside of traditional property concepts.”<sup>143</sup> For example, they need not be salable, assignable, transferable, descendible, or have exchange value.<sup>144</sup> The *Elkus* court, rather than relying on the property syllogism, preferred to rest its holding on policy considerations, such as the fact that the purpose of New York marriage law was to prevent inequitable distributions of assets, and to promote more fully the partnership concept of marriage.<sup>145</sup> Thus, the high, expected, future earning power of a celebrity that was enhanced during the marriage should be divided, including, as one component, expected future celebrity endorsements.<sup>146</sup> The *Elkus* court steered itself away from the formalist approach of *Golub*, and moved toward a more functionalist analysis.

Although New Jersey does not follow *O’Brien*’s treatment of professional licenses,<sup>147</sup> a New Jersey court in *Piscopo v. Piscopo*,<sup>148</sup> a case involving a well-known comedian, held celebrity goodwill to

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<sup>139</sup> 400 F. Supp. 836 (S.D.N.Y. 1975). For an overview of the case’s holding and reasoning with respect to the inheritability issue, see *supra* text accompanying notes 60-63.

<sup>140</sup> *Golub v. Golub*, 527 N.Y.S.2d 946, 949 (Sup. Ct. 1988).

<sup>141</sup> 572 N.Y.S.2d 901 (App. Div. 1991).

<sup>142</sup> *Id.* at 902 (relying on *O’Brien v. O’Brien*, 489 N.E.2d 712 (N.Y. App. Div. 1985)). Although the *Elkus* court referred to the husband’s contribution to his wife’s career as determining the extent to which the appreciation in the wife’s career was marital property, see *Elkus v. Elkus*, 572 N.Y.S.2d 901, 904 (App. Div. 1991), and at least one case refused to treat a husband’s successful completion of actuary examinations as divisible marital property where his wife did not contribute to his success, or sacrifice her own career prospects to further it, see *McAlpine v. McAlpine*, 574 N.Y.S.2d 385 (App. Div. 1991), it is not easy to find a basis for excluding career assets from the broad definition of marital property in *O’Brien*, whether or not the other spouse’s efforts contributed to their acquisition.

<sup>143</sup> *Elkus*, 572 N.Y.S.2d at 902.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 903.

<sup>146</sup> *Id.*

<sup>147</sup> *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. Sup. Ct. 1982).

<sup>148</sup> 555 A.2d 1190 (N.J. Ch. 1988), *aff’d*, 557 A.2d 1040 (N.J. Super. Ct. App. Div. 1989).

be marital property.<sup>149</sup> The New Jersey court emphasized that, as in New York, marital property in New Jersey was defined broadly to effectuate policies of fairness and equity, and that celebrity goodwill could be compared to professional goodwill, which was already protected.<sup>150</sup> It was only the exceptional figure, like the highly successful lawyer, or the celebrity, who would generate this type of goodwill.<sup>151</sup> Further, the court noted, there was no reason to differentiate between publicity rights and the general notion of celebrity status because the two were "inextricably intertwined" since the amount a celebrity could earn from advertising generally correlated well with the extent to which she was a celebrity.<sup>152</sup> At any rate, it would be unfair for New Jersey courts to vigorously protect publicity rights on the one hand, while not giving the spouse her just interest in those rights on the other.<sup>153</sup>

The value of the New York and New Jersey cases as precedents for other states was limited, for two reasons. First, both states have extremely broad notions of marital property.<sup>154</sup> Second, none of these cases makes a clear distinction between celebrity goodwill or celebrity status (some vague notion of future earning power stemming from being a celebrity) and publicity rights.<sup>155</sup> In part, the

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<sup>149</sup> *Id.* at 1193.

<sup>150</sup> *Id.* at 1191.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 1192 n.1. The court also noted, along similar but less clear lines, that celebrity goodwill "has always been a component of the 'right to publicity.'" *Id.* at 1192.

<sup>153</sup> *Id.*

<sup>154</sup> See Robin P. Rosen, Note, *A Critical Analysis of Celebrity Careers as Property Upon Dissolution of Marriage*, 61 GEO. WASH. L. REV. 522, 532-540 (1993) (stating "[t]he majority of jurisdictions employ the traditional two-pronged definition of property to evaluate whether intangible assets are property capable of distribution on divorce." This definition states that

[t]he asset at issue must be both a separate and distinct asset and be capable of valuation. To be a separate asset, property must have its own value and existence apart from its holder; be susceptible of ownership, transfer, and survival; and be capable of sale, assignment, or pledge. To satisfy the valuation requirement, the property should have either an exchange value or an objective transferable value on an open market—an expectancy of future income is insufficient).

(footnotes omitted).

<sup>155</sup> *Piscopo* explicitly refused to make this distinction. See *Piscopo v. Piscopo*, 555 A.2d 1190, 1191 n.1 (N.J. Ch. 1988). *Golub* and *Elkus* implicitly fail to make the distinction between publicity rights and celebrity status. See *Elkus*, 572 N.Y.S.2d at 903 (referring to endorsements as though they were one component of a broader notion of enhanced celebrity earning power); *Golub v. Golub*, 527 N.Y.S.2d 946, 949 (Sup. Ct. 1988) (referring to *Price v. Hal Roach Studios*, 400 F. Supp. 836 (S.D.N.Y. 1975), a publicity rights case, as support, but then holding that virtually all aspects of a celebrity's enhanced future earnings power were dissoluble, not only advertising revenues). Commentators have picked up on this distinction. See Jonathan L. Kranz, Note, *Sharing the Spotlight: Equitable Distribution of the Right of Publicity*, 13 CARDOZO ARTS & ENT. L.J. 917 (1995).

Treatment of a celebrity career as marital property does not adequately address the need to separately and distinctly subject a celebrity's right of publicity to



blame for this result stems from the vague character of the right of publicity itself. The right usually protects the use of one's identity in connection with advertising or merchandising. However, *Zacchini* and a few other cases have protected a somewhat different interest under the rubric of publicity rights: a celebrity's right not to have her performance—her primary professional activity—stolen or imitated without her consent.<sup>156</sup> These “performance rights” cases look more as if they protect some broadly defined future celebrity income, because for most celebrities, like actors and athletes, most of their income probably comes from performances, not from endorsements. Therefore, when we refer to publicity rights in this section and the next section on bankruptcy, we are not including performance rights.<sup>157</sup> The irony of *Golub*, *Elkus*, and *Piscopo*'s vagueness is that these courts seemed to see valuation problems as the most significant obstacle and countervailing consideration to protection of celebrity goodwill.<sup>158</sup>

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equitable distribution. While celebrity goodwill is the expectation of future patronage or future employment, a right of publicity is a right to capitalize on the celebrity's name and likeness. By concentrating on celebrity goodwill and reputation, the courts have effectively ignored the unique and significant value of the right of publicity.

*Id.*; see also Rosen, *supra* note 154, at 545 n.120, 549 n.163 (arguing that there is a distinction between publicity rights and celebrity goodwill and that the former is marital property, while the latter is not).

<sup>156</sup> See, e.g., *Zacchini*, 433 U.S. at 575-76 (holding that the First Amendment did not bar plaintiff, a human cannonball specialist, from recovering based on the right of publicity from a news station that broadcast his “entire act,” and stressing that the case was about Zacchini's rights to his own performance, not “the unauthorized use of another's name for purposes of trade.”). See also Madow, *supra* note 4, at 208 n.395 (arguing that the traditional, advertising-based, right of publicity is different from the right of performance, that the rationales behind the latter, particularly the rationale that protection will lead to high incentives for celebrities to achieve, are much stronger than those behind the former, thus performance rights should certainly be protected while the traditional right of publicity is not necessarily worthy of support).

<sup>157</sup> Adding performance rights to the mix would make a celebrity's involuntary loss of control over her own publicity rights virtually unthinkable. If a loss of control is not involved, the analysis of publicity rights as marital property or property of a bankrupt estate would basically remain the same with or without performance rights included. But the scenario of loss of control over performance rights, with the celebrity involuntarily performing her primary professional activity under the direction of, and on behalf of, someone else, would make for a difficult situation for courts; the monitoring of the celebrity's effort level by the publicity right's new owner would violate the constitutional bar against involuntary servitude. See Jacoby & Zimmerman, *supra* note 86, at 1351 & n.163. It would be basically equivalent to an injunction forcing someone to work for a given employer, a measure that is never enforced, even if resulting from a freely signed labor contract, see, e.g., *Am. Broad. Co. v. Wolf*, 420 N.E.2d 363, 366 (N.Y. 1981). Jacoby & Zimmerman argue that performance rights should not be part of the right of publicity because, unlike the rest of the right, they are not really alienable; the property right in a celebrity's performances cannot be enforced against that celebrity's will. Jacoby & Zimmerman, *supra* note 86, at 1351 n.163. If performance rights are encompassed by the right of publicity, this is a very good reason not to treat publicity rights as property in the bankruptcy context, or to give a spouse or third party, control of these rights in the divorce context.

<sup>158</sup> See *Golub*, 527 N.Y.S.2d at 950; *Piscopo*, 555 A.2d at 1191, 1192-93.

Most of these valuation problems disappear if what is to be divided on divorce is publicity rights, instead of celebrity goodwill, at least so long as the rare "performance right" cases are ignored. Publicity rights in advertising and merchandising, unlike celebrity goodwill, are regularly assigned to agents, etc., and thus a thriving market exists for publicity rights.<sup>159</sup> Rather than using past income to speculate about future income, which can change for any number of reasons (as in the case of celebrity goodwill),<sup>160</sup> publicity rights can be valued more easily by estimating, through comparison to other, similar transactions, what a gross assignment of all of a celebrity's endorsement rights would fetch on the open market *today*.

Because the few cases to deal with the issue of publicity rights upon divorce are of dubious value as precedents, future courts will likely turn to the commentators on this issue. Gary Stiffelman wrote one of the earliest pieces on the divorce issue,<sup>161</sup> in which he emphasized that the right of publicity really has two components: a "proprietary component" that protects a celebrity's economic exploitation of her fame, and a "pure privacy component" that carries over from the traditional right of privacy and protects a person's emotional and dignity interests in being let alone, and unexposed to undesired publicity.<sup>162</sup> He contended that the proprietary component, which is transferable and descendible, is clearly marital property, and it should be valued at its fair market value based on its highest and best use, even if the celebrity has chosen for some reason not to fully exploit his fame, just like "a fertile field."<sup>163</sup> However, the privacy component is a purely personal interest that is not property, and should not be subject to division.<sup>164</sup> As a reconciliation of these two intertwined and divergent interests, Stiffelman proposes making publicity rights marital property, only for those forms of publicity that the celebrity has economically exploited, based on the theory that in these areas, the celebrity has waived any privacy claim to be let alone.<sup>165</sup>

While Stiffelman took a somewhat nuanced approach to pub-

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<sup>159</sup> It is not unusual for a celebrity to assign all of his advertising and merchandising rights. See, e.g., MCCARTHY, *supra* note 1, § 10.14 (explaining the various reasons why celebrities assign away all of their publicity rights).

<sup>160</sup> *Piscopo*, 555 A.2d at 1192-93.

<sup>161</sup> See Gary S. Stiffelman, Note, *Community Property Interests in the Right of Publicity: Fame and/or Fortune*, 25 UCLA L. REV. 1095 (1978).

<sup>162</sup> See *id.* at 1102-09.

<sup>163</sup> See *id.* at 1119.

<sup>164</sup> See *id.* at 1122-25.

<sup>165</sup> See *id.* at 1125-28. To deal with the problem of a celebrity who had not exploited an aspect of his publicity rights during marriage but who later decided to do so, Stiffelman

licity rights, and tried to split the difference with a compromise, Jonathan Kranz argued unequivocally that the right to publicity should be marital property.<sup>166</sup> He made two major points: first, jurisdictions that have (1) broad definitions of marital property (like New York), which sweep well beyond traditional definitions of property, and (2) a partnership theory of marriage, should allow divisibility of publicity rights as a matter of basic fairness and equity—these rights have value that the noncelebrity spouse helped to enhance.<sup>167</sup> Second, those jurisdictions that require something to be property-like in character before deeming it marital property, should also find the right of publicity to be divisible, because “the general view has been to treat [publicity rights] as proprietary in nature . . . within various jurisdictions, the right of publicity may be assigned in gross, is enforceable despite the public character of the plaintiff or the public nature of the information publicized, and survives the death of the claimant.”<sup>168</sup>

Robin Rosen contended that Kranz’s second, traditional property approach, rather than the looser New York definition of marital property, was the proper way to approach this issue.<sup>169</sup> As she argued, in order for something to be marital property:

The asset at issue must be both a separate and distinct asset and be capable of valuation. To be a separate asset, property must have its own value and existence apart from its holder; be susceptible of ownership, transfer, and survival; and be capable of sale, assignment, or pledge. To satisfy the valuation requirement, the property should have either an exchange value or an objective transferable value on an open market—an expectancy of future income is insufficient.<sup>170</sup>

Because it does not fit this definition, and because of policy reasons (particularly the avoidance of involuntary servitude by effectively forcing a celebrity to continue working high paying jobs), a “celebrity career” or “celebrity goodwill,” such as a degree, should not be considered marital property; any hardships caused by this rule should be fixed through maintenance payments.<sup>171</sup>

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states that courts should retain jurisdiction and have the option of changing the value of publicity rights considered marital property. *Id.* at 1128-30.

<sup>166</sup> Kranz, *supra* note 155.

<sup>167</sup> *Id.* at 948. Why enhancement (or nonenhancement) of the right by the noncelebrity spouse should be relevant at all is unclear, if the right is seen as property acquired during marriage, to any greater extent than her right to share in divorce accumulated compensation for services during marriage.

<sup>168</sup> *Id.* at 949 (footnotes omitted).

<sup>169</sup> Rosen, *supra* note 154.

<sup>170</sup> *Id.* at 532.

<sup>171</sup> *Id.* at 549-55.

However, because publicity rights do fit this definition, as they can be sold, inherited, etc, and there is an open market for them, publicity rights ought to be seen as marital property.<sup>172</sup>

With all of the above commentators, especially Rosen, the property syllogism loomed large: each of them used the reasoning that to the extent publicity is property for other purposes, it ought to be property for divorce purposes as well. Further, all three of the above commentators, and all three cases to address the issue, supported at least limited categorization of publicity rights as marital property. What all of the commentators have overlooked is that publicity rights, whether called “property” or not, are a very unique kind of property because they are extremely personal in nature.<sup>173</sup>

At a metaphysical level, Miranda Oshige McGowan’s point about copyright in the marriage context is relevant here:

Community property laws may undermine an author’s ability to control how expressions of personality are presented to the world by impairing her right to control the publication and licensing of her works . . . . [G]iving the spouse rights to dispose of the author’s copyrights implies that an artistic work is no different than any other personal property asset owned by the marriage—freely alienable by the decision of either party. Such an attitude inappropriately commodifies a kind of property that has a peculiarly close relationship to the author’s self, perhaps even giving the spouse the ability to commodify the author’s self.<sup>174</sup>

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<sup>172</sup> *Id.* at 549 n.163. Rosen appears to accept Stiffelman’s distinction between purely private and proprietary aspects of the right of publicity, and consequently, would limit its division as marital property to situations where the right was already being exploited. *Id.*

<sup>173</sup> Alice Haemmerli, for example, proposes a philosophical justification for publicity rights that is based in Kantian notions of human autonomy and freedom, rather than Lockean labor theory. See Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 421-24 (1999).

[I]mage can be viewed as unique, a product of the peculiar mix of mental, psychological, and physical attributes that make the progenitor the individual she is . . . . The objectification of one’s self may be viewed not as a purely external, objective thing, but as something more . . . . Most people—and, many will agree, celebrities in particular—experience a special, even unique, attachment to their own images or other objectified attributes, and feel that those things are inextricably associated with their identities.

*Id.* See also Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (arguing intuitively and on the basis of Kantian/Hegelian theory, that some property, like a person’s home, is more personal than others, therefore is entitled to special types of treatment and different kinds of protection).

<sup>174</sup> Miranda Oshige McGowan, *Property’s Portrait of a Lady*, 85 MINN. L. REV. 1037, 1114, 1116 (2001). McGowan’s comments were made in the context of discussing control rights (like rights of disposal) by the non-producing spouse *during* a marriage, not upon divorce. However, the principle is the same: some forms of property are too personal, and too close to the self, to involuntarily share with anyone else, even a spouse.

If this is true of copyright, how much more true must it be of publicity rights, which protect a person's very identity?

On a more practical level, a court ordering equitable distribution of publicity rights has three choices: (1) the asset could be sold to a third party, and the compensation split between the spouses; (2) control could be split between the two spouses; and (3) the celebrity spouse could keep control, but be required to surrender equivalent amounts of cash or property to the other spouse to make the distribution equal.<sup>175</sup>

The first option is clearly unsatisfactory because it forces the celebrity to involuntarily relinquish all control over the commercialization of her identity to a third party, and the second option similarly forces the celebrity to give up some of this control. For example, a celebrity may desire not to exploit her publicity rights at all for personal reasons,<sup>176</sup> but a third party (in the first option), or her spouse (in the second option), may make endorsement deals because he wants more money. Further, from an economic standpoint, the third party's, or non-celebrity spouse's, efforts at control could have detrimental effects on the celebrity's career.<sup>177</sup> This is particularly true in option two, where a non-celebrity spouse who may be driven by acrimony towards the celebrity spouse acquires some control.<sup>178</sup>

Although commentators have suggested, in the context of bankruptcy, that both the first and second options may violate the strong, and perhaps constitutionally undergirded, public policy against forced labor if the non-celebrity spouse or third party has the power to force the celebrity to appear in commercials or other promotions,<sup>179</sup> it is difficult to find a basis, in either divorce or

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<sup>175</sup> Stiffelman, *supra* note 161, at 1119-20 (listing these options).

<sup>176</sup> See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097 (9th Cir. 1992) (involving publicity rights case where plaintiff, a famous singer, refused to do any commercials throughout his career). Even if the celebrity has chosen to exploit her rights to some extent, there may still be personal and/or dignity interests implicated when one loses total control over how they are exploited. See *supra* text accompanying note 156.

<sup>177</sup> See Stiffelman, *supra* note 161, at 1120.

<sup>178</sup> *Id.*

<sup>179</sup> But see Jacoby & Zimmerman, *supra* note 86, at 1351 (stating, in order to deal with the same problem in the bankruptcy context, that "publicity rights are properly understood as purely passive in nature; any associated right to command active participation by a celebrity should be understood as arising separately as a result of a specifically negotiated contract term."). Jacoby and Zimmerman's definition of publicity rights is rather questionable, and not well supported. They argue, logically and consistently with some other commentators, see Kranz, *supra* note 155, that "performance rights" should not be considered part of the rubric of publicity rights. See Jacoby & Zimmerman, *supra* note 86, at 1351 n.163. But "performance rights" encompass only a celebrity's rights to perform in her primary field (like sports or movies). They do not include active performances by a celebrity in a commercial. There seem to be no other commentators or courts who have made the distinction Jacoby and Zimmerman want to make between active and passive publicity

bankruptcy law, to support requiring a spouse to perform services after divorce for the holder of her rights of publicity.

The third option, allowing the celebrity to keep control but forcing him to surrender equivalent amounts of other property, may do as much damage, through indirect financial pressure, as the first two options do directly. If a celebrity is forced to surrender a large amount of other property to equal her spouse's share of the value of her publicity rights, she may be under tremendous financial pressure to fully exploit those rights, even if she would prefer not to do so for personal reasons.<sup>180</sup>

Full exploitation may also have detrimental effects on the celebrity's career.<sup>181</sup> Thus, it seems strange that Rosen should be so concerned about "involuntary servitude" in the context of celebrity careers or goodwill, and be blind to a very similar phenomenon with publicity rights.<sup>182</sup> Loss of control over career choice (and its associated elements, like work hours, working conditions, etc.) may be more taxing for the celebrity, and have a bigger impact on her life path, but exploitation of one's identity is, arguably, a more personal choice.

Stiffelman attempts to solve this problem through compromise, treating a celebrity's publicity rights as marital property only in "forms of exploitation" where he has already exploited the

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rights—infringement cases involving "active" cooperation by the celebrity do not come up because if the celebrity was actively cooperating with the use, it probably was not unauthorized. Additionally, for obvious reasons, publicity rights in infringement cases are typically conceptualized as the negative right to exclude others from using one's identity, not as the positive right of someone else to force one to endorse another. Thus, there is no authority supporting Jacoby and Zimmerman's definition. Further, the distinction between "active" and "passive" uses is odd because much exploitation of a living celebrity involves active cooperation by that celebrity. How are most photographs of the celebrity to be acquired, for example, without the celebrity's consenting to have his picture taken? Publicity rights are worth substantially less for living celebrities, if some active cooperation by the celebrity is not included.

<sup>180</sup> Admittedly, this problem may be minimized to the extent that the celebrity is very wealthy because of her primary income generating activity (her performance), or for other reasons. Cf. Madow, *supra* note 4, at 136-37 (noting that many celebrities, such as athletes and entertainers, "are already very handsomely compensated for the primary activities to which they owe their fame" and thus that the right of publicity "redistributes wealth upwards"). However, the number of celebrities who have sought the protection from creditors offered by the bankruptcy laws is by no means insignificant. See Jacoby & Zimmerman, *supra* note 86, at 1325-26.

<sup>181</sup> See, e.g., Sims, *supra* note 89, at 479 (noting, in a criticism of the lifetime exploitation requirement for inheritability, that "many celebrities have no desire to commercially exploit their names and likenesses during their lifetimes for reasons of personal sensitivity or *professional judgment*" (emphasis added)); see also Kwall, *supra* note 89, at 199 (noting that certain types of advertising, particularly "when the advertised product or service is of poor quality," can damage a celebrity's reputation and thus future endorsement deals and even "professional development").

<sup>182</sup> See *supra* text accompanying notes 152, 153.

rights.<sup>183</sup> There are several problems with this approach. First, as a practical matter, it will be difficult for a judge to ascertain which aspects of identity a celebrity has exploited, and which he has not; a simpler approach is thus preferable.<sup>184</sup> Second, just because the celebrity has previously exploited his publicity rights in an area does not mean that he should be pressured to exploit his rights in that area in the future. A celebrity's choice to commercially exploit her identity is so personal, and connected to her career, that she should be able to rescind a previous decision to exploit her identity if she chooses. Third, Stiffelman sees the emotional and dignity interests (the privacy interests) and the economic interests as being much more readily separable than they really are. For example, a celebrity may be offended, not merely by advertisements of a clearly lower quality than she has already consented to, (say, in *Hustler* versus *Newsweek*), but, because of the personal nature of identity, she may also be offended by *any* unconsented exploitation, even in advertisements of similar quality (*Esquire* versus *Glamour*). Even these types of exploitations may involve a more personal, dignity-like aspect, in addition to the economic aspect, because any loss of control over exploitation of one's identity may be a strange and disturbing experience for anyone, including a celebrity.<sup>185</sup> Also, the decision not to exploit one's identity may be as

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<sup>183</sup> See Stiffelman, *supra* note 161, at 1125-28.

<sup>184</sup> For example, what does Stiffelman mean by "forms of exploitation"? *Id.* He tries to solve this problem by giving an illustration:

[C]onsider the example of Lawrence Olivier, who recently appeared in a series of Polaroid commercials. Despite the fact that he willingly exposed his personality to millions of viewers, one could argue that he retains the right to sue for commercial appropriation of his name and likeness for uses which might be less dignified and which he might consider offensive, like advertisements for a 'girlie' magazine. The foundation for such an argument is that conventional privacy doctrine, insofar as it is intended to protect one's feelings, is waived not quantitatively (in terms of audience size) but by the demonstrated willingness to expose oneself in a specific qualitative connotation. By doing the Polaroid commercial, Olivier demonstrated a willingness to be associated with a commercial product of a certain quality. It must not be assumed from this partial waiver that he no longer has a right to protect his image or that certain types of exploitation would not damage his feelings.

*Id.* at 1127-28 n.137. The problem with Stiffelman's example is that it seems to rely on the presumed subjective valuations of the celebrity, rather than objective categories like magazine versus television; this objective categorization, although easier to carry out, would admittedly be a rather illogical approach. A judge is going to have a very hard time determining these subjective valuations—if he asks the celebrity, he is not apt to get an honest answer. Perhaps past patterns of the celebrity's behavior, coupled with evidence of "normal" endorsement behavior in an entertainment industry, could help solve these practical issues. At any rate, valuation becomes somewhat more difficult when the right of publicity valued on the open market is not "all of my publicity rights," but something like "publicity rights in classy but not low-brow magazines." *Id.*

<sup>185</sup> See Haemmerli, *supra* note 173, at 422, 427-28:

[A Kantian] philosophical orientation permits us to reconceive the right of

much an economic decision as a dignity decision<sup>186</sup>—why should these types of economic decisions be protected from division upon divorce, while economic decisions to exploit one’s identity are not protected? At any rate, the policy considerations raised in the preceding few paragraphs should at least be weighed against the policy gains (in equity towards the non-celebrity spouse and in support of the partnership theory of marriage)<sup>187</sup> that would stem from making publicity rights marital property.

Unless it is clear in the jurisdiction where a divorce is sought that the right to publicity is not a divisible asset, a celebrity takes a serious risk if there is no adjudication confirming her ownership of the right.<sup>188</sup> To anticipate such a problem, a celebrity or aspiring celebrity may wish to include in a premarital agreement a waiver of her prospective spouse’s claim to an interest in the right. Even if publicity rights are not marital property, the actual or potential income the celebrity could derive from them could be considered in fixing the amount of alimony payable to the non-celebrity spouse, so that her claim to participate in them might still be recognized. We now turn to the relevant precedent pertaining to this issue.

## 2. Effect of an Obligor’s Choice of Occupation or Retirement on Alimony Obligations

Judicial and academic views of the extent to which alimony claims are affected by an obligor’s choice of a less remunerative occupation (or retirement) are divided. Although courts continue to refer to “need” as the basis for alimony awards,<sup>189</sup> duration of marriage and expected difference in post-divorce incomes are the

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publicity as a freedom-based property right with both moral and economic characteristics, rather than being forced to make a dichotomous choice between a privacy right concerned with moral injury on the one hand, or a purely pecuniary publicity right on the other . . . [W]hile there is a difference between the self and objectification (or commodification) of self, the latter does not negate the former (indeed, it derives from the former); . . . a property right which provides for control over objectification of identity is not logically opposed to an autonomy right that protects the self; and . . . the two can, in fact, be viewed as two facets of freedom. What this means in reality is that even in the presence of commodification, a viable claim can be made to control the commercial exploitation of identity on both moral and economic grounds.

<sup>186</sup> See Siffelman, *supra* note 161.

<sup>187</sup> See *Elkus*, 572 N.Y.S.2d at 903; *Piscopo*, 555 A.2d at 1191, *aff’d*, 557 A.2d 1040 (N.J. Super. App. Div. 1989); *Kranz*, *supra* note 155, at 948.

<sup>188</sup> See, e.g., CAL. FAM. CODE § 2556 (2004) (stating that court has continuing jurisdiction to award community estate assets that have not been previously adjudicated). See also BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 9.06 at 655 (1994) (general agreement that the decree can be reopened if assets are omitted because of fraud or mistake, and minority view that court’s jurisdiction continues until all assets have been expressly divided).

<sup>189</sup> See A.L.I., *supra* note 129, § 5.02, cmt. a, at 788-89.



factors most consistently relied on by courts today in fixing the amount of alimony.<sup>190</sup> It may then be important to determine whether spousal incomes for this purpose should include amounts that could be realized from the exploitation of either spouse's right to publicity. Ordinarily, of course, the question would arise only in determining the obligor's income, but one can imagine an obligor responding to a claim by a former spouse by asserting that her needs could be met through exploitation of her right to publicity.

There is no apparent evidence of a case in which a court based a maintenance award on the obligor's potential increased earnings if he changed his occupation. However, courts have had to consider whether a reduction in earnings, as a result of such a change, justified a reduction or termination of an alimony obligation, and the results have been mixed.<sup>191</sup> An obligor's early retirement raises the same issue, again with mixed results in the courts.<sup>192</sup> And courts are similarly divided on whether to reduce payments because an obligor wants to leave work to seek further education.<sup>193</sup> In contrast, courts and legislatures have been more inclined to treat a support claimant's failure to make reasonable efforts at rehabilitation as a basis for reducing or terminating her claim to maintenance.<sup>194</sup>

The cases just referred to are generally consistent with the view that an obligor's failure to exploit his right to publicity should not cause the potential income from such exploitation to be considered in determining a maintenance obligation, but that a claimant's failure to exploit her right may reduce the amount of her claim. In either situation, it is difficult to find a basis for disregard-

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<sup>190</sup> See *id.*, § 5.04 Rptr's Notes cmt. d, at 828-29.

<sup>191</sup> Compare *Stiltz v. Stiltz*, 223 S.E.2d 689 (Ga. 1976) (no relief from obligation to former spouse while obligor attended a seminary, despite genuineness of his desire to enter the ministry), with *Meegan v. Meegan*, 13 Cal. Rptr. 2d 799 (Cal. App. 1992) (support terminated where husband resigned from his job as sales executive to attend a monastery; the court relied on a finding that his resignation was made "in good faith" and not just to avoid paying support).

<sup>192</sup> Compare, e.g., *Sinks v. Sinks*, 251 Cal. Rptr. 379 (1988) (voluntary early retirement not grounds for reducing support), with *Burns v. Burns*, 331 A.2d 768 (Pa. Super. Ct. 1974) (reduction allowed on early retirement, in view of husband's health problems and loss of interest in his work after his son's death).

<sup>193</sup> Compare *Ilas v. Ilas*, 16 Cal. Rptr.2d 345 (Cal. App. 1993) (no reduction to attend medical school), with *Overbey v. Overbey*, 698 So.2d 811 (Fla. 1997).

<sup>194</sup> See, e.g., *Berland v. Berland*, 264 Cal. Rptr. 210 (Cal. App. 1989) (reduction in maintenance award justified because wife's rehabilitation had been delayed by her unrealistic efforts to find employment as a paid fundraiser); *Hecker v. Hecker*, 568 N.W.2d 705 (Minn. 1997) (affirming award attributing to a dependent spouse the income that could have been produced by reasonable effort); OR. REV. STAT. § 107.412 (1996) (court shall terminate support if recipient "has not made a reasonable effort during the previous ten years to become financially self-supporting . . .").

ing income actually being derived from such exploitation in determining the amount of the obligor's maintenance obligation.<sup>195</sup>

### B. *Bankruptcy*

Federal bankruptcy raises different issues from those raised by divorce because of the interaction of state property law, exemption statutes and federal bankruptcy law.<sup>196</sup> In a Chapter 7 bankruptcy proceeding, absent an applicable state exemption statute,<sup>197</sup> the bankrupt estate includes "all legal or equitable interests of the debtor in property,"<sup>198</sup> and, absent any controlling federal law, these terms are solely creatures of state law.<sup>199</sup> Thus, although a state could determine the right of publicity is not an asset divisible on divorce, despite its treatment as property for other purposes, a state does not have a similar option in the context of bankruptcy. If the right is property, the only way it could be excluded from the bankrupt estate is by a state exemption statute.<sup>200</sup> Absent such an exemption, the right could, in theory, be sold to the highest bidder and the proceeds used to pay creditors.<sup>201</sup>

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<sup>195</sup> See Rosen, *supra* note 154, at 554 (noting that most jurisdictions use a "reimbursement" form of maintenance, because of its "flexibility," to deal with unfairness caused by the failure to consider degrees marital property, and stating that this approach would also work for celebrity careers). The advantage of a maintenance approach is that it could be tailored to a celebrity's preexisting level of commercial exploitation, and adjusted if the level of exploitation were to change; thus, a celebrity could be forced to share in any earnings from her publicity rights to the extent that she has already exploited them, but would not be forced or even pressured to exploit her publicity rights to any extent involuntarily. An alternative approach, which is quite similar in practice, would be to give the non-celebrity spouse a fixed share (say, half) of the celebrity spouse's future income from exploiting her publicity rights, without mandating that she exploit them. *Cf. Rodrigue v. Rodrigue*, 218 F.3d 432 (5th Cir. 2000) (creating such a scheme in a divorce case involving a copy-right). One problem with such an approach in the divorce context is that while it would generally be in the celebrity spouse's economic interest to exploit her rights, she may choose not to do so, not because of dignity concerns, but out of spite towards her former spouse.

<sup>196</sup> The issue is very real and may be as or even more pressing than the divorce issue; a "casual search" by Jacoby and Zimmerman turned up "dozens" of celebrity bankruptcies in the recent past. Jacoby & Zimmerman, *supra* note 86, at 1325-26.

<sup>197</sup> See 11 U.S.C. § 522 (2000), authorizing debtors to invoke state exemption statutes and § 522(b), permitting states to opt out of the federal exemptions. Thirty-four states have done so. See 4 COLLIER, BANKRUPTCY § 522.01 (15th rev. ed.). At least one state prohibits security interests in, or levy or attachment of, publicity rights. See 765 ILL. COMP. STAT. ANN. 1075/15.

<sup>198</sup> See 11 U.S.C. § 541(a) (2000).

<sup>199</sup> See generally *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992).

<sup>200</sup> See *supra* note 197.

<sup>201</sup> See Jacoby & Zimmerman, *supra* note 86, at 1357-58 (finding [t]his is where debtor-creditor law differs most starkly from the taxation and divorce cases . . . . For the most part, those cases were about sharing value, rather than sharing control over or, worse yet, divesting control of, the publicity right. . . . In the debtor-creditor context, by contrast, forced sale of the asset gives to the highest bidder complete control over the exploitation of the right of publicity, including the right to sue for infringement).

The reality, however, is that rights of publicity are not being treated as “property of the estate” in bankruptcy,<sup>202</sup> even though the fact that unsecured creditors rarely receive anything on account of their claims<sup>203</sup> may provide an incentive in some celebrity bankruptcies to seek such treatment. Accepting the idea that publicity rights probably should be considered part of a bankrupt estate under current law, the question then becomes what the state of the law ought to be. States could avoid a classification of publicity rights as property under a bankrupt estate by passing exemption statutes or the federal law could be altered.

The possibility of a sale of publicity rights within a bankrupt estate raises the basic question of what rights the bidder would acquire. In a voluntary assignment of the right of publicity, it is not unusual for the assignor to perform a variety of services for the assignee to assist in the exploitation of the right.<sup>204</sup> However, it is difficult to find a legal basis for the purchaser at a sale by a bankruptcy trustee to require the celebrity to perform any services whatsoever.

Professors Jacoby and Zimmerman assume that involuntarily transferring control to a third party could result in forced labor by

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Chapters 11 and 13 work differently: rather than having a debtor’s assets liquidated as under Chapter 7, Chapters 11 and 13 allow the debtor to keep her assets but generally require to pay creditors at least as much in future income as would have been netted through Chapter 7 liquidation. Thus, under Chapters 11 and 13, the debtor is able to maintain control over her publicity rights, but there are several drawbacks. First, the option is risky. Second, the pressures outlined above in Part II.A. for the third option in divorce cases (celebrity keeps control over publicity rights but gives up equivalent amounts of other assets to the non-celebrity spouse) also apply here. *See supra* text accompanying notes 163-65. The debtor, unless she can find significant alternative productive assets, will effectively be forced to exploit her publicity rights to a high degree even if she would rather not engage in this much exploitation, in order to make the payments to her creditors. In fact, the pressures experienced in this context, where a celebrity must make payments to her creditors and is, by definition, having serious financial problems, seem substantially more severe than the pressures of the divorce context, where a celebrity is simply trying to maintain a certain standard of living and is often quite wealthy anyway. *See supra* note 163.

<sup>202</sup> Professor Jacoby reports that she and Professor Zimmerman found no evidence of such treatment, although there have been anecdotal reports of creditors’ lawyers in celebrity cases considering making the argument that the right should be so treated. *See* E-mail from Professor Jacoby (Aug. 19, 2003) (on file with authors).

<sup>203</sup> *See* LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 139 (3d ed. 2000) (referring to a study by the General Accounting Office of distributions to creditors in the 1.2 million Chapter 7 bankruptcy cases closed in the statistical years 1991 and 1992 and finding that money reached the hands of unsecured creditors in only about three percent of the cases).

<sup>204</sup> *See* form for personality and endorsement agreement in 3 ALEXANDER LINDEY, LINDEY ON ENTERTAINMENT, PUBLISHING, AND THE ARTS: AGREEMENTS AND THE LAW § 14:9 (2d ed. 1980) (form for personality and endorsement describing services to be performed by the celebrity as including radio and television programs and commercials, good will tours, and personal appearances).

forcing the celebrity to perform in advertisements.<sup>205</sup> A more serious concern is that such a transfer would give a stranger the right to determine how to exploit someone else's identity commercially, with negative personal/dignity<sup>206</sup> and career<sup>207</sup> implications for the

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<sup>205</sup> Jacoby and Zimmerman would get around this problem by defining publicity rights so as only to include "passive" uses of a celebrity's identity (like using preexisting pictures on posters, etc), rather than "active" uses (like making a celebrity show up and shoot a commercial). Jacoby & Zimmerman, *supra* note 86, at 1351. As already noted, we do not find their definition convincing. See *supra* note 160. They propose that even if their definition of publicity rights is not a sound one, one should simply divide publicity rights into "active" and "passive" components and allow creditors to sell only the latter right. Jacoby & Zimmerman, *supra* note 86, at 1351 n.163. This might be easier said than done. How does one define "active" and draw the line between "active" and "passive" uses? Does "active" include even minor acts of cooperation, like posing for a few seconds for a photograph? If so, then the "passive" right of publicity that passes to creditors is, for living celebrities, worth substantially less than the full right of publicity. See *supra* note 160. Further, it is odd for Jacoby and Zimmerman to argue that publicity is property in the bankruptcy context because it is property in other contexts, and then to redefine the term 'publicity right' to make it different from what it was in those other contexts.

<sup>206</sup> Jacoby and Zimmerman note the problem of giving someone else control over a celebrity's identity, but then downplay the problem by noting that celebrities are only able to exercise control over their own identities in a fairly small sphere anyway.

In most important regards, celebrities do not control the ways in which their image is presented to the public, and attempts to exercise such control would violate the First Amendment rights of others. Newsworthy uses of celebrity personas, even highly unflattering ones, are virtually never subject to a celebrity's property right. Furthermore, the very concept of alienability means that the law contemplates the real possibility that celebrities will assign all or part of the right to use their personas to others – at which point they necessarily give up, albeit voluntarily, any legal right to object to how the assignee uses their identities in the future.

Jacoby & Zimmerman, *supra* note 86, at 1362. Their point about newsworthy uses is sound, although it does not necessarily follow that celebrities should lose even more control over their identity—because news (even sleazy news) is usually protected by the First Amendment, advertising is one of the only realms where celebrities can offer their voice and voluntarily express themselves and their image to the public. The analogy to alienability is problematic precisely because of the point Jacoby and Zimmerman identify—alienation is fully voluntary, while bankruptcy seems to involve much more compulsion. It is precisely the involuntary loss of control that is a threat to celebrities' autonomy and dignity. If (like us) one is still uncomfortable with the idea of giving control of identity to a third party, Jacoby and Zimmerman suggest several possible compromises. First, they suggest that the bankruptcy court could sell only publicity rights that had already been exploited, thus preserving privacy and dignity for those celebrities morally opposed to any endorsements. *Id.* at 1365. One problem with this is, as Jacoby and Zimmerman note, that even celebrities who have already exploited some of their publicity rights may have legitimate moral objections to certain other uses of their rights. *Id.* Further, this risks unfairness to creditors; who may be kept away from unexploited publicity rights only to see the celebrity making bundles of money from them months later. *Id.* A third problem, not really noted by Jacoby and Zimmerman but discussed above, is that the economic and dignity interests of a celebrity are really inseparable—losing control over the use of one's identity at all in the commercial context is an indignity, a loss of personal freedom and autonomy, as well as an economic issue. See *supra* note 168 and accompanying text. Further, as already noted, some people choose not to exploit their fame at all for economic and not personal reasons; these people cannot be any more deserving of protection than celebrities who have already exploited their rights. See *supra* note 164 and text accompanying note 169. Jacoby and Zimmerman also note as a possibility that debtors could enter Chapter 11 or 13 instead of Chapter 7 bankruptcy. Jacoby & Zimmerman, *supra* note 86, at 1367. This does keep control of the right in the hands of the celebrity, but its attendant pressure on the

celebrity. This will likely stop the celebrity from signing any endorsement deals in her own right because they would be infringements of her own publicity rights,<sup>208</sup> and conceivably could expose the celebrity to liability for various highly personal actions by the celebrity (like poor on-screen performance or a divorce) that sharply reduce the value of her publicity rights.<sup>209</sup> While bankruptcy filings are neither fully voluntary nor fully coercive (excepting involuntary bankruptcy or involuntary state law debt collection),<sup>210</sup> there is clearly a large dose of coercion involved in

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celebrity has high costs. *See supra* note 173. As a final option, the authors state that courts could do something similar to what maintenance does in the divorce context: the celebrity debtor would keep full control over his publicity rights and could choose whether and when to exploit them, but the creditors would receive 100 percent of the money made by the celebrity from his endorsements. Jacoby & Zimmerman, *supra* note 86, at 1366. The problem with this approach, as Jacoby and Zimmerman point out, is that it leaves the celebrity with very little or no incentive to exploit his publicity rights (in this respect, the bankruptcy context is very different from marriage, where the parties split any income). *Id.* at 1366-67. Perhaps one solution to this problem would be to use this system but to give celebrity debtors a thirty, forty or fifty percent stake in any endorsement earnings—both parties would probably make out better this way than under the 100 percent approach, although the celebrity's incentives to exploit his publicity rights are obviously still dulled somewhat.

<sup>207</sup> Jacoby and Zimmerman note that negative career implications due to third party control are possible, but argue that these are not likely to occur because the celebrity and third party owner of the publicity rights will tend to cooperate: "both stand to benefit in many instances by cooperating with one another." Jacoby & Zimmerman, *supra* note 86, at 1357. This probably has some truth to it, but, even putting aside non-economic considerations, it ignores the very real conflict of interest between the celebrity and the third party owner. The former (now that he no longer owns his publicity rights) is seeking to maximize future earnings from his primary income-generating activity (performances), while the latter seeks to maximize future earnings from the celebrity's publicity (advertising and merchandising). Often, increased endorsement money may translate into increased performance money (as an actor becomes better known, for example, she may get more lucrative roles), and vice versa. These circumstances tend to encourage cooperation. However, oftentimes increased endorsements may decrease performance revenue (for example, an actor may no longer be able to get roles because he is overexposed and the public is sick of him, or his endorsements are seen as tacky or annoying). Similarly, a celebrity may do things that are good for his performance career but bad for his endorsement career (for example, an athlete may no longer make public appearances and refuse to do interviews because he wants his efforts to be more focused on his sport). Thus, there is no automatic tendency towards cooperation in many instances. Also, spite may develop between a celebrity and a third party who bought that celebrity's commercial identity at auction.

<sup>208</sup> Jacoby and Zimmerman approve this result, stating that celebrities should not be able to put themselves into competition with the purchasers of their own publicity rights. *Id.* at 1355-56. They do acknowledge that in some circumstances, it may be difficult to draw the line between publicity rights (which belong exclusively to the third party buyer) and performance rights in a celebrity's primary activity (which they do not see as part of publicity rights, *id.* at 1351 n.163, and thus which remain with the celebrity). *Id.* at 1356. For example, if Cindy Crawford was modeling clothes, it might be difficult to tell whether she was engaging in her primary profession (modeling) or endorsing the clothes she was wearing. *Id.* But they generally believe that courts can sort these issues out. *Id.*

<sup>209</sup> Jacoby and Zimmerman do not deal with this issue.

<sup>210</sup> *See* Jacoby & Zimmerman, *supra* note 86, at 1354 (noting that these two practices must be considered involuntary unless the voluntary act is the nonpayment of debt itself).

the decision to file for bankruptcy, and thus all of the policy concerns listed above have some bite to them.

Despite these problems, Jacoby and Zimmerman's law review article, the only commentary ever to address this issue, has strongly argued that publicity rights should be considered property for purposes of bankruptcy.<sup>211</sup> Courts have never considered the issue, although one state statute has clearly come out against this position.<sup>212</sup> Jacoby and Zimmerman reason by using the now familiar property syllogism along with some policy considerations. First, they note that:

Over the last fifty years, state law increasingly has come to treat the ability to profit from the commercialization of one's persona less as a privacy interest and more as a kind of property interest, fully alienable, and, in many jurisdictions, descendible as well . . . [O]nce the individual persona is transformed from something purely personal into a fully alienable commodity, these publicity rights should be just as susceptible to forced sale in the debtor-creditor system as cars, boats, or businesses.<sup>213</sup>

This use of the property syllogism is then bolstered by various policy considerations: avoiding the popular outcry that followed many celebrities' abuse of the bankruptcy system to salvage luxurious assets, like huge houses through generous homestead exemptions,<sup>214</sup> supporting "the overall philosophy of our current debtor-creditor system," which "puts the interests of the creditor in forcing the sale of the debtor's assets—publicity rights or otherwise—

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<sup>211</sup> See *id.*

<sup>212</sup> See 765 ILL. COMP. STAT. 1075/15 (West 2002):

[T]he rights under this Act are not subject to levy or attachment and may not be the subject of a security interest. Nothing in this Section limits the ability of any party to levy, attach, or obtain a security interest in the proceeds of the rights under this Act or the proceeds of the exercise of those rights.

It is probably correct to treat security interests the same way as involuntary attachments. Even though the decision to write a contract pledging one's publicity rights as collateral is voluntary, the inability to repay the loan is generally not, so collections of security interests should be treated like bankruptcy filing, not like fully voluntary contractual assignments or licenses.

<sup>213</sup> See Jacoby & Zimmerman, *supra* note 86, at 1324, 1326 (footnote omitted). Further, Jacoby & Zimmerman argue that since "property" in the phrase "all legal or equitable interests of the debtor in property," 11 U.S.C. § 541(a) (2000), the language that determines what can be sold for the creditors and what cannot be in Chapter 7, is not defined, "[i]f something is a property right under state law, it is also likely to qualify as property of the [bankrupt] estate." *Id.* at 1344. Note that this is quite a different approach to defining property for the bankruptcy code than *Miller v. Commissioner* used to interpret the term "property" in the tax code. Jacoby & Zimmerman essentially write that what is property for other purposes is property for bankruptcy purposes as well, while the *Miller* court stressed that the tax context was special and had unique policy considerations. See *Miller v. Comm'r*, 299 F.2d 706, 710-11 (2d. Cir 1962); see also *supra* text accompanying notes 29-37.

<sup>214</sup> Jacoby & Zimmerman, *supra* note 86, at 1363-64.

ahead of the preferences of the delinquent debtor,"<sup>215</sup> and getting the celebrity debtor to surrender her publicity rights as a "quid pro quo" for the debt relief that one gets in Chapter 7 bankruptcy.<sup>216</sup> Finally, Jacoby and Zimmerman deal with a variety of policy-based counter arguments.<sup>217</sup> They are overly driven by the property syllogism; what is needed is a clear weighing of all of the involved policy interests against each other.

When this weighing is done, it seems relatively clear that publicity rights should not be treated as property for purposes of bankruptcy. A better solution might be to let the celebrity debtor maintain control over her publicity rights, but give the creditors a fifty percent share of the proceeds from any exploitation that the debtor chose to pursue.<sup>218</sup> Such a nuanced treatment would require either federal or state legislation. In its absence, celebrities who seek bankruptcy protection may be well advised to list their right of publicity as an asset, as any failure to list valuable assets subjects the debtor to charges of bankruptcy fraud, revocation of the discharge, and if it is serious enough, to criminal prosecution.<sup>219</sup>

#### CONCLUSION: A NORMATIVE EVALUATION OF THE RIGHT OF PUBLICITY

Having discussed the history and current contours of publicity rights, we are now in a position to evaluate their propriety from a normative standpoint. Our basic point is that it is difficult to either support or criticize the existence of publicity rights all that strongly. Contrary to the biting tone of much of the commentary, strong interests are not really implicated either way. Instead, a

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<sup>215</sup> *Id.* at 1364.

<sup>216</sup> *Id.*

<sup>217</sup> Most of these counterarguments are explored, *supra*, notes 164-167, 169-170. Jacoby and Zimmerman also note some other counterarguments that are less relevant here. For example, they reject the idea that involuntarily selling a celebrity's publicity rights constitutes forced association. See Jacoby & Zimmerman, *supra* note 86, at 1363:

In the first place, the scope of associational rights under the Constitution is not very well defined, and the likelihood that the First Amendment protects what arguably are mostly economic activities and interests is particularly uncertain. Second, much of what motivates the desire not to associate with commercial enterprises appears to reflect personal taste rather than issues of constitutional stature, such as deep-seated belief systems, political affiliations, or concern with social causes.

(footnotes omitted).

<sup>218</sup> For an explanation of why this policy would solve many of the policy problems listed above, see *supra* note 176.

<sup>219</sup> Concealment of assets can constitute bankruptcy fraud, see 18 U.S.C. § 157 (2000) and constitutes a class D felony. See *id.* at § 152. Concealment can constitute grounds for denying or provoking the debtor's discharge. See 11 U.S.C. § 727 (2000).

more powerful approach to both supporting and criticizing publicity rights focuses on the policy effects of a given expansion or reduction in the contours of the right. In this kind of focused, nuanced debate (as opposed to the kind of general debate that has dominated the most important publicity rights literature thus far), our uncovering of the property syllogism has much to say.

While there has been a raging debate between supporters and critics of publicity rights about whether the rights should exist at all, the stakes involved in the general debate ultimately seem low. The primary argument enlisted in favor of publicity rights is some claim of unjust enrichment linked to the labor theory of value:<sup>220</sup> celebrities work hard to create their famous identities, and thus they should have the right to exploit their publicity rights without having them stolen by others. A group of postmodern-influenced scholars, led by Michael Madow, has at least greatly diminished the intuitive force of this argument. These scholars point out that celebrities do not make their image in the same way as a carpenter makes a chair:<sup>221</sup> fame is largely conferred by the media and the public (often being recoded and being given new meaning by certain public groups),<sup>222</sup> and is largely controlled not by the celebrity herself but by an army of consultants, agents, publicists, etc.<sup>223</sup> In-

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<sup>220</sup> For an early proponent of the labor theory and unjust enrichment as the underpinning of publicity rights, see Nimmer, *supra* note 15, at 216 (stating:

[i]t would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing policy considerations. Yet, because of the inadequacy of traditional legal theories . . . persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to . . . the right of publicity . . .).

See also *Uhlaender v. Henrickson*, 316 F. Supp. 1277, 1282 (D. Minn. 1970) (stating:

[i]t is this court's view that a celebrity has a legitimate proprietary interest in his public personality. A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property).

Unjust enrichment is often presented as a separate argument from the labor theory argument. See, e.g., Madow, *supra* note 4, at 182, 196. But this makes little sense, because without some other normative content, the unjust enrichment idea is essentially vacuous—in order for the enrichment to be “unjust,” the celebrity must have some moral claim to it.

<sup>221</sup> Madow, *supra* note 4, at 183 (citing Eileen R. Reilly, Note, *The Right of Publicity for Political Figures: Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products*, 46 U. PITT. L. REV. 1161, 1168 n.37 (1985)).

<sup>222</sup> The well-known example given by Madow is how Judy Garland was remade by urban gay men in the 1940's and 1950's into a symbol of themselves. See *id.* at 194-95 (citing RICHARD DYER, *HEAVENLY BODIES: FILM STARS AND SOCIETY* (1986)); see also Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Law and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863-64 (1991).

<sup>223</sup> Madow, *supra* note 4, at 184-96; Rochelle Cooper Dreyfuss, *We are Symbols and Inhabit*



deed, the critical importance of the media and the public in creating value for a celebrity's right of publicity can be taken to support the view that most of that value may be socially created, not unlike the value of a choice piece of real estate in an urban area. Further, current celebrities often borrow their images from past celebrities.<sup>224</sup> Finally, the law does not always protect labor as a natural right;<sup>225</sup> commercial borrowing from others is not, as a general rule, protected in the absence of some special reason for doing so.<sup>226</sup>

A second basis for supporting publicity rights, which has also been thoroughly discredited, is to provide economic incentives. For example, one could argue publicity rights are necessary to induce people to seek fame or to enhance fame they already have achieved.<sup>227</sup> The critics have two convincing counterpoints. First, such an incentive may not be a good thing as it may lead to overinvestment in fame. More specifically, it may also encourage certain social groups (like young black men) to spend much of their energy trying to surmount the considerable odds against newcomers becoming celebrities, thus producing negative distributional consequences.<sup>228</sup> Second, even if this incentive effect is desirable, its magnitude is likely to be minor because celebrities are usually already wealthy from their primary performance activities and have the ability to make substantial sums of money from advertising even without publicity rights.<sup>229</sup> We note that England does not

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*Symbols, So Should We Be Paying Rent?, Deconstructing the Lanham Act and Rights of Publicity*, 123 COLUM-VLA J.L. & ARTS 123, 141-144 (1996).

<sup>224</sup> Madow, *supra* note 4, at 196-98; David Lange, *Recognizing the Public Domain*, LAW & CONTEMP. PROBS. 147, 161-63 (Autumn 1981).

<sup>225</sup> See Madow, *supra* note 4, at 183-84. One notes, for example, that, in copyright, facts themselves are not generally protected, even though the discovery of these facts may involve some "sweat of the brow" by the discoverer. See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

<sup>226</sup> See Madow, *supra* note 4, at 200-03.

<sup>227</sup> The most famous case to make this argument is *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576-77 (1977). One should note that the argument made sense on the facts of *Zacchini*, which was a performance rights case—copying the performance on which a performer's livelihood is based very likely will act as a substantial disincentive. But the argument has also carried over to traditional publicity rights cases. See, e.g., *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983); *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods.*, 296 S.E.2d 697, 705 (Ga. 1982); see also Felcher, *supra* note 58, at 1128 ("The social policy underlying the right of publicity is encouragement of individual enterprise and creativity by allowing people to profit from their own efforts.").

<sup>228</sup> Madow, *supra* note 4, at 208-219.

<sup>229</sup> *Id.* at 208-11. Notably, even many economists do not seem to buy this incentive argument. See, e.g., Vincent M. de Grandpre, *Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73, 101-03 (2002) (arguing that the incentives argument is unsound and adopting instead an allocative efficiency argument as the economic basis for publicity rights). Richard A. Posner, *The*

protect publicity rights and yet it appears to have no shortage of celebrities.<sup>230</sup>

A third argument is also economic but focuses on allocative efficiency rather than dynamic efficiency (incentives). The argument is that lack of protection will lead to overexploitation of a given celebrity's identity, utilizing the identity until it becomes worthless—a version of the tragedy of the commons. In contrast, publicity rights, by forcing advertisers to pay fair market value for a celebrity's image, will avoid this problem and will also ensure that celebrity identity goes only to those advertisers who value it most highly and are thus willing to pay the highest price.<sup>231</sup> As Madow points out, one problem with this argument is that it appears, at the least, to be difficult to overexploit celebrity identity and therefore decrease the value of that identity: often times extra exposure simply increases the value of a persona.<sup>232</sup> Also, publicity is in some ways not like other goods because the level of substitutability is so high. If advertisers run one celebrity's image into the ground, they can either turn to another celebrity or turn to another advertising technique to sell their product.<sup>233</sup> Finally, the argument has not been popular with courts, perhaps because it does not capture what many people believe to be intuitively wrong with the unconsented commercial use of another's identity.<sup>234</sup>

With the labor theory and economic arguments thoroughly rebutted, the only theory in support of publicity rights left standing is Dean Haemmerli's theory linking publicity rights to Kantian ideas about human freedom, autonomy, and control.<sup>235</sup> Haemmerli's argument is really an application of Radin's important contribution that some types of property are more essential to personhood than

*Right of Privacy*, 12 GA. L. REV. 393, 411 (1978) (arguing that the appropriation tort is economically justified by an allocative efficiency argument and not even mentioning the incentive argument).

<sup>230</sup> See, e.g., Kevin M. Fisher, Comment, *Which Path to Follow: A Comparative Perspective on the Right of Publicity*, 16 CONN. J. INT'L L. 95, 107-12 (noting that England has rejected publicity rights). As well, publicity rights did not exist before this century and yet there were plenty of celebrities before then. See, e.g., de Grandpre, *supra* note 229, at 103 ("[F]ame pre-existed the right of publicity and no one apparently needed the law's protection to become famous before this century.").

<sup>231</sup> See de Grandpre, *supra* note 229, at 103-08; Posner, *supra* note 229, at 411.

<sup>232</sup> Madow, *supra* note 4, at 221-22. Madow also notes that the argument really fails if there are high transaction costs involved. See *id.* at 223-24.

<sup>233</sup> *Id.* at 224-25.

<sup>234</sup> *Id.* at 225 (stating:

no court, to my knowledge, has ever put this argument forward in support of the right of publicity . . . I suspect the failure of Posner's argument to attract any judicial support . . . has something to do with the fact that [it] captures next to nothing of what most people . . . believe to be wrong with the unauthorized commercial appropriation of famous personalities).

<sup>235</sup> Haemmerli, *supra* note 173; see also *supra* notes 154, 168.

other types, and this more personal property should be (and sometimes is) given the most protection in our legal system.<sup>236</sup> This argument has some intuitive plausibility to it, and stands up very well against the objections of the postmodernist critics, though no courts have adopted this approach.<sup>237</sup>

If the critics of publicity rights are good at tearing down positive arguments for a right of publicity, they are not nearly as good at building their own positive case against those rights. The primary complaint of these critics is that the right of publicity infringes on the public domain and free speech rights by limiting the public's ability to use these rights in discourse: "publicity rights facilitate private censorship of popular culture."<sup>238</sup> They especially harm marginalized groups, who often recode celebrities to use them as symbols of their oppressed identities.<sup>239</sup> The problem with this argument is that the right to publicity only covers commercial uses like advertising and merchandising, and thus it is hard to imagine how its damage to popular culture would be all that great. Further, Madow argues that publicity rights are objectionable because they "redistribute wealth *upwards*."<sup>240</sup> This is certainly true, but most other forms of property within our system have the same effect, making it unclear why publicity rights should be singled out.<sup>241</sup>

As we have seen, neither those favoring publicity rights nor those opposed to publicity rights have managed to articulate particularly strong policy rationales supporting their positions. This gives the whole debate an odd character. McCarthy, probably the staunchest defender of publicity rights (and author of the only treatise on the topic) has asked "why not" have publicity rights; they seem to make sense and the critics have not made any con-

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<sup>236</sup> Radin, *supra* note 173.

<sup>237</sup> See Haemmerli, *supra* note 173, at 430-41.

<sup>238</sup> See, e.g., Madow, *supra* note 4, at 138.

<sup>239</sup> The most common example that is used is urban gay men's recoding of "Judy Garland" to make her a symbol of gay identity in the 1940s and 1950s. See *supra* note 187.

<sup>240</sup> Madow, *supra* note 4, at 137 (emphasis added).

<sup>241</sup> Some final concerns, which, in our view, support limiting the right in this manner, are the social costs in litigation expenses and attorneys' fees for legal advice that recognition of any new form of property inevitably entails. Furthermore, such expenses may be only the tip of the iceberg, if the dimensions of the new form are sufficiently uncertain to deter commercial activity that might otherwise take place because of concerns about possible liability. For a discussion of the high cost of legal services, see generally Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000). The writer cites the estimate of an experienced litigator of "a minimum of \$100,000 to litigate a straightforward business claim." *Id.* at 957. An illustration that is particularly relevant to the right of publicity is a successful suit by a Canadian judge against a satirical magazine for \$75,000 damages; his fees were \$20,000, and the magazine's were \$40,000. See *id.* at 954.

vincing arguments against them.<sup>242</sup> Madow responds to this challenge by asking instead, why?

Property rights in our culture's basic linguistic, symbolic, and discursive raw materials should not be created unless a clear and convincing showing is made that very substantial social interests will thereby be served . . . [N]o such showing has yet been made with respect to star images. The proponents of publicity rights still have work to do to persuade us why these images should not be treated as part of our cultural commons, freely available for use in the creation of new cultural meanings and social identities, as well as new economic values.<sup>243</sup>

The reason these two commentators put so much emphasis on what is essentially a burden-shifting exercise is that the commentator who successfully shifts the burden to the other party effectively wins the argument, since neither side can marshal convincing arguments in favor of their own position.

Thus, the right of publicity is both hard to object to and hard to support. It is then pointless to debate in general terms whether the right ought to exist at all. A much more fruitful argument would analyze the precise contours and characteristics of the right, to see whether it ought to be expanded or cut back along each given dimension. There is a very strong argument, first made by Judge Frank in *Haelan* fifty years ago, in favor of allowing publicity rights to be assignable: celebrities and advertisers have started behaving this way by creating exclusive contracts and the like, and the law should generally adapt, in a commercial context, to common business practices, which are presumptively efficient for the parties involved.<sup>244</sup> However, this argument provides support for treating publicity rights as property only in specific commercial contexts, such as assignments and licenses during the life of the celebrity and perhaps for some very limited period after her death. In contrast, certain property-like attributes that the right has already accrued arguably do not make sense, like inheritability and exposure to the estate tax,<sup>245</sup> and it is in danger of accruing yet more attributes, including treatment as marital property upon divorce<sup>246</sup> and treatment as property within a bankrupt's estate.<sup>247</sup>

Judge Frank stood on particularly solid ground when he cre-

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<sup>242</sup> 1 MCCARTHY, *supra* note 1, § 2.3.

<sup>243</sup> Madow, *supra* note 4, at 239.

<sup>244</sup> See text accompanying notes 21-28.

<sup>245</sup> See *supra* Part I.D.

<sup>246</sup> See *supra* Part II.A.

<sup>247</sup> See *supra* Part II.B.

ated a new right out of preexisting business practices. This may be one situation where it is desirable to create new forms of property. However, judges and commentators alike should not fall victim to the property syllogism. They should not assume that just because something has been labeled property for one purpose, particularly where it is intellectual property, all of the attributes typically associated with property should automatically apply. Rather, particularly where one is dealing with such a peculiarly personal property right as the right of publicity, the proper approach is the one taken in this essay: to weigh competing policy concerns against one another every time a new context arises in which the label of property has consequences. Legislatures, bureaucrats, and judges faced with a *Haelan*-like situation in the future—poised to give something an aspect of property-like treatment for some narrow functionalist purpose—would do well to heed the warning implicit in the story of the publicity right's expansion. The formalist constructs of legal reasoning may eventually create out of their actions a Frankenstein bearing little resemblance to the founder's carefully considered functionalist purposes.

