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Problems With the Modern Right of Publicity

Michael John Herb

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I. INTRODUCTION

The right of publicity doctrine was founded on the idea of protecting celebrities' likenesses from being appropriated by another party without compensating the celebrity that had invested time and money into developing their likeness. In *Fraley v. Facebook*[1], however, the court took a different approach, and extended the right of publicity to any individual, regardless of whether they are famous. The court expanded the right of publicity doctrine and set precedent that non-famous individuals can assert a claim based upon a right of publicity as long as it has commercial value. This case marks a departure from right of publicity jurisprudence, which until *Fraley* relied on the notion that the right of publicity was designed to protect individuals whom had made a substantial investment into their likeness. Although many commentators argue that this expansion of publicity rights benefits those whose likeness is appropriated – it also grants a right to an individual who had no expectation to earn a profit. Using free-rider theory, however, courts going forward can work through right of publicity cases and correctly protect the rights of those individuals who deserve protection, without wrongfully conferring rights to individuals.

This article explores the right of publicity doctrine and its current state today, and how the doctrine could benefit from the application of free-rider theory. Part II examines the history of the right of publicity doctrine and the theories that have shaped the doctrine over time. The doctrine grants intellectual property rights to individuals in order to protect against others appropriating their likeness without compensating for the right. The doctrine also stemmed from the right of privacy as a way to protect celebrities who have invested time and money into their

[1] 830 F.Supp.2d 785 (N.D.Cal. 2011).

likeness and expect to earn a profit due to that investment. To reach this conclusion, courts relied on the theory of unjust enrichment. The idea behind this application was to protect against appropriators of a celebrity's likeness being enriched without any investment on their own part. This would hurt the celebrity's incentive to invest into their own image. Modern courts, however, disagree over the correct breadth of the right of publicity doctrine. This article explores the how the doctrine is treated in different jurisdictions and the conflicting applications. The conflict among these jurisdictions shows the uncertainty of this right, and many current courts only "know it when they see it."

While the right of publicity doctrine originated to protect celebrities, in *Fraley*[2] the court expanded the doctrine to include non-famous individuals. Part III explores the court's decision in *Fraley* and the steps that it took to reach its conclusion. In *Fraley*, the court looked at whether Facebook, a social networking website misappropriated the likenesses of its users when it used their names and photos without permission in advertisements by third parties.[3] The court first determined that sufficient injury existed to withstand a standing analysis, due to the commercial value of the plaintiffs' likeness.[4] The court held that this commercial value equaled the value added to the advertisements by the inclusion of the plaintiffs' likeness – this value essentially being equivalent to the value of a friend's recommendation.[5] Further, the court disregarded the fact that the plaintiffs were not celebrities, and held that they could afford themselves to the right of publicity as long as their likeness had commercial value.[6] To reach this result, the court had to distinguish a previous case within the same district that was very similar in the facts and cause of

[2] *Id.*
[3] *Id.* at 795-96.
[4] *Id.* at 796.
[5] *Id.*
[6] *Id.* at 809-10.

action.[7] The court accomplished this by holding that the plaintiffs in *Fraley* had commercial value in their likeness, whereas, the plaintiffs in the earlier case did not.[8] Therefore, this case allows for the right of publicity to any individual whose likeness has commercial value.

One theory noticeably absent from the court's reasoning in *Fraley* is the free-rider theory. Part IV explores the free-rider theory and its application to the right of publicity doctrine. Free-rider theory suggests that courts should seek to balance the incentive of encouraging investment into intellectual property with public policy concerns. The theory seeks to prevent those who have not made substantial investments of their own to "free-ride" off another's hard work and investment. This section explores how free-rider theory has been used in intellectual property law in the past, including in the three major intellectual property disciplines: patent, copyright and trademark law. Free-rider theory is not entirely new to the right of publicity doctrine, with a parallel theory, unjust enrichment, being applied in the past. Part IV argues that the right of publicity doctrine would benefit from the application of the free-rider theory and how the *Fraley* decision would have come out differently with the theory applied. Another important aspect of free-rider theory is the additional substantial investment approach, where it is not considered free-riding if the appropriator makes substantial investments on their own. Part IV concludes with how the additional substantial investment idea should have been applied to *Fraley*, where Facebook made investments on their own in order to obtain the plaintiffs' likenesses.

The application of free-rider theory to the right of publicity doctrine, however, is not without problems. Part V explores the problems with the free-rider theory and how the advent of social media creates issues that did not exist when the right of publicity was first created. First, the commercial value doctrine protects against appropriators being unjustly enriched, for

[7] Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090 (N.D. Cal. 2011).
[8] *Fraley*, 830 F.Supp.2d at 809.

otherwise they can obtain the commercial value of the likeness for little or no investment. Second, the advent of social media creates issues with the traditional approach of affording the right of publicity to only celebrities, since social media creates commercial value where it did not exists before. Part V also explores how *Fraley* dealt with these issues and how the commercial value test has a history in California. Next, several jurisdictions have broad statutory rights of publicity that make it difficult for courts to deny property rights in one's image. Part V concludes with the idea that despite all these problems with the application of the free-rider theory, the theory is necessary because otherwise individuals who have invested little to no time or effort into their likeness will be given a property right with value far exceeding their expectations.

Part VI concludes by acknowledging the uncertainty in right of publicity law today, and arguing that free-rider theory can help settle the doctrine. While the commercial value test used by the court in *Fraley* offers protection from unjust enrichment, it also gives a right to a class of individuals who have expended no substantial time or effort in developing their image and have no expectation to earn a profit. Free-rider theory corrects the problem of giving rights to individuals who had no expectations of having the right, by holding that the right of publicity should only apply to those who make investments into their image and have an expectation to earn a profit from those investments. Using free-rider theory as an underlying test for the right of publicity would settle the disputes among the jurisdictions and create a right were one is deserved, and prohibit others from collecting on a right that was not expected.

II. THE RIGHT OF PUBLICITY DOCTRINE

The right of publicity doctrine has been adopted by many states to protect a party from exploiting the commercial value of an individual's likeness.[9] Nineteen states recognize a cause of action based upon this right by statute and eleven by common law.[10] This right originated from the common-law right of privacy. However, throughout the 1950s and 1960s, courts started to separate the two doctrines and created a common-law right of publicity. This separation was spurred by the notion of preventing unjust enrichment. In *White v. Samsung Electronics, Inc.*[11], California popularized the notion of the right of publicity, which has now been adopted into a broad statute in California. The right of publicity has come a long way since its introduction in the 1950s.

Although many jurisdictions vary in their treatment of this right, most find it premised upon an individual's right to privacy.[12] The right to privacy, however, sets out to protect an individual from humiliation and intrusion, not necessarily the economic value of one's likeness.[13] Further,

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[9] Brittany A. Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through A Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499, 501 (2010); *see also* PROSSER, LAW OF TORTS at 807 (4th ed. 1971):

> Although the element of protection of the plaintiff's personal feelings is obviously not to be ignored in such a case, the effect of the appropriation decisions is to recognize or create an exclusive right in the individual plaintiff to a species of trade name, his own, and a kind of trade mark in his likeness. It seems quite pointless to dispute over whether such a right is to be classified as 'property'; it is at least clearly proprietary in its nature. Once protected by the law, it is a right of value upon which the plaintiff can capitalize by selling licenses.'

[10] Brittany A. Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through A Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499, 501 (2010).

[11] White v. Samsung Electronics Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992).

[12] Mark Bartholomew, *A Right Is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 Conn. L. Rev. 301, 309 (2011).

[13] The right of privacy is inherently different than the right of publicity. *See generally* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (holding that the right of publicity is premised on protecting an individual's investment into their likeness and their expectation for profit). For the right of privacy, the injury is the intrusion into an individual's privacy, whereas for the right of publicity, the injury is the loss of the ability to earn a profit from an investment into one's likeness. The difference in the injury for each of these causes of action is why they are separate in almost every jurisdiction nowadays. The right of privacy is a tort action, however, the right of publicity is a quasi-intellectual property doctrine. Therefore, this paper will not address the right of privacy, except as one of the founding principles behind the right of publicity doctrine.

right of privacy causes of action were often not afforded to celebrities before the right or publicity existed since it was believed that all celebrities did not intend their lives to be private.[14]

In 1953 the modern right of publicity doctrine was born for celebrities in *Haelan Laboratories v. Topps Chewing Gum.*[15] In *Haelan,* the court held that a celebrity baseball player had the exclusive right to sell his photograph to a baseball-card company and exclude another baseball-card from using that photograph.[16] The court named the doctrine the "right of publicity" and justified the doctrine because "it is common knowledge that many prominent persons… would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways."[17] Although this case greatly expanded an individual right to protect an investment into their likeness, courts still struggle with how expansive this right should be.[18]

One theory behind the creation of the right of publicity that courts often turn to in their analysis is unjust enrichment.[19] In *Crump v. Beckley Newspapers, Inc.*, the Supreme Court of West Virginia held that the right of publicity "remedies the unjust enrichment caused by an unauthorized exploitation of the good will and reputation that a public figure develops in his name or likeness through the investment of time, money and effort."[20] Further, in *State ex rel. Elvis Presley Int'l Mem'l,* the court reasoned that the creation of the right of publicity was necessary to protect famous individuals' expectation that investing in their image will create a

[14] *See e.g.* O'Brien v. Pabst Sales Co., 124 F.2d 167, 169 (5th Cir. 1941) (holding that a famous football player could not succeed on a violation of his right to privacy action against a beer company that published a calendar with his likeness without permission because the plaintiff sought out to publicize his name and likeness on many occasions).
[15] *Haelan Labs*, 202 F.2d at 868.
[16] *Id.* at 868.
[17] *Id.*
[18] Compare Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011) (rejecting non-famous individuals assertion that Facebook misappropriated their likeness with the "Friend Finder" service for lack to sufficiently plead injury) with *Fraley*, 830 F. Supp. 2d at 808 (holding that Facebook's "Sponsored Stories" could sufficiently injure non-famous plaintiffs in their right of publicity action).
[19] Crump v. Beckley Newspapers, Inc., 173 W. Va. 699, 714 n. 6 (1983).
[20] *Id.*

valuable capital asset, and that individual should have a right to protect against others gaining that capital asset without any investment.[21] This theory is premised upon the fundamental principle of American jurisprudence that "one may not reap where another has sown nor gather where another has strewn."[22] Thus, the right originated from a need to protect one's investment in their own likeness, and the expectation that the investment will yield a profitable capital asset.

This principle is further demonstrated by the Ninth Circuit's analysis in *White v. Samsung Electronics America, Inc.*[23] In *White,* Samsung ran a series of television advertisements that contained a robot that resembled Vanna White of Wheel of Fortune on a set that resembled that of Wheel of Fortune.[24] The court held that this was a violation of White's right of publicity since White had a right to protect the commercial interest of her identity.[25] In order to reach this result, the court relied heavily on the theory of unjust enrichment.[26] The court held that "[c]onsiderable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof."[27] The individual's "sole right to exploit" the celebrity value protects against others from obtaining the value of the publicity of the individual and profiting from it unjustly.[28] Despite the theory of

[21] State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 98 (Tenn. Ct. App. 1987) (citing M.M. Newcomer Co. v. Newcomer's New Store, 142 Tenn. 108, 118 (1919)).
[22] *Id.*
[23] White v. Samsung Electronics Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992).
[24] *Id.* at 1396.
[25] *Id.* at 1398
[26] See *id.* (the court held that "[t]he 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").
[27] *Id.* at 1399.
[28] *See generally id.*

unjust enrichment offering some guidance for the application of the right of publicity doctrine, courts across the country struggle to find a uniform approach to applying this right.[29]

For example, although some courts hold that the right of publicity should only apply to celebrities, others take a more expansive approach and afford the right to all individuals.[30] California's statutory right of publicity, which is considered one of the most progressive in the nation, provides that:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent … shall be liable for any damages sustained by the person or persons injured as a result thereof.[31]

This statute grants a broad right of publicity and notably only limits the class of individuals who can claim misappropriation of their likeness to those that were actually injured. Further, in *Fraley*, the court acknowledged that California Civil Code § 3344 could be expanded to any individual that has a commercial value in their likeness, and therefore were injured by a misappropriation.[32] Although this statute, and other statutes in other progressive jurisdictions,

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[29] Brittany A. Adkins, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through A Uniform Right of Publicity Act*, 40 Cumb. L. Rev. 499, 501 (2010).
[30] Compare Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Products, Inc., 250 Ga. 135, 137, 296 S.E.2d 697, 700 (1982) (holding that in Georgia the right of publicity applies only to famous or public individuals) with Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 795 (N.D. Cal. 2011) (holding that non-famous individuals on a social networking site may have a legally cognizable right to their publicity).
[31] Cal. Civ. Code § 3344 (West 2013). Also note Restatement (Third) of Unfair Competition § 46 (1995), which provides "[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability."
[32] *Fraley*, 830 F. Supp. 2d at 806.

marks a departure from the original limited doctrine, many courts seem to be open to expanding the right of publicity doctrine in limited cases.[33]

The right of publicity doctrine has come a long way since its birth in 1953. The underlying theories behind the original doctrine, however, still guide the application today. The theory of unjust enrichment provides a backbone for determining when application is appropriate, especially in the celebrity context. Courts in some progressive jurisdictions, however, have expanded the doctrine to apply to non-famous individuals and famous individuals alike.

III. THE RIGHT OF PUBLICITY IN FRALEY V. FACEBOOK

In one of the most expansive right of publicity cases to date, the Northern District of California held that the right applies to famous and non-famous individual alike, as long as the individuals' likeness has commercial value.[34] First, *Fraley* addressed whether there even was an injury based upon a standing analysis. Next, *Fraley* applied the right of publicity doctrine, relying heavily on the commercial value notion. Third, the court in *Fraley* looked similar precedent. Lastly, *Fraley* distinguished that precedent by holding the cases different on the facts. In the end, the court in *Fraley* left the right of publicity doctrine broad and wide open for many new classes of plaintiffs.

In *Fraley*, plaintiffs sued Facebook, a popular social networking website that generates revenues through targeted advertising, for misappropriation of their right of publicity.[35] The

[33] *See generally id.*
[34] *Id.*
[35] *Id.* at 790 (plaintiffs also alleged violations of Unfair Competition law, Business and Professions code, and common law unjust enrichment. However, these causes of action are not relevant here).

advertisements in question are called "Sponsored Stories" and used Facebook's users' pictures and names in advertisements paid for by third-parties and directed at the users' friends.[36] Further, the advertisements contain an assertion that the user "likes" the page, and contain the advertiser's logo in addition to the user's picture and name.[37] Plaintiffs, who were individual users who had their photo and names appear in these advertisements, alleged that this was without their permission and therefore a violation of California's statutory and common law right of publicity.[38] Facebook, in its defense, asserted the newsworthiness exception, that the plaintiffs consented, and that the plaintiffs did not suffer sufficient injury.[39] The court, however, found Facebook's defenses inapplicable, and held that the plaintiffs had sufficiently alleged a plausible cause of action to survive a motion to dismiss.[40]

The first hurdle for the plaintiffs in *Fraley* that the court addressed was whether there was sufficient injury to maintain standing.[41] In order to achieve standing in Federal court, the plaintiff must have an injury that is "both 'concrete and particularize,' as well as 'actual or imminent, not conjectural or hypothetical.'"[42] Facebook argued that the plaintiffs could not establish any economic injury, that the injury was merely conjectural or hypothetical.[43] The court, however, held that "personalized endorsement of products, services, and brands to [the users'] friends and acquaintances has concrete, probative value in the economy at large, which can be measured by the additional profit Facebook earns from selling Sponsored Stories compared to its sale of regular advertisements."[44] This commercial value of the users' likeness

[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at 805-06
[40] *Id.* at 809-810.
[41] *Id.* at 796-97.
[42] *Id.* at 797.
[43] *Id.* at 797-98.
[44] *Id.* at 799.

was sufficient for the court to create a right of publicity, despite the users not being famous.[45] The court reasoned that "in essence, Plaintiffs are celebrities—to their friends."[46] To achieve this result, the court relied heavily on a statement by Facebook COO Sheryl Sanberg.[47] Sanberg stated that "marketers have always known that the best recommendation comes from a friend… This, in many ways, is the Holy Grail of advertising."[48] This relationship between the value of peer recommendations among users in a social network and its commercial value in advertising was held sufficient by the court to create a sufficient injury for its standing analysis.[49]

The court then moved on to determine if the plaintiffs' allegations stated a sufficient cause of action for misappropriation under California's right of publicity.[50] The court looked at Facebook's motion to dismiss based upon the newsworthiness exception, whether the plaintiffs consented, and whether there was sufficient injury alleged for the elements of the right of publicity.[51] With respect to the newsworthiness exception, the court quickly dismissed the argument because under California law, even if the use of the plaintiffs' likenesses were newsworthy, liability can still attach if the information was "published for commercial rather than journalistic purposes."[52] The court held that this was clearly a commercial use. With respect to the issue of consent, the court analyzed Facebook's Terms of Use contract signed by the plaintiffs.[53] The court held that nothing in the Terms of Use showed that the plaintiffs

[45] *Id.* at 799-800 (holding that "in the same way that celebrities suffer economic harm when their likeness is misappropriated for another's commercial gain without compensation, Plaintiffs allege that they have been injured by Facebook's failure to compensate them for the use of their personal endorsements").
[46] *Id.*
[47] *Id.* at 799.
[48] *Id.*
[49] *Id.* at 801.
[50] *Id.* at 803.
[51] *Id.* at 803-04.
[52] *Id.* at 805.
[53] *Id.*

manifested assent to have their images and names used in advertising.[54] Lastly, the court discussed whether there was sufficient injury to satisfy the injury prong of California's right of publicity cause of action.[55] The court first acknowledged that economic injury was sufficient.[56] Facebook, however, argued that since the plaintiffs were not celebrities they had to establish some preexisting commercial value to their likeness.[57] The court found this argument unpersuasive, likening it to a heightened pleading standard for non-celebrities, which it felt was not in the statute.[58] The court also found sufficient economic injury existed, relying heavily on a statement made by Facebook CEO Mark Zuckerberg.[59] Zuckerberg stated, "nothing influences people more than a recommendation from a trusted friend. A trusted referral influences people more than the best broadcast message. A trusted referral is the Holy Grail of advertising."[60] Thus, the court held that the plaintiffs' right of publicity cause of action survived Facebook's motion to dismiss.

In order to achieve this result, the court in *Fraley* had to distinguish an early case similar on the facts, *Cohen v. Facebook, Inc.*[61] In *Cohen I*, the plaintiffs were users of Facebook, like in *Fraley*, and complained of the misappropriation of their likeness based on Facebook's advertising of their "Friend Finder" service.[62] Friend Finder is a tool on the Facebook website that allows users to find individuals who they know but are not currently "friends" with on the

[54] *Id.* (holding that "nothing in the provisions of the Terms documents to which Facebook has pointed constitutes a clear consent by members to have their name or profile picture shared in a manner that discloses what services on Facebook they have utilized, or to endorse those services") (citing Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090, 1095 (N.D. Cal. 2011)).
[55] *Id.* at 806.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 807-08 ("[n]or does the Court find any reason to impose a higher pleading standard on non-celebrities than on celebrities").
[59] *Id.* at 808.
[60] *Id.*
[61] Cohen v. Facebook, Inc., 798 F.Supp.2d 1090, 1094–95 (N.D.Cal.2011) ("*Cohen I*"). The court also discussed Cohen v. Facebook, Inc., 2011 WL 5117164, at *1, *3 (N.D.Cal. Oct. 27, 2011) ("*Cohen II*"), which arose after the court granted the plaintiffs in Cohen I leave to amend their complaint.
[62] *Cohen I*, 798 F.Supp.2d at 1092–93.

site by entering the email addresses of these people.[63] In order to promote this service, Facebook advertised it on their website using the names and profile pictures of users who had used the service with the phrase "[g]ive it a try."[64] The plaintiffs asserted that they did not give permission for Facebook to use their likeness in the Friend Finder advertisement.[65] The court, however, dismissed these claims for failure to state a cause of action, holding that no injury was alleged. The court held that the "[p]laintiffs have not shown how the mere disclosure to their Facebook friends that they have employed the Friend Finder service (even assuming some of them did not) causes them any cognizable harm, regardless of the extent to which that disclosure could also be seen as an implied endorsement by them of the service."[66] Further, in *Cohen II*, after an amended complaint by the plaintiffs from *Cohen I*, the plaintiffs argued that the Friend Finder advertisement served a commercial purpose for Facebook, for it served to grow Facebook's user base which it relied on for its primary way of generating income, advertising to that user base.[67] The court also rejected this argument, holding that this argument was still insufficient to show harm to the plaintiffs.[68]

Despite the very similar fact patterns between *Fraley* and *Cohen I* and *II*, the court in *Fraley* distinguished the cases.[69] The court found that in Cohen I and II the plaintiffs' allegations were dismissed because they were unable to show that their names and pictures (their likeness) had any commercial value.[70] Relying on the statements made by Mark Zuckerberg and Cheryl Sandberg, the court held that the plaintiffs in *Fraley* were able to show that their likeness

[63] *Id.*
[64] *Id.* at 1093.
[65] *Id.*
[66] *Id.* at 1097.
[67] Cohen v. Facebook, Inc., 2011 WL 5117164, at *2 (N.D.Cal. Oct. 27, 2011).
[68] *Id.* at *3.
[69] Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 800 (N.D. Cal. 2011).
[70] *Id.*

had commercial value and held the Cohen decisions inapplicable to the facts of *Fraley*.[71] The court held that the injury to the plaintiffs was the commercial value that existed due to the benefits of advertising using the plaintiffs' likenesses versus advertisements without their likenesses.[72] It therefore distinguished Cohen and held it inapplicable.

Fraley makes a departure from the traditional approach to the right of publicity doctrine. It holds that the right of publicity, as defined by Californian statute and common law, is applicable to anyone that can demonstrate a commercial value to their likeness. To reach this result, the court noticeably distinguishes similar precedent yet maintains a broad holding. Going forward, *Fraley* sets forth a very liberal standard to avail on a right of publicity claim – misappropriation of a likeness that maintains any form of commercial value.

IV. FREE-RIDER THEORY, UNJUST ENRICHMENT AND THE APPLICATION IN RIGHT OF PUBLICITY DOCTRINE

[71] *Id.* This holding is a puzzling. The amended complaint in *Cohen II* makes a nearly identical argument to that of the plaintiffs in *Fraley*. *Fraley* held that the commercial value of the plaintiffs likeness is that which is the value added to the advertisements by the use of the plaintiffs' likeness. *Id.* at 809. The plaintiffs in *Cohen II* make nearly the same argument, that the use of their likeness in advertising the Friend Finder service adds value to the advertisements and benefits Facebook through the growth of their user base. Cohen v. Facebook, Inc., 2011 WL 5117164, at *2 (N.D.Cal. Oct. 27, 2011). Further, one of the primary reasons for the holding in Cohen II that is also applicable in Fraley is completely overlooked by the court in *Fraley*. In *Cohen II*, the court held:

> [i]t is also worth noting that this is not a situation where the defendant is alleged to have publicized the plaintiffs' names or likenesses to any audience or in any context where they did not already appear—rather, the names and likenesses were merely displayed on the pages of other users who were already plaintiffs' Facebook "friends" and who would regularly see, or at least have access to, those names and likenesses in the ordinary course of using their Facebook accounts. While the prior order rejected Facebook's argument that it could not be said to have used the names and likenesses to its own "advantage," this further undercuts any claim plaintiffs can make that they were somehow harmed.

Id. at *3. Just like in *Cohen II*, the Sponsored Stories in *Fraley* only appeared to individuals whom the plaintiffs were already "friends" with. The court in Fraley, however, ignores this factor altogether, which is possibly how it reached the result that the plaintiffs in Fraley were distinguishable from Cohen I and II.

[72] *Fraley*, 830 F. Supp. 2d at 809.

A fundamental theory of intellectual property law that is noticeably absent from the court's analysis in *Fraley* is free-rider theory. Free-rider theory has provided the intellectual property disciplines guidance in the common law for years. Courts seek to protect individuals investments and seek to prevent others from unjustly profiting off that investment. This section discusses the theory and how the court in *Fraley* should have applied it. The section also discusses how other courts have used the theory to shape intellectual property and how it should be used going forward in the right of publicity doctrine. Lastly, this section argues that many of the problems of the right of publicity doctrine could be solved with the use of this theory.

In the intellectual property context, free-rider theory provides that "a person who profits from another's investment is misappropriating themselves the benefits of another's labor."[73] Therefore, misappropriation occurs under this theory when an individual earns a profit based on another person's work, without making any substantial improvements on their own.[74] Proponents of this theory argue that free-riders should be discouraged in order to give inventors and originators incentive to gain an exclusive benefit from their hard work, and prohibit others from free-riding off of their investment.[75] Thus, every free-rider is unjustly enriched.[76]

The analysis, however, does not stop there. Courts and legislatures often permit free-riding after balancing the incentives of the creator or originator with the benefit of the public having access.[77] For example, in patent law, an inventor has the exclusive right to prohibit

[73] David W. Barnes, *Free-Riders and Trademark Law's First Sale Rule*, 27 Santa Clara Computer & High Tech. L.J. 457, 470 (2011) (arguing that free-rider theory follows the maxim, "[o]ne man may not reap where another has sown, nor gather where another has strewn"). In this application, free-rider theory draws many parallels to the theory of unjust enrichment as discussed in State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 98 (Tenn. Ct. App. 1987). This correlation will be discussed, *supra*, in Section IV.
[74] *Id.* (arguing that since the user is unjustly enriched, they are misappropriating another's hard work).
[75] *Id.* (citing McKevitt v. Pallasch, 339 F.3d 530, 534 (7th Cir. 2003) (equating a free-rider in the intellectual property disciplines to a thief)
[76] *Id.*
[77] *Id.* at 473-74 (arguing patent law and copyright privileges after a certain period of protection are examples of permissive free-riding).

individuals from free-riding for a period of 20 years.[78] To determine how long or if an individual should be allowed an exclusive right to their investment, courts must balance these incentives.

This doctrine has helped shaped the intellectual property disciplines. For example, in *National Basketball Association v. Motorola, Inc.*, the court relied on free-rider theory to determine if Motorola had misappropriated the National Basketball Association's ("NBA") copyright to broadcast basketball games.[79] The court articulated that the test should be whether, "the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened."[80] Further, free-rider theory plays an important role in patent law.[81] Congress, in enacting the current patent laws, determined that in order to balance the incentive to invent and prevent free-riders with the benefits of public disclosure, inventors should be given 20 years protection against free-riders after disclosing their invention.[82] In trademark law, free-rider theory plays an important role in dilution claims.[83] Courts apply the free-rider theory to protect

[78] 35 U.S.C.A. § 154 (2006)
[79] Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 845 (2d Cir. 1997) (holding that free-riding is an essential element to making a claim for misappropriation of a copyright).
[80] *Id.*
[81] SmithKline Beecham Corp. v. Apotex Corp., 247 F. Supp. 2d 1011, 1052 (N.D. Ill. 2003) *aff'd*, 365 F.3d 1306 (Fed. Cir. 2004) *opinion vacated on reh'g en banc*, 403 F.3d 1328 (Fed. Cir. 2005) and *superseded*, 403 F.3d 1331 (Fed. Cir. 2005) and *aff'd on other grounds*, 403 F.3d 1331 (Fed. Cir. 2005):

> Moreover, free riding is an integral part of the scheme of the patent law. In exchange for the exclusive and in the case of Paxil very valuable rights that a valid patent grants, the patentee is required to make public disclosure of the steps required to create the patented product, so that when the patent expires and the patented product enters the public domain competitors can manufacture the product. Those competitors are free riders with a vengeance. But they are lawful free riders. And so is Apotex.

[82] 35 U.S.C.A. § 154 (West 2006).
[83] Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 903 (9th Cir. 2002) ("[w]hereas trademark law targets "interference with the source signaling function" of trademarks, dilution protects owners "from an appropriation of or free riding on" the substantial investment that they have made in their marks" (citing I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 50 (1st Cir. 1998)); see also Stephens Media LLC v. CitiHealth, LLC, 2:09-CV-02285-MMD, 2012 WL 4711957 (D. Nev. Oct. 3, 2012) (holding that whether the user is a free-rider and was unjustly enriched are important questions in a trademark dilution claim).

trademark owners against others from benefiting from their investment into the trademark.[84] In sum, free-rider theory plays an important role in determining what protections intellectual property law should offer, and whether an infringement on a right afforded by the law exists.

The court in *Fraley*, however, failed to address free-rider theory in any material respect. In fact, if the court had done so, the holding would likely have turned out substantially different. The court in *Fraley* looked at third-party advertisements on Facebook's social networking website that used the names and pictures of users of Facebook without their consent.[85] The court reasoned that since the plaintiffs' likeness had substantial commercial value in the social network context, then there was sufficient evidence to lay the foundation for the injury prong of the right of publicity test.[86] Applying the free-rider theory, it is clear from the facts of *Fraley* that no free-riding occurred. The plaintiffs were *non-famous* individuals whose likeness was being used on a social networking site; therefore, the substantial investment required by the free-rider theory never occurred. This is reason that some courts hold that the right of publicity applies only to famous individuals.[87] Celebrities invest time and money into their appearance. That time and money can take the form of everything from perfecting their craft to be held in high esteem by

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[84] Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 903 (9th Cir. 2002).

[85] Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 791-92 (N.D. Cal. 2011) (the issue of consent was raised at trial, however, the court held that no consent was given in this case).

[86] *Id.* (Specifically talking about California's statutory right of publicity, which states

> [a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.

[87] Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Products, Inc., 250 Ga. 135, 141 (1982):

> [t]he rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.

the public, to hiring personal relations personnel to boost their public image. This creates a direct investment into their likeness that courts seek to protect against others from free-riding off this investment.[88] Non-famous individuals, however, absent special circumstances, do not make a sufficient investment into their likeness to trigger free-riding concerns.[89] Therefore, applying the free-rider theory to the facts of *Fraley*, no misappropriation of the plaintiffs' right of publicity occurred since the court has no reason to protect an individual's likeness when it is not protecting the incentive for an individual to invest into that likeness.

Since non-famous individuals generally make no investment into their likeness, the courts and legislature should not seek to grant exclusivity. Exclusivity in intellectual property law is premised upon protecting the incentive to invest – whether it be conducting research in the patent context, composing a work of art in the copyright context, or cultivating one's likeness. When courts overprotect intellectual property, such as a non-famous person's likeness, they create inefficiency in the market of intellectual property, hurting the right of the public to have access to that intellectual property. This is where the application of the free-rider theory comes in; courts should look to the theory to determine if the protection is necessary to protect the incentive for one to invest into their intellectual property, and even if necessary, balance it with the benefit of public access. Going forward, courts should apply the free-rider theory to the right of publicity doctrine, and afford the right of publicity only in the cases when necessary to protect the incentive to invest into one's likeness, which generally will apply to celebrities only. *Fraley* is a perfect example of what happens when courts ignore this theory, rights are offered to

[88] White v. Samsung Electronics Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992) ("[t]he right of publicity has developed to protect the commercial interest of celebrities in their identities" (citing Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983)).

[89] The court in Fraley even recognized this point in dicta, admitting that "these previous non-celebrity plaintiffs have typically been models, entertainers, or other professionals who have cultivated some commercially exploitable value through their own endeavors." *Fraley*, 830 F. Supp. 2d at 808.

individuals whom expended little to no effort in creating the commercial value of their right, which only harms the public.

This is not the first time this idea has been explored in the right of publicity context. In *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, the court held that the estate of Elvis Presley had the right to prohibit others from using Elvis Presley's likeness without permission.[90] The court relied on the doctrine of unjust enrichment and held that Elvis Presley had expended great effort during his life to boost the value of his likeness, which entitled his estate to protect against others being unjustly enriched by a free use of his likeness.[91] The courts logic in Cromwell followed that of the free-rider theory. Due to the investment that Presley had made into his image during his life, through his signing career and movies, he was entitled to protect against others free-riding off of his hard work. The corollary between unjust enrichment and free-rider is important, for the right of publicity was founded on the principal of unjust enrichment.[92] Therefore, the free-rider theory should be considered when determining whether to expand the rights of the right of publicity doctrine.

Further, the free-rider theory also seeks to protect against others from earning a profit from free-riding off another's effort, if the user does not make substantial investments on their own.[93] In *National Basketball Association v. Motorola, Inc.*, Motorola collected news on National Basketball Association ("NBA") games through data feed that consisted of a group of

[90] State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 98 (Tenn. Ct. App. 1987) ("relying on a theory of unjust enrichment that parallels the free-rider theory, the court held "[t]his unjust enrichment principle argues against granting a windfall to an advertiser who has no colorable claim to a celebrity's interest in the right of publicity").
[91] *Id.*
[92] *Id.*
[93] Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 854 (2d Cir. 1997) (holding that Motorola was "in no was free-riding on Gamestats," when it collected news from Gamestats and transmitted the news via pagers to customers).

reporters that listen to and watch the NBA games.[94] Motorola then transmitted this data to pagers owned by customers, as a way of getting almost real time updates on basketball games.[95] The NBA asserted that this consisted of impermissible free-riding on Motorola's behalf, and that Motorola should be prohibited from doing so under state law "hot-news" misappropriation law.[96] The Second Circuit, however, rejected this view of the free-rider theory, holding that Motorola had spent great expense in collecting and distributing the news, and this substantial investment on their own vindicates their actions from being considered free-riding.[97] Any party that invests substantial efforts on their own is not unjustly enriched; even though they may be enriched, it is not unjust for they have invested their own time and money. Thus, if a party expends significant resources on their own, the riding is not free.[98]

The additional investment approach to the free-rider theory should be applied in cases such as *Fraley*, where courts are determining whether or not to expand intellectual property rights. In *Fraley*, Facebook's riding off its users likeness was not "free" in any sense. Facebook expends large amounts of money into the research and development of their website. In 2012, Facebook spent almost $1.4 billion on research and development alone.[99] Obviously, the

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[94] *Id.* at 843-44.
[95] *Id.* at 844.
[96] *Id.* at 854. This particular statute is based upon the Supreme Court's decision in Int'l News Serv. v. Associated Press, 248 U.S. 215, 267, 39 S. Ct. 68, 82, 63 L. Ed. 211 (1918), where the Supreme Court held that a news service has a "quasi-property" interest in the news service they produce, but do not have any intellectual property rights.
[97] *Id.*:

> Motorola and STATS expend their own resources to collect purely factual information generated in NBA games to transmit to SportsTrax pagers. They have their own network and assemble and transmit data themselves… SportsTrax and Gamestats are each bearing their own costs of collecting factual information on NBA games, and, if one produces a product that is cheaper or otherwise superior to the other, that producer will prevail in the marketplace. This is obviously not the situation against which *INS* was intended to prevent: the potential lack of any such product or service because of the anticipation of free-riding.

[98] David W. Barnes, *Free-Riders and Trademark Law's First Sale Rule*, 27 Santa Clara Computer & High Tech. L.J. 457, 472 (2011) ("[i]f the riding is expensive, it is not 'free' riding").
[99] https://ycharts.com/companies/FB/r_and_d_expense (last visited Nov. 24 2013) (Facebook spent roughly $1,399,000,000 on research and development in 2012).

majority of the expense was not spent solely on the development of the Sponsored Stories. However, the great expense illustrates the investment that Facebook makes into its services. Like in Motorola, Facebook collected the pictures and names of its users, but not after significant investment into researching and developing the algorithm behind the Sponsored Stories. This should not suggest, however, that Facebook cannot be a free-rider just based upon the large investment they make into research and development. It should be up to the court to balance these interests and determine if free-riding exists, and if so, if it should be permitted.

Free-rider theory provides an insight into when courts should grant exclusive rights over a property interest. In its application, courts seek to balance the interests between benefits to incentivize personal investment in creating property interests with the benefits of public access. The theory plays an important role in intellectual property law, with the three major disciplines of intellectual property acknowledging the economic incentives that the theory creates. The court in *Fraley*, however, failed to address the theory, and granted an expansion in the right of publicity. This case, therefore, marks the gradual departure of the right of publicity doctrine from the main intellectual property disciplines. Further, it is also important to consider the additional investment aspect of free-rider theory, and its implications. Thus, going forward, courts should be more cognizant of free-rider theory in deciding whether right of publicity should be extending, for the theory addresses important economic considerations.

V. SOME PROBLEMS WITH APPLYING FREE-RIDER THEORY TO THE RIGHT OF PUBLICITY DOCTRINE

On problem with the application of the free-rider theory to the right of publicity doctrine is the idea of commercial value.[100] The basic idea is that courts should seek to protect a property interest that has commercial value, where appropriation by another party would result in unjust enrichment.[101] This idea ignores whether any investment is made by the individual holding the property interest, and simply protects commercial value no matter how acquired.[102] For example, in *White*, the court stated "[t]elevision and other media create marketable celebrity identity value.... The law protects the celebrity's sole right to exploit this value whether the celebrity has achieved her fame out of rare ability, *dumb luck*, or a combination thereof."[103] This suggests that the true test for right of publicity should be whether the individual's likeness has commercial value, regardless of whether investment has been made.

Commercial value is defined as "provable value in the economy at large."[104] Put more simply, it is the instance that another individual would be willing to pay for property in a commercial environment. In *Fraley*, the court found that the plaintiffs had concrete commercial value in their likenesses.[105] The Sponsored Stories, the court argued, derive additional value from a recommendation from a friend.[106] In fact, Facebook's Chief Operating Officer Sheryl

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[100] *See generally* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 799 (N.D. Cal. 2011) (holding that commercial value is the applicable test for right of publicity cases).
[101] *See id.* at 807 (holding that injury can be proven in the right of publicity context by commercial value, because "where the identity appropriated has a commercial value, the injury may be largely, or even wholly, of an economic or material nature" (quoting Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974)).
[102] *Id.* at 808 ("the Court finds nothing requiring that a plaintiff's commercially exploitable value be a result of his own talents or efforts in order to state a claim for damages under [the right of publicity statute]").
[103] *White*, 971 F.2d at 1399 (emphasis added). The court in White also acknowledged, however, that "[c]onsiderable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit." It can be argued that this statement is actually a justification for the free-rider doctrine – that celebrities do invest into their likeness.
[104] *Fraley*, 830 F.Supp.2d at 799.
[105] *Id.* (agreeing with the plaintiffs' argument that "in the same way that celebrities enjoy commercially exploitable opportunities among consumers at large, they enjoy commercially exploitable opportunities to advertise among their immediate friends and associates because "[i]n essence, Plaintiffs are celebrities—to their friends").
[106] *Id.* (relying on the contention of the Plaintiffs, "that the Nielsen Company, a well-respected marketing research firm frequently quoted by Facebook, has also determined that advertising consisting of recommendations by friends is the most effective form of advertising").

Sanberg was quoted stating, "the value of a Sponsored Story advertisement is at least twice and up to three times the value of a standard Facebook.com advertisement without a friend endorsement."[107] This additional value, which the court contributed to the likeness of the plaintiffs, was held to constitute cognizable commercial value.[108]

The commercial value test shows that although free-rider theory may have helped shaped the right of publicity doctrine, it may not be applicable in the current environment, especially given advent of social networking. The court in *Fraley* noted, "[i]n a society dominated by reality television shows, YouTube, Twitter, and online social networking sites, the distinction between a "celebrity" and a "non-celebrity" seems to be an increasingly arbitrary one."[109] This is based on the notion that the power of a recommendation to a social network can be almost as powerful as a celebrity's recommendation.[110] The advent of online social networking furthers this idea, for the depth of one's social network is published. Webpages, such as Facebook, can show the value of an individual's social network with the sheer number of "friends" one has on their personal social network page. These webpages make it easier for a person to recommend something to a friend, for by clicking a "like button" they can publish their interest to their entire network of "friends" in an instance. It is safe to say, that when the right of publicity doctrine was founded and shaped into what it is today, that courts and legislatures did not contemplate the value that one's social network can have with the internet. Therefore, proponents of the

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[107] *Id.*

[108] *Id.* at 800.

> Plaintiffs here have quoted explicit statements by Facebook's own CEO and COO that friend endorsements are two to three times more valuable than generic advertisements sold to Facebook advertisers. Plaintiffs here have furthermore identified a direct, linear relationship between the value of their endorsement of third-party products, companies, and brands to their Facebook friends, and the alleged commercial profit gained by Facebook. Thus, Plaintiffs have alleged facts showing that their personal endorsement has concrete, measurable, and provable value in the economy at large.

[109] *Id.* at 808.

[110] *Id.* at 800 ("in essence, Plaintiffs are celebrities—to their friends").

commercial value approach taken by the court in *Fraley* would argue that the free-rider theory is an antiquated way of approaching the right of publicity, and the correct approach to look towards whether the plaintiff's likeness has commercial value.

Fraley was not the first case to apply a commercial value test to a right of publicity question; in fact, Californian courts have a history of the use of the commercial value test. For example, in *KNB Enterprises v. Matthews*, the court dealt with the unauthorized use of erotic photographs depicting models.[111] These models were not celebrities; they were new models who were "fresh" in the industry.[112] The court held that the fact the models were not celebrities was immaterial to the discussion, because "the statutory right of publicity exists for celebrity and non-celebrity plaintiffs alike."[113] The court also argues that the fact that the Californian legislature specifically provides a minimum damages in the right of publicity statute, shows the intention for broad interpretation and the inclusion of classes of individuals who may not have preexisting commercial value to their likeness.[114] Further, in *Motschnbacher v. R. J. Reynolds Tobacco Co.*, the court examined a right of publicity action by a professional racing car driver against a tobacco company for the unauthorized use of his likeness in advertisements.[115] The court held:

[111] KNB Enterprises v. Matthews, 78 Cal. App. 4th 362, 365, 92 Cal. Rptr. 2d 713, 716 (2000).
[112] *Id.* at 368 (asserting that the fact the models were new in the industry created even greater commercial value for their pictures were harder to find).
[113] *Id.* at 373 n. 12.
[114] *Id.* at 367 (emphasis added):

> Although the unauthorized appropriation of an obscure plaintiff's name, voice, signature, photograph, or likeness would not inflict as great an economic injury as would be suffered by a celebrity plaintiff, California's appropriation statute is not limited to celebrity plaintiffs. Section 3344 provides for minimum damages of $750, even if no actual damages are proven. In discussing a similar Nevada statute, the Nevada Supreme Court noted that the legislative purpose for providing a minimum recovery for non-celebrities is "to discourage such appropriation."

[115] Motschenbacher v. R. J. Reynolds Tobacco Co., 498 F.2d 821, 822 (9th Cir. 1974)

> Generally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury suffered. However, it is quite possible that the appropriation of the identity of a celebrity may induce humiliation, embarrassment and mental distress, *while the appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously valueless*.

The court even went as far as stating that the mere act of exploitation may itself impute commercial value onto an individual's likeness.[116] This idea is based upon the fact that commercial value can be created at any time, even if it occurs by the user after the exploitation occurs. Thus, the precedent in California would suggest that *Fraley* applied the right of publicity doctrine correctly, by using the commercial value test.

Another reason the free-rider theory may be inapplicable for the right of publicity doctrine is the broad language of certain state statutes. For example, the Restatement (Third) of Unfair Competition § 46 states "[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for

[116] *Id.* at 822 n. 11; *see also* Canessa v. J. I. Kislak, Inc., 97 N.J. Super. 327, 350, 235 A.2d 62, 75 (Ch. Div. 1967):

> In the case of one not a public figure or one who makes himself a public figure by his own act, such as the commission of a crime, we have a situation where there is no pecuniary or market value in the name, likeness, etc., of such a person until the defendant, by unlawfully appropriating the property rights in these aspects of plaintiff's personality, establishes a pecuniary value and a market for them (though the plaintiff has never attempted to market them). In such a case, the damages would be measured by the value to the defendant and, in a suit on the basis of unjust enrichment, would be that portion of the profits accruing to the defendant to which a court or jury decides plaintiff is entitled, commensurate with his role in and importance to the commercial enterprise

purposes of trade is subject to liability."[117] Although no state has adopted the Restatement's version, several states have functionally similar statutes.[118] These statutes represent the codification of the commercial value rationale. Further, this formulation of a right of publicity statute creates broad authority by courts to grant any misappropriation of another's likeness actionable, as long as the likeness has commercial value.

Although there are problems with the application of free-rider theory to right of publicity doctrine, its use would be beneficial in shaping the doctrine. First, the commercial value test suggests the application of the right of publicity to non-famous individuals who have commercial value in their likeness. If, however, non-famous individuals who have invested little to no investment into their likeness are allowed to sue for damages for misappropriation, the plaintiff's would be the ones who are unjustly enriched. The plaintiffs would have expended nothing and would benefit simply from their lawsuit. The free-rider theory corrects this problem for it provides recovery for the plaintiff only if the plaintiff stands to lose something – that is, their investment. Although the non-famous plaintiff would lose the commercial value of the use of their likeness, it is value they never expected to have. Next, although the advent of socially networking creates commercial value for non-famous individuals where there was not any before, it still only requires little to no investment on behalf on the non-famous individual. This lack of investment makes the only loss to the non-famous individual the commercial value of

[117] Restatement (Third) of Unfair Competition § 46 (1995); *but see id.* at Comment C (arguing that even though broad language is used, courts may decide to interpret the statute narrowly in cases where the value of the plaintiff's likeness was acquire through little investment:

> In other cases the commercial value acquired by a person's identity is largely fortuitous or otherwise unrelated to any investment made by the individual, thus diminishing the weight of the property and unjust enrichment rationales for protection. In addition, the public interest in avoiding false suggestions of endorsement or sponsorship can be pursued through the cause of action for deceptive marketing. Thus, courts may be properly reluctant to adopt a broad construction of the publicity right.

[118] *See* discussion regarding California's right of publicity statute, *infra*, Section II.

their likeness, which the individual never expected to have or profit from. Lastly, the broad language of the statutes is a problem for the legislatures to correct. All the broad language does is to create a right where one should not exist. It creates a right in a class of individuals who never expected to earn a profit from their right and never invested time or money to cultivate that right. Therefore, although objections to the free-rider theory exist, the free-rider theory should be applied to the right of publicity doctrine.

VI. CONCLUSION

The right of publicity creates an intellectual property right in an individual's image and likeness. In the past, this right was afforded only to celebrities who had invested time and effort into cultivating the value of their image, and had an expectation to earn a profit from this investment. In *Fraley*, however, the court expanded this right to non-famous individuals, holding that any individual whose likeness had commercial value. This case marks the newest departure from traditional the right of publicity and demonstrates the conflicting views that jurisdictions take with regard to the doctrine. The law remains greatly unsettled in this field, which creates uncertainty of whether this right exists in certain circumstances.

The application of the free-rider theory, however, could help ease this uncertainty. Free-rider theory dictates that the right of publicity be afforded only to those who invest in their likeness and have an expectation to earn a profit due to that investment. Further, appropriation of another's likeness would be permitted if the riding is not free – that is, the appropriator makes substantial investments on their own. This rests squarely against the commercial value test, but helps to correct the problems it creates. The commercial value test grants a right to an individual

who has invested no time or money and has no expectation to earn a profit. Free-rider theory, on the other hand, would allow only the individuals that deserved the right to be compensated.