

## Publicity and Privacy Rights: Evening out the Playing Field for Celebrities and Private Citizens in the Modern Game of Mass Media

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**PUBLICITY AND PRIVACY RIGHTS:  
EVENING OUT THE PLAYING FIELD FOR  
CELEBRITIES AND PRIVATE CITIZENS IN THE  
MODERN GAME OF MASS MEDIA**

*Fame is a bee.  
It has a song—  
It has a sting—  
Ah, too, it has a wing.  
—Emily Dickinson<sup>1</sup>*

INTRODUCTION

As Sir Robert Walpole said over one hundred years ago, “all . . . men have their price.”<sup>2</sup> Indeed, in this modern age of pervasive commercial influence through mass media, when anything of value to one person is potentially another person’s profit, individual personas are no exception to the rule that what will be bought will be sold. This is evident in the immense value of the highly coveted celebrity endorsement in the marketing of commercial products.<sup>3</sup> While some manufacturers claim “image is nothing,”<sup>4</sup> the marketing practices employed and the billions of dollars expended on celebrity endorsements in advertising demonstrate otherwise.<sup>5</sup> The use of well-known identities in commercial marketing responds to our national psyche.<sup>6</sup> As a culture, we have demonstrated that we place stock in the ability of a product to aid in our quest to “Be Like Mike,”<sup>7</sup> and in other ways to emulate

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1. THE COMPLETE POEMS OF EMILY DICKINSON 713 (Thomas H. Johnson ed., 1957).

2. See JOHN BARTLETT, FAMILIAR QUOTATIONS 295 (Justin Kaplan et al. eds., 16th ed. 1996).

3. See ROBERT GOLDMAN & STEPHEN PAPSON, SIGN WARS: THE CLUTTERED LANDSCAPE OF ADVERTISING 38 (1996). In the market of celebrity endorsement, “the rule of thumb has generally been ‘the bigger the celebrity, the more handsome the sign value.’” *Id.*

4. *Id.* at 5 (Goldman and Papson discuss the mid-1990s Sprite campaign slogans “Obey your thirst” and “image is nothing,” as examples of “anti-signs.”).

5. See *id.* at 20. Celebrity tennis star Andre Agassi responded to Sprite’s sentiment by exclaiming, “Image is everything!” in a commercial for Canon brand cameras.

6. See Gretchen A. Pemberton, *The Parodist’s Claim to Fame: A Parody Exception to the Right of Publicity*, 27 U.C. DAVIS L. REV. 97, 120 (1993) (“[C]elebrities’ power to ‘sell’ commodities with which they are associated proves that their images mean something to consumers. Their economic value (their ‘associative’ or ‘publicity’ value . . . ) derives from their ‘semiotic’ power . . . to carry and provoke meanings.”).

7. See GOLDMAN & PAPSON, *supra* note 3, at 3. By 1996, Nike had gained a larger percentage of the commercial market than competitor Reebok as a result of its ability to “effectively harness the power of Michael Jordan’s image.” See Pemberton, *supra* note 6, at 123-24 (“[T]he public admires its celebrity heroes and will adopt their opinions and emulate their behavior and ap-

our pop culture icons. Indeed, it “says a great deal about modern America that no society has ever had as many celebrities as ours or has revered them as intensely.”<sup>8</sup> One author characterizes the role of the celebrity in modern culture by stating:

Celebrities symbolize individual aspirations, group identities, and cultural values. Celebrities are common points of reference for millions of individuals who may never interact with one another, but who share, by virtue of their participation in a mediated culture, a common experience and a collective memory. We use celebrities as symbols to express ourselves and to communicate with one another. They are the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation.<sup>9</sup>

The associative value of a persona in the commercial marketplace cannot be underestimated. This concept is at the core of the legal right of publicity, a right intended to protect an individual’s economic interest in his or her identity, and is the subject of this Comment.

Yet the rich and famous are not necessarily the only personas that qualify as marketable commodities.<sup>10</sup> The recent craze in “reality television” suggests a powerful fascination in our culture with the common person.<sup>11</sup> However, for those individuals whose identity is of economic value only to themselves, there is a lack of protection under the right of publicity when that identity is used for the commercial purposes of another without consent. Although, in theory, noncelebrities have a right to publicity,<sup>12</sup> this right is often neglected in practice. Moreover, the aggrieved private individual faces a significant challenge in effecting recovery under the right of privacy, the tradi-

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pearance. . . . Today, celebrities are indirectly and directly influential in almost every sphere of consciousness—from fashion to sexual morality to politics.”).

8. See NEAL GABLER, *LIFE THE MOVIE: HOW ENTERTAINMENT CONQUERED REALITY* (1998); see generally Roberta Rosenthal Kwall, *Fame*, 73 *IND. L.J.* 1 (1997) (analyzing the development of the modern cultural fascination with fame and its connection to the legal right of publicity).

9. See Pemberton, *supra* note 6, at 118-19 (citations omitted).

10. See Roberta Rosenthal Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 *U.C. DAVIS L. REV.* 191, 202 (1983) (Arguing for a “universal right of publicity,” Professor Kwall explains that noncelebrity endorsement is a reality of modern advertising.).

11. See Todd Leopold, *How Much Reality TV Can We Survive?*, at <http://www.cnn.com/2001/SHOWBIZ/TV/05/01/reality.tv/index.html> (last visited Jan. 21, 2004) (discussing the prevalence of reality television programming, examining specific shows, and offering explanations for the unrelenting popularity of this brand of entertainment); see also Tom Shales, *All Too Real*, *WASH. POST*, Jan. 13, 2003, at C1 (criticizing reality programming and claiming that of “TV’s long road of wretched excess, few excesses have seemed as wretched as the current outbreak of reality shows”).

12. J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 4:14, at 4-17 (2d ed. 2003) (“[T]he majority of commentators and courts hold that everyone, celebrity and noncelebrity alike, has a right of publicity.”).

tional avenue of relief available to private individuals, as courts grant broad deference to countervailing free speech interests.<sup>13</sup> Unlike the unjust enrichment theory of recovery employed in publicity claims,<sup>14</sup> success in asserting a personal or emotional claim brought under the right of privacy is often unattainable absent a showing of an exclusively commercial use of identity.<sup>15</sup>

The purpose of this Comment is to examine the current state of the law regarding the misappropriation of identity, embodied in the rights of privacy and publicity, as it pertains to both celebrities and noncelebrities alike. While the rights of privacy and publicity, the “conjoined twins of modern media society,”<sup>16</sup> each protects individuals from unauthorized use of their name and likeness to promote another’s business or product without their consent,<sup>17</sup> the cause of action, at least for private individuals,<sup>18</sup> must be aligned with the harm to be reconciled. Specifically, recovery under the right of publicity requires a showing of economic harm.<sup>19</sup> An economic value in that identity is, therefore, condition precedent to such a claim. Although this monetary value is established easily by celebrities, given our cultural fascination with and commodification of famous personas, average private citizens can rarely assert an economic value in their identity to sustain a publicity claim.<sup>20</sup> Because claims brought under the right of publicity and privacy often reflect the same individual interests, be they economic or personal, assertion of and subsequent success of a claim is often dependent on the status of the individual and not the interest at issue.

Part II of this Comment will trace the lineage of misappropriation of identity as a legal claim: its birth in the concept of privacy, the First Amendment limitations on this right, its splintering into the offshoot right of publicity, and the present status and scope of each right. Following this foundation, the analysis in Part III will focus on the judicial approaches to determining “commercial” use of identity and assessing First Amendment implications in right of privacy claims. In

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13. See *infra* notes 48-57 and accompanying text.

14. See *infra* notes 127-128 and accompanying text.

15. See *infra* notes 58-67 and accompanying text.

16. See Jonathan Kahn, *Bringing Dignity Back To Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 221 (1999).

17. See RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977).

18. See *infra* notes 187-193 and accompanying text.

19. See *Parks v. LaFace Records*, 329 F.3d 437, 460 (6th Cir. 2003) (citing *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 624 (6th Cir. 2000)) “[A]ll that a plaintiff must prove in a right of publicity action is that she has a pecuniary interest in her identity, and that her identity has been commercially exploited by a defendant.

20. See *infra* notes 187-193 and accompanying text.

particular, Part III will examine the seemingly disparate burden of the First Amendment as it is imposed upon private individuals asserting claims against unauthorized use of identity compared to the broad deference afforded to famous persons who bring economic claims under the right of publicity. Part IV will discuss the state of this area of law and its correlation to the modern cultural regard for fame and celebrity. Part IV will further address the possible approaches to calming the storm of confusion surrounding the right of publicity. Given its inherent conflict with the First Amendment, the right of publicity must be tailored to yield to all protectible uses of identity. As a corollary, the concept of unjust enrichment must be expanded to encompass more readily claims brought by anonymous individuals. Clarification of these problematic issues and exploration into possible analytical approaches seek to aid in the goal of furthering the purposes of both privacy and publicity law such that the economic and emotional interests of all people in their own identity will be legally protected from unauthorized commercial use.

This Comment is not a condemnation of the right of publicity, although inconsistencies and deficiencies are evident. Rather, in support of the right of publicity and its continuing development, this Comment sets forth two primary contentions: 1) that all persons should be protected against economic and emotional injury resulting from the unauthorized use of identity for commercial purposes; and 2) that a "commercial purpose" should be clearly defined and narrowly construed to avoid any infringement upon freedom of speech, particularly regarding the cultural necessities of parody and commentary. While it is arguable that the current state of the law reflects such harmony, case law demonstrates a need for further improvement in the promotion of the interests protected under both privacy and publicity law. As Professor Melville Nimmer stated in his highly influential law review article advocating the right of publicity, "only the unhurried occurrence of actual cases" will clearly establish the limitations and scope of this right.<sup>21</sup> This Comment will explore how case law has been both successful and inadequate in defining that scope, and the measures needed to ensure consistent and just results for all seeking protection from unauthorized commercial use of identity.

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21. See Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

## II. BACKGROUND

Since its inception,<sup>22</sup> the right of publicity has been the subject of exhaustive comment, criticism, and controversy.<sup>23</sup> Although it is well established that the right of publicity grew out of the right of privacy,<sup>24</sup> the exact evolution of the former from the latter and the present correlation between the two independent rights is a subject of much disagreement and debate.<sup>25</sup> Familial terms have been employed to analogize the relationship between these two rights; the right of publicity has been coined the right of privacy's "stepchild"<sup>26</sup> and "flashier cousin,"<sup>27</sup> the former created from the latter, its "parent,"<sup>28</sup> as "Eve from Adam's rib."<sup>29</sup> The confused intermingling of these two independent rights, rooted in fundamentally different legal interests,<sup>30</sup> has earned this cross-section of the law its infamous nickname: "haystack in a hurricane."<sup>31</sup> In order to examine the present relationship between the right of privacy and that of publicity, an examination of

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22. In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), the Second Circuit Court of Appeals first determined that celebrities have the right to recover for the misappropriation of their identity for the commercial benefit of others and that this right exists independently from the right of privacy.

23. Compare Sheldon Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199 (1986) (outlining the movement of law in recognizing the right of publicity and arguing that sound justification for the emergence of this right exists and the necessity of its common law recognition), with Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993) (arguing that the adoption of the right of publicity into American law was erroneous because no adequate justification for the existence of this right has been asserted).

24. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995); see also Kwall, *supra* note 10, at 193 ("[P]ublicity's genesis in the right of privacy is undisputed.").

25. See Alice Haemmerli, *Whose Who?: The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 388 (1999) ("The resultant (and often convoluted) bifurcation of publicity and privacy interests has engendered intractable doctrinal confusion.").

26. See David R. Ginsburg, Comment, *Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild*, 22 UCLA L. REV. 1103 (1975).

27. See Kahn, *supra* note 16, at 214 ("In case after case, even while demanding restitution for the converted monetary value of their names and images, celebrities invoke dignitary concerns as a prime motivation for their attempt to protect and vindicate the integrity of their identities before the law.").

28. See Kwall, *supra* note 10, at 193.

29. J. THOMAS MCCARTHY, THE RIGHT OF PUBLICITY AND PRIVACY § 5.8[A], at 5-68 (1999).

30. The right of publicity is deemed a property interest. The right of privacy, however, is the right against injury to one's emotions. See Kahn, *supra* note 16, at 215. "Publicity rights demand accountants and other relevant experts from the realm of . . . marketing to determine damages. Appropriation calls upon the local community to consider whether an outrage or affront to relevant social norms has occurred." *Id.*

31. This expression was first espoused in *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 485 (3d Cir. 1956), by Chief Judge Biggs who was commenting on the state of the law governing the right of privacy. It has since been used to generally describe the confusion surrounding the rights of privacy and publicity.

the historical development of the concept of a legal interest in one's identity, which is central to each right, is essential. This section will discuss the historical correlation between the right of privacy and the right of publicity and the present scope of and limitations on each right.

### A. *Privacy: Human Good to Legal Right*

Privacy, as an abstract concept, has been considered throughout time and culture as an elevated human good.<sup>32</sup> One author articulates this inherent human desire for privacy as follows:

Man's desire to be private is ancient, intense and takes many forms. He seeks the privacy of his thoughts, his person, his home, his papers and other effects, and his communications to others. He seeks to be private from the state, whose undue intrusion into his spheres of privacy is oppressive; and he seeks to be private from other individuals, whose intrusions are offensive rather than oppressive, but no less unwelcome.<sup>33</sup>

Samuel Warren and William Brandeis first introduced the concept of a legally recognized "right to privacy," or the right "to be left alone" in a compelling and controversial law review article published in 1890.<sup>34</sup> Since its introduction, the article, which champions a legally based right against intrusion into the private affairs and lifestyle of private individuals, has been revered for its profound impact on modern law.<sup>35</sup> Yet the early judicial response to the concept proposed by Warren and Brandeis was less than favorable. The court in *Roberson v.*

32. See RICHARD F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT* 3 (1987). Hixson maintains that the role of "privacy" in the biblical story of Adam and Eve demonstrates the tremendous consideration this concept has been given throughout the cultural and historical development of mankind.

33. Laura M. Murray Richards, Comment, *Arrington v. New York Times Company: A Missed Opportunity To Recognize a Constitutional Right to Privacy of Personality*, 26 *How. L.J.* 1579, 1584 (1983) (citations omitted).

34. Samuel D. Warren & William Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890); see generally Benjamin E. Bratman, *Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy*, 69 *TENN. L. REV.* 623 (2002).

35. See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 1051 (1941) ("[N]o other tort has seen such an outpouring of comment in advocacy of its bare existence."); see also Nimmer, *supra* note 21, at 203, 19 *LAW & CONTEMP. PROBS.* 203 (1954) ("perhaps the most famous and certainly the most influential law review article ever written"); see also HIXSON, *supra* note 32, at 29. According to Hixson, Roscoe Pound, the Dean of Harvard Law School at the time the article came out, stated that Warren and Brandeis had "done nothing less than added a chapter to our law." Professor Bratman stated:

In their twenty-eight page piece, Brandeis and Warren chastised the journalists of their day, particularly photojournalists, for prying into people's private lives in search of tawdry and alluring "news," and then made a cogent plea for the law to recognize a right of privacy and to impose liability in tort for these and other types of invasions of privacy. Bratman, *supra* note 34, at 624.

*Rochester Folding Box Co.*,<sup>36</sup> unpersuaded by the Warren and Brandeis article, rejected an emotional distress claim for the unauthorized use of an individual's photograph in an advertisement.<sup>37</sup> It was the dissenting opinion in that case, provided by Judge Gray<sup>38</sup> that became the "fountainhead . . . of the right as expounded in the majority of later cases."<sup>39</sup> In response to the *Roberson* decision, the New York State Legislature enacted a statutory provision prohibiting the use "for advertising purposes, or for purposes of trade" of the "name, portrait, or picture of any living person" without consent.<sup>40</sup>

The common law right of privacy was first recognized in *Pavesich v. New England Life Insurance Co.*,<sup>41</sup> wherein the Supreme Court of Georgia, quoting heavily from Judge Gray's dissent in *Roberson*,<sup>42</sup> recognized the plaintiff's right of privacy claim for the defendant's use

36. 64 N.E. 442 (N.Y. 1902).

37. The court in *Roberson* rejected the Warren and Brandeis article and refused to recognize the right of privacy for an infant whose guardian brought suit against the defendants for their unauthorized use of the infant's picture on posters advertising flour. *Id.* at 447-48. The Court interpreted the proposed right to mean that "the individual has the right to prevent his features from becoming known to those outside his circle of friends and acquaintances." *Id.* at 443. The majority also reasoned that indoctrinating this theory into common law would produce "litigation bordering on the absurd, for the right of privacy . . . must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habit." *Id.* The majority did recognize that proper legislation could tailor this right to protect the unauthorized use of likeness for the selfish gain of the defendant but declined to act in place of the legislature on this issue. *Id.*

38. *Id.* at 450. Judge Gray disagreed with the majority's rejection of plaintiff's claim of injury to her feelings on the grounds that there was no common law precedent for such an action, stating:

[T]he proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity . . . if her face or her portraiture has a value, the value is hers exclusively, until the use be granted away to the public. Any other principle of decision, in my opinion, is as repugnant to equity as it is shocking to reason.

64 N.E. 442 (N.Y. 1902).

39. See *Canessa v. J. I. Kislak, Inc.*, 235 A.2d 62, 68 (N.J. Super. Ct. Law Div. 1962).

40. See N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2000).

41. 50 S.E. 68 (Ga. 1905). The unanimous opinion of the *Pavesich* court, written by Judge (FIRST NAME) Cobb, predicted that the previous failure of courts to recognize the right of privacy would be regarded by future courts in the same regard as the present judiciary regards the injustices of the Salem witch trials. He wrote:

So thoroughly satisfied are we that the law recognizes . . . the right of privacy . . . that we venture . . . to predict that the day will come when the American bar will marvel that a contrary view was . . . ever entertained by judges of eminence and ability . . . just as in the present day we stand amazed . . . that Lord Hale, with perfect composure of manner and complete satisfaction of soul, imposed the death penalty for witchcraft on ignorant and harmless women.

*Id.* at 80-81.

42. *Roberson*, 64 N.E. at 448.



of the plaintiff's picture in a newspaper advertisement for life insurance. The right of privacy gained stronger support subsequent to the publication of an influential article by Professor William L. Prosser.<sup>43</sup> Professor Prosser identified protection under the right of privacy to exist in four separate respects.<sup>44</sup> Professor Prosser's four-pronged model of the legal right of privacy was ultimately included in the *Restatement (Second) of Torts*.<sup>45</sup> From the Warren and Brandeis article emerged a solidly established legal right against the unauthorized use of an individual's name or likeness for the commercial benefit of another.<sup>46</sup>

## B. First Amendment Limitations on Individual Privacy Interests

### 1. The "Newsworthiness" Exception

Given the broad protection afforded under the First Amendment, an unauthorized use of identity must be "commercial" in order to violate the right of privacy. In *Lahiri v. Daily Mirror, Inc.*,<sup>47</sup> the Supreme Court of New York articulated the distinction between commercial and noncommercial uses for the purpose of determining violations of the right of privacy. Specifically, a use is commercial if it constitutes a "solicitation for patronage." On the contrary, a use of identity in any type of publication involving matters of current news or immediate public interest is considered noncommercial.<sup>48</sup> Therefore, when the use of identity is considered to involve a matter of public interest, a right of privacy claim must fail. In *Lahiri*, the plaintiff was denied recovery for invasion of privacy by misappropriation of identity against the defendant for the use of the plaintiff's photograph in connection with an article attempting to expose the "Hindu rope trick" as an illusion.<sup>49</sup>

As in *Lahiri*, the following cases illustrate permissible unauthorized uses of identity in connection with matters deemed "public interest."

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43. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

44. *Id.* at 401-05. According to Prosser, the right of privacy also protected against: (i) intrusion on physical solitude, (ii) public disclosure of private facts, (iii) placing the plaintiff in a false light in the public eye, and (iv) appropriation for the defendant's benefit of the plaintiff's name or likeness. *Id.*

45. RESTATEMENT (SECOND) OF TORTS § 652A-§ 652I (1977).

46. RESTATEMENT (SECOND) OF TORTS § 625C addresses appropriation of another's name or likeness for personal benefit.

47. 295 N.Y.S. 382, 386 (Gen. Term 1937).

48. *Id.* at 389.

49. *Id.* at 383. Plaintiff was a well-known Hindu musician and the photograph in question featured him playing a musical instrument as an accompaniment to a female dancer.

In *Arrington v. New York Times Co.*,<sup>50</sup> the plaintiff, a black male, could not recover against the defendant corporation, a newspaper publisher, for the unauthorized use of his photograph in connection with an article entitled "The Black Middle Class: Making It."<sup>51</sup> The article was considered a matter of public interest and the plaintiff was unable to show that his photograph bore no reasonable relationship to the article or that it was an advertisement in disguise.<sup>52</sup> In *Lerman v. Flynt Distributing Co.*,<sup>53</sup> an article misidentified the plaintiff<sup>54</sup> as the woman depicted in two illicit photographs.<sup>55</sup> The photographs were stills of a movie based on a book written by the plaintiff, which was the subject of the article. In *Jackson v. Playboy Enterprises, Inc.*,<sup>56</sup> three minor boys were also denied their invasion of privacy claims. An adult magazine pictured the three boys with a female police officer, along with several nude photographs of the police officer, in an article and layout entitled "Beauty and The Badge."<sup>57</sup> In each of the foregoing cases, despite the plaintiffs' assertions of a personal privacy interest, the publication at issue was entitled to the First Amendment "newsworthiness" exception because the use of identity was deemed to involve matters of public interest.

## 2. A Solicitation for Patronage

While the use of an individual's identity is wholly permissible so long as it is done for a "newsworthy purpose," if that use is found to be "commercial" in nature, it is unprotected. Such a "commercial" use, defined as a "solicitation for patronage," was found in *Flores v.*

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50. 434 N.E.2d 1319 (N.Y. 1982).

51. *Id.* at 1320; see also Richards, *supra* note 33, at 1579. Richards noted:

"Clarence W. Arrington, an attractive, well-dressed Black businessman, was walking down a street in Manhattan one day in 1978 when, without his knowledge or consent, his photograph was taken by a freelance photographer, Gianfranco Gorgoni. Arrington, at that time a financial analyst for General Motors, had done nothing to attract attention or to make himself a newsworthy figure. Gorgoni was working on an assignment for the *New York Times* to shoot pictures of middle-class Blacks to illustrate an upcoming article. Arrington fit the description." *Id.*

52. *Id.* at 1322-23.

53. 745 F.2d 123, 127 (2d Cir. 1984).

54. It should be noted that the plaintiff in this case was Jackie Collins Lerman, a well-known author. Although this Comment is intended to highlight the differences in treatment of private citizens and celebrities under privacy and publicity rights, the more concentrated focus of this particular section of the analysis is to demonstrate the sweeping range of the "newsworthiness" exception to right of privacy claims. As such, Ms. Collins's notoriety, while relevant, is incidental for the purpose of this case illustration.

55. *Lerman*, 745 F.2d at 127. In one photograph the woman was topless and in the other she was engaged in an orgy. *Id.*

56. 574 F. Supp. 10 (S.D. Ohio 1983).

57. *Beauty and the Badge*, PLAYBOY, May 1982, at 165.

*Mosler Safe Co.*<sup>58</sup> The *Flores* court held that the defendant's use of a newspaper article, which featured the plaintiff<sup>59</sup> as part of an advertisement for the defendant's safes, violated the plaintiff's right of privacy because the use qualified as a "solicitation for patronage."<sup>60</sup> In *Tellado v. Time-Life Books, Inc.*,<sup>61</sup> the plaintiff recovered for the unauthorized use of his picture in a brochure advertising the sale of historical books because the brochure constituted a solicitation for a commercial transaction.<sup>62</sup> The *Tellado* court specifically pointed out that, had the publication appeared in the books and not the brochure, there would be no violation of the plaintiff's right of privacy.<sup>63</sup> In *Beverley v. Choices Women's Medical Center, Inc.*,<sup>64</sup> the court held that a promotional calendar distributed by a nonprofit family planning center constituted a "solicitation for patronage" and, thus, the unauthorized use of the plaintiff's photograph<sup>65</sup> in such a calendar constituted an invasion of privacy.<sup>66</sup> The court in *Beverley* specifically noted that an "advertising message in the cloak of public interest" cannot escape liability for the invasion of privacy under the First Amendment protection for "newsworthy" publications.<sup>67</sup> These cases demonstrate that the privacy plaintiff can prevail when the use of identity is in connection with a publication that is overwhelmingly commercial in its nature and purpose.

### C. *Personal Privacy Right Waived by the Celebrity as a Public Figure*

Invasion of privacy through misappropriation of identity focuses primarily on the personal interest of the individual, protecting against injury to an individual's emotional well-being.<sup>68</sup> For instance, in *Co-*

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58. 164 N.E.2d 853 (N.Y. 1959).

59. The newspaper article and photograph depicted the plaintiff in an incident in which the plaintiff and an acquaintance accidentally set fire to a building by lighting matches in order to find a pair of lost keys in the dark. *Id.* at 854.

60. *Id.* at 857.

61. 643 F. Supp. 904 (D.N.J. 1986).

62. The picture depicted the plaintiff twenty years earlier, fighting in the Vietnam war. *Id.* at 914.

63. *Id.*

64. 587 N.E.2d 275 (N.Y. 1991).

65. The calendar included a photograph of the plaintiff, who was totally unaffiliated with the organization, and in the caption included both her name and her professional title. *Id.* at 277.

66. *Id.* at 278.

67. *Id.* at 279.

68. See *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 449 (N.Y. 1902) (Gray, J., dissenting) ("[T]he conspicuous display of her likeness . . . has so humiliated [plaintiff] . . . as to cause her distress and suffering, in body and mind.").

hen v. *Herbal Concepts, Inc.*,<sup>69</sup> a picture of the plaintiffs (a mother and her four-year-old daughter) bathing nude was featured in an advertisement for the defendant's cellulite removal product.<sup>70</sup> The court denied the defendant's motion for summary judgment. The *Cohen* court found that, although the photograph featured only the back side of the plaintiffs' figures, there were sufficiently identifiable details to sustain the plaintiffs' cause of action.<sup>71</sup> Even though the public at large would not likely identify the plaintiffs, the feelings of embarrassment constituted a legally cognizable injury and sustained a cause of action against the defendants.<sup>72</sup> Case law in this area continuously reflects the narrow purpose of this cause of action—to protect the personal and emotional interests of individuals against the unauthorized use of their identity for commercial purposes.<sup>73</sup>

Since the establishment of the right of privacy under common law, courts have recognized that, in certain instances, privacy rights may be unprotected because either the individual waived protection under this right, or the rights of the public or others necessarily prevail.<sup>74</sup> Because the basis of a right of privacy was injury to feelings, early courts denied relief to well-known personalities whose celebrity precluded injury to solitude.<sup>75</sup> For instance, in *O'Brien v. Pabst Sales Co.*,<sup>76</sup> a well-known football player was denied his claim under invasion of privacy for use of his photograph in a calendar advertising the defendant's beer. The *O'Brien* court held that the "publicity he got was only that which he had been constantly seeking and receiving"<sup>77</sup>

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69. 472 N.E.2d 307 (N.Y. 1984).

70. *Id.* at 308.

71. *Id.* at 310.

72. *Id.*

73. *See, e.g., Miller v. Madison Square Garden Corp.*, 28 N.Y.S.2d 811, 812-13 (App. Div. 1941) (denying the plaintiff, the last of the "pony express," his invasion of privacy claim for the use of his picture on a sports program for failure to state an actual injury and, contrarily, testifying that "the use of his name and picture by defendant had not subjected him to any ridicule nor caused him any humiliation whatever"); *see also Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194, 197 (Cal. Ct. App. 1955) (holding that plaintiff adequately stated a material injury to his "peace of mind"); *Bi-Rite Enters. v. Button Master*, 555 F. Supp. 1188, 1198 (S.D.N.Y.1983) (identifying the primary purpose of the right of privacy as protecting the feelings of the "little man").

74. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 72 (Ga. 1905); *see also Gautier v. Pro-Football, Inc.* 107 N.E.2d 485 (N.Y. 1952).

75. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995) ("Classification of the tort as an aspect of the right of privacy, however, led some courts to deny relief to well-known personalities whose celebrity precluded the allegations of injury to solitude or personal feelings normally associated with an invasion of privacy.").

76. 124 F.2d 167 (5th Cir. 1941).

77. *Id.* at 170.

and denied his claim against personal, emotional harm.<sup>78</sup> Other courts agreed that celebrities, by the public nature of their personas, were not entitled to protection under the appropriation prong<sup>79</sup> of the invasion of privacy tort. This tort protects emotional interests of the private individual who, unlike the celebrity, opts to enjoy life outside of the public spotlight.<sup>80</sup>

In *Gautier v. Pro-Football, Inc.*,<sup>81</sup> an individual who performed a half-time show for an audience of over 35,000 did not succeed under the right of privacy in an action against the unauthorized rebroadcast of that performance.<sup>82</sup> Still, the concurring opinion in *Gautier* recognized that the exclusion of public personas from the right of privacy leaves unprotected an important economic interest.<sup>83</sup> This important economic interest, unprotected by the invasion of privacy tort, is now protected under the "right of publicity."

#### D. *The Right of Publicity is Born*

Official recognition of the common law right of publicity emerged in 1953 when the United States Court of Appeals for the Second Circuit held that famous persons have the right to protection against the unauthorized use of their name and likeness existing independently

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78. *Id.* The court stated:

Throughout the pleadings, the record and the brief, plaintiff has uniformly taken the position that he is not suing for the reasonable value of his endorsement of beer, on the contrary, the whole burden of his pleading and brief is the repeated asseveration, that he would not and did not endorse beer, and the complaint is that he was damaged by the invasion of his privacy in so using his picture as to create the impression that he was endorsing beer.

*Id.* at 170.

79. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

80. See *Nimmer, supra* note 21, at 204-06; *Madow, supra* note 23, at 169; *Paramount Pictures, Inc. v. Leader Press, Inc.*, 24 F. Supp. 1004 (W.D. Okla. 1938), *rev'd on other grounds*, 106 F.2d 229 (10th Cir. 1939) (holding that movie star plaintiff could not claim that posters of her constituted an invasion of privacy); *Pallas v. Crowley-Milner & Co.*, 54 N.W.2d 595, 597 (Mich. 1952) (denying showgirl/model plaintiff's claim of invasion of privacy for the unauthorized use of her face in a newspaper advertisement for cosmetics where the court found it relevant to consider whether the plaintiff "abandoned her strictly private character and waived to any extent the right to absolute privacy").

81. 107 N.E.2d 485 (N.Y. 1952).

82. *Id.* at 489.

83. *Id.* at 489 (Desmond, J., concurring). The Court stated:

[Plaintiff's] grievance here is not the invasion of his "privacy" - privacy is the one thing he did not want, or need, in his occupation. His real complaint, and perhaps a justified one, but one we cannot redress in this suit brought under the New York "Right of Privacy" statutes, is that he was not paid for the telecasting of his show." *Id.* at 489.

*Id.* See also *Nimmer, supra* note 21, at 205 (discussing Judge Desmond's opinion and agreeing that surrender of privacy as a performer should not equate surrender of control of profits derived from that performance).

from the right of privacy.<sup>84</sup> In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*,<sup>85</sup> the plaintiff gum manufacturer entered into a contract with a major league baseball player granting the manufacturer the exclusive right to use the player's photograph in connection with gum sales.<sup>86</sup> The defendant was a competing manufacturer that then used the same player's image in the promotion of its own gum.<sup>87</sup> The defendants claimed that the contract only prevented the ball player from suing the original contracting manufacturer for invasion of privacy, yet did not allow the originally contracting gum manufacturer to sue a third party.<sup>88</sup> Judge Jerome Frank, writing for the majority, declared that the baseball player had a "right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture."<sup>89</sup> The court held that this right was independent of the player's right of privacy.<sup>90</sup> The next year, Professor Nimmer published an article advocating recognition of this right as a necessary protection against unauthorized appropriation of the economic value of an individual's likeness.<sup>91</sup> The existence of this right was further validated by its inclusion in the *Restatement (Third) of Unfair Competition*.<sup>92</sup>

### E. The Modern Right of Publicity

Today, the right of publicity exists in approximately twenty-eight states.<sup>93</sup> Some states recognize the right of publicity at common law,<sup>94</sup>

84. 202 F.2d 866, 868 (2d Cir. 1953).

85. *Id.* at 866.

86. *Id.* at 867.

87. *Id.*

88. *Id.* at 868.

89. *Id.*

90. *Haelan Labs.*, 202 F.2d at 868.

91. See Nimmer, *supra* note 21.

92. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995):

One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in §§ 48 and 49.

*Id.*

93. It is difficult to state the exact number of states which recognizing a "right of publicity" per se. See MCCARTHY, *supra* note 12, stating:

Sometimes [the right of publicity] is simply lumped together with privacy rights, sometimes it is referred to as "unfair competition," and sometimes a court said it didn't matter what the label was, it was the law.

*Id.* § 414.

94. *Id.* (listing Arizona, Alabama, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Mississippi, New Jersey, Ohio, Pennsylvania, Texas, Utah, and Wisconsin).

and some recognize the right explicitly in publicity statutes.<sup>95</sup> Other states,<sup>96</sup> such as New York, recognize the right of publicity inclusively within the context of the right of privacy.<sup>97</sup> Governance of the right of publicity under state law finds both support<sup>98</sup> and opposition, as many advocate federal statutory protection of this right.<sup>99</sup> Protection has been recognized under the right of publicity for a wide gambit of personal attributes, from name and likeness,<sup>100</sup> to voice,<sup>101</sup> phrases,<sup>102</sup> nicknames,<sup>103</sup> and look-alikes.<sup>104</sup> The Second Circuit recognized electronic look-alikes as elements of persona protectible under the right of publicity; the actors who played Norm and Cliff on *Cheers*<sup>105</sup> and Vanna White of *Wheel of Fortune*<sup>106</sup> recovered under the right of publicity within this context, in two important cases that will be addressed in further detail below.<sup>107</sup>

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95. *Id.* § 6:4 (listing California, Illinois, Indiana, Kentucky, Nevada, Ohio, Oklahoma, Tennessee, Texas, and Washington).

96. *Id.* § 6:8 (listing Florida, Massachusetts, Nebraska, New York, Rhode Island, Utah, Virginia, and Wisconsin).

97. NEW YORK CIVIL RIGHTS LAW §§ 50, 51 (McKinnley 2000). See generally Tara B. Molrooney, Note, *A Critical Examination of New York's Right of Publicity Claim*, 74 ST. JOHN'S L. REV. 1139 (2000).

98. See generally Usha Rodrigues, Note, *Race to the Stars: A Federalism Argument for Leaving the Right of Publicity in the Hands of the States*, 87 VA. L. REV. 1201 (2001) (arguing that introduction of this right would be premature given the number of states who have yet to adopt the right and the possibility of a workable state-based system).

99. See generally Richard S. Robinson, *Preemption, the Right of Publicity, and a New Federal Statute*, 16 CARDOZO ARTS & ENT. L.J. 183, 202-07 (1998) (advocating the introduction of a federal publicity statute to eliminate preemption, split circuits, and conflict of law problems and to promote predictability); see also Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 227 (1999).

100. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

101. See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). Singer Bette Midler succeeded in a right of publicity claim against Ford Motor Co., which used a "sound-alike" to imitate the singer in its commercial. *Id.* See also *Waitts v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992). Singer Tom Waitts succeeded in his publicity claim against defendant for using a "sound-alike" to imitate the singer in a chip commercial. *Id.*

102. See, e.g., *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983). Comedian Johnny Carson recovered against defendant corporation under the right of publicity for use of the phrases "Here's Johnny" and "The World's Foremost Comedian," which the court found to be included as part of Carson's identity. *Id.*

103. See *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979). Plaintiff, a football player known commonly by his nickname "Crazylegs" was able to recover under the right of publicity against the defendant for use of that name in connection with the defendant's line of disposable razors. *Id.*

104. See *Onassis v. Christian Dior, Inc.*, 472 N.Y.S.2d 254 (Spec. Term. 1984) (holding that the right of publicity protected the plaintiff, Jacqueline Kennedy Onassis, from the use of a look-alike model intended to invoke her image in the defendant's fashion advertisement).

105. See *Wendt v. Host Int'l, Inc.*, 197 F.3d 1284 (9th Cir. 1999).

106. See *White v. Samsung Elecs. Am.*, 971 F.2d 1395 (9th Cir. 1992).

107. See *infra* notes 172-181 and accompanying text.

The right of publicity has been broadly interpreted and expanded. Some states have recognized that the right of publicity is descendible.<sup>108</sup> Successors to the publicity rights of famous persons such as the actors who played The Three Stooges,<sup>109</sup> the Marx Brothers,<sup>110</sup> and Elvis Presley,<sup>111</sup> enforced claims against unauthorized use of the identity of these celebrities. Indeed, the right of publicity has received broad recognition in both statutory and common law.

The right of publicity emerged in modern law as a vitally important legal interest, particularly to those whose image constitutes a coveted marketable commodity. Since its introduction into the modern legal system, countless celebrities have asserted this claim against the unauthorized use of identity. While some individuals such as Jacqueline Onassis,<sup>112</sup> Cary Grant,<sup>113</sup> Mohammad Ali,<sup>114</sup> and Clint Eastwood<sup>115</sup> defeated the free speech assertions brought in defense against such claims, other famous persons, such as Dustin Hoffman,<sup>116</sup> were unable to defeat the First Amendment when claiming right of publicity violations. Civil rights icon Rosa Parks is currently challenging the unauthorized use of her name as the title of a rap song as a violation of her right of publicity against the artists' First Amendment defense.<sup>117</sup>

The roots of the right of privacy and the right of publicity are intertwined, yet through this lineage, two distinct causes of action have emerged in American jurisprudence. Given the powerful role of the media and instant accessibility of images through modern technology, the right of publicity, as well as the right of privacy, should be reassessed to ensure that the burdens endured and the protections received under the First Amendment are properly accorded to all.

### III. ANALYSIS

As discussed in the preceding section, private citizens asserting claims under the misappropriation of identity tort must assert a personal emotional harm. Celebrities, having "waived" this personal

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108. See MCCARTHY, *supra* note 12, § 9:18 (listing California, Florida, Illinois, Indiana, Kentucky, Nebraska, Nevada, Ohio, Oklahoma, Tennessee, Texas, Virginia, and Washington).

109. See *Comedy III Prods., Inc. v. Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

110. See *Groucho Marx Prods., Inc. v. Day & Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982).

111. See *Estate of Elvis Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981).

112. See *Onassis v. Christian Dior Inc.*, 472 N.Y.S.2d 254 (Spec. Term.1984).

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

114. See *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

115. See *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983).

116. See *Hoffman v. Capital Cities, Inc.*, 255 F.3d 1180 (9th Cir. 2001).

117. See *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003).



emotional interest in privacy, must assert an economic harm under the right of publicity.<sup>118</sup> Yet in claims of both privacy and publicity rights, the issue is not only the purpose for which the right is invoked, but also the use to which the identity is put.<sup>119</sup> Oftentimes, the use at issue is a hybrid of both commercial and expressive elements.<sup>120</sup> While both rights relate to the “commercial” use of the plaintiff’s identity, courts employ different interpretations of what constitutes an actionable commercial use when looking at these two independent rights.

Courts seem to favor a broader interpretation of “commercial” speech when evaluating right of publicity claims, whereas broader deference to the First Amendment is granted in invasion of privacy claims under the “newsworthiness” defense.<sup>121</sup> In a right of publicity context, courts have attempted to establish clear guidelines for applying a balancing approach to determine what constitutes a “commercial” use in publicity claims. It is established that explicitly commercial speech is undeserving of First Amendment protection against a right of publicity claim. Still, courts seem to broaden the scope of what constitutes commercial speech beyond the established minimum that when the “message is ‘buy’ the content is labeled ‘commercial’”<sup>122</sup> when assessing claims brought under the right of publicity. This is problematic for two reasons: 1) this may pose a direct threat to cultural parody; and 2) there may be a legal distinction being drawn inadvertently based on the status of the individual asserting a claim.

This section will discuss three concerns raised in considering publicity and privacy law in modern American culture: 1) that the overriding societal interest in freedom of expression often eclipses genuine and compelling personal privacy interests asserted by private individuals; 2) the comparatively expansive parameters of the right of publicity as it is primarily applicable to celebrities; and 3) the resultant danger of disparate treatment of similar claims on the basis of fame. Exploration into each of these issues addresses the difficulties and peculiari-

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118. See Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People in the Media*, 88 YALE L.J. 1577, 1588 (1979) (discussing the contradictory nature of the word “privacy” when applied to claims brought by famous persons).

119. See Kahn, *supra* note 16, at 221.

120. See Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 152 (“Such uses include situations that involve a mixture of commercial and political, informational, entertainment, or other expressive components.”).

121. See *infra* notes 127-132 and accompanying text.

122. See MCCARTHY, *supra* note 12, § 8:17.

ties of this important amalgam of privacy, property, and constitutional law.

A. *The Right of Privacy: Bearing the Burden of the First Amendment*

There is an inherent conflict between the right of privacy and the First Amendment, as the right of privacy directly impinges upon the free dissemination of ideas. Particularly in regard to news publications, the First Amendment freedom of the press has been given weighty deference in right of privacy claims.<sup>123</sup> Corollary to the reverence in American law and culture of the freedom of the press is the established principle that commercial speech is entitled to minimal First Amendment protection.<sup>124</sup> It is the differentiation between commercial and noncommercial speech that creates the hurdle for individuals asserting both privacy and publicity claims. Courts have broadly and, at times, inconsistently construed the parameters of what constitutes a “commercial” use when applied to the identity of celebrities, whose fame generally guarantees that unjust enrichment occurs whenever and wherever the costly authorization for use of their well-known identity has not been obtained.<sup>125</sup> However, private individuals cannot always establish the requisite unjust enrichment.<sup>126</sup> Pursuant to the deference to “newsworthy” uses in assessing right of privacy claims, individuals who assert such claims often must endure personal and emotional detriment that yields only negligible social benefit.

1. *The Right of Publicity Escapes the Newsworthiness Exception*

The defining distinction between privacy and publicity claims is that the right of publicity protects a *proprietary* and not a personal interest

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123. See *Time, Inc. v. Hill*, 385 U.S. 374, 383-84 (1967) (analyzing a claim of false light invasion of privacy). Footnote 5 of the Court’s opinion cites twenty-two cases in which the right of privacy was defeated by the overriding interest in freedom of the press. at 383 n.5.

124. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562-63 (1980).

125. See *infra* notes 160-181 and accompanying text.

126. See, e.g., *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527 (9th Cir. 1984). In this case, a photograph of the plaintiff, created by use of special effects to appear as though he was shooting himself through the head, was featured in the defendant’s magazine publication. The court denied the plaintiff in his common law right of publicity claim for failure to establish that the use served a commercial purpose. The Ninth Circuit Court of Appeals stated that the right of publicity “means in essence that the reaction of the public to name and likeness, which may be fortuitous or which may be managed or planned, endows the name and likeness of the person involved with commercially exploitable opportunities.” *Id.* at 530 (quoting *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979)) (internal quotation marks omitted). The court, although basing its finding on the non-commercial purpose of the use, additionally found that the reaction of the public to the plaintiff’s likeness does not endow him with commercially exploitable opportunities, the “essence” of the right of publicity. *Id.* (quoting *Lugosi*, 603 P.2d. at 431).

in one's identity, protecting against *economic* but not emotional harm.<sup>127</sup> This is the core explanation for the disparate treatment of celebrities and noncelebrities asserting unauthorized commercial use of identity. This rationale supports the transferability and descendibility rights recognized in statutes and common law.<sup>128</sup> The discussion of cases in the previous section involved private individuals asserting claims under the right of privacy who were unable to defeat the broad scope of the "newsworthiness" exception. Each of the uses of identity at issue in these cases was published in a periodical. The case of *Eastwood v. National Enquirer, Inc.*<sup>129</sup> illustrates how an opposite result can be achieved when a celebrity plaintiff brings a right of publicity claim for the use of identity within this same context of news or public interest-related publications.

In *Eastwood*, popular film star Clint Eastwood brought suit against the defendant publishing corporation for violation of his right of publicity. The magazine had used Eastwood's name and likeness on the cover of a publication and in telecast advertisements promoting a nondefamatory article of which he was the subject.<sup>130</sup> The court held that the use constituted commercial exploitation and was not entitled to First Amendment protection.<sup>131</sup> Specifically, the *Eastwood* court based its determination on "a weighing of the private interest of the right of publicity against matters of public interest calling for constitutional protection, and a consideration of the character of these competing interests."<sup>132</sup> The court's weighing of Mr. Eastwood's publicity interest is clearly distinguishable from the stringently applied First Amendment exception for all newsworthy publications discussed in the aforementioned privacy cases. This case suggests that the celebrity who asserts a claim of unjust enrichment under the right of publicity has more leverage in prevailing against the conflicting First Amendment interest than a private individual who can only defeat a free speech defense if he or she suffers a personal injury due to a wholly commercial use of identity.

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127. See Kwall, *supra* note 10, at 197. As Professor Kwall explains:

the right of privacy has served as a means of compensating an individual for injured feelings caused by the defendant's conduct. In the typical right of publicity action, however, the plaintiff is not objecting primarily to the *fact* of the exploitation, but rather to the *loss of financial gain* associated with the unauthorized appropriation.

*Id.*

128. See *infra* notes 48-59 and accompanying text.

129. 198 Cal. Rptr. 342 (Ct. App. 1983).

130. *Id.* at 344.

131. *Id.*

132. *Id.* at 349-50.

As stated by the court in *Arrington*, "an inability to vindicate a personal predilection for privacy may be part of the price every person must pay for a society in which information and opinion flow freely."<sup>133</sup> While it is evident that the average individual living in modern society must bear some of the intrusion of overriding free speech interests, the ability of Mr. Eastwood to defeat this principle, and the liberal protection afforded to the use of noncelebrity images discussed above suggests that the well-known and the anonymous do not equally share this "price."

## 2. *The Necessary Evil of the "Reasonable Relationship" Standard*

Private individuals face a more daunting task when the absence of commercial value in their persona precludes the possibility of success under the right of publicity. Specifically, the "reasonable relationship" standard for determining whether the use of a photograph in connection with a publication qualifies as "newsworthy" is problematic for unsuspecting private citizens. In *Arrington*,<sup>134</sup> Mr. Arrington found the content of the article to which his photograph was attached insulting and degrading not only to black persons of middle class status, but to himself in particular.<sup>135</sup> He expressly disagreed with the ideas espoused in the article discussing the role of the expanding black middle class that stated, "[T]his group has been growing more removed from its less fortunate brethren."<sup>136</sup> He also suffered significant emotional injury as he was the subject of scorn and ridicule by others who assumed his endorsement of the article by virtue of the associated photograph.<sup>137</sup> Still, because a reasonable relationship existed between Mr. Arrington's picture and the subject of the article, the article itself was not "an advertisement in disguise," and therefore the court would not sustain a claim for invasion of privacy.<sup>138</sup>

Similarly situated to Mr. Arrington were the plaintiffs in *Jackson v. Playboy Enterprises, Inc.*<sup>139</sup> Like Mr. Arrington, these three minor boys were unaware that their presence outside the private domain of their home would subject them to publication of their picture without their authorization, much less in a pornographic magazine. The *Jackson* court held that the plaintiffs could not state a valid claim of invasion of privacy under Ohio law without showing that the defendant

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133. *Arrington v. New York Times Co.*, 434 N.E.2d 1319, 1323 (N.Y. 1982).

134. *Id.*

135. *Id.* at 1320.

136. *Id.*

137. *Id.*

138. *Id.* at 1322.

139. 574 F. Supp. 10 (S.D. Ohio 1983).

appropriated for its own benefit some value contained in the plaintiffs' identity.<sup>140</sup> Because the three young boys in *Jackson* could not demonstrate that their likenesses were intrinsically valuable, the use was considered "incidental" and recovery was denied.<sup>141</sup> The boys' assertions that they were "humiliated, annoyed, disgraced [and] exposed to public contempt and ridicule" could not overcome the countervailing interest in free speech.<sup>142</sup>

Mr. Arrington was publicly associated with an article that espoused a particular political and social commentary which, as the subject of the attached photograph, he opposed.<sup>143</sup> The three minor boys in *Jackson* were featured in a pornographic magazine, a specific genre of publications to which neither these boys, nor presumably their parents, wished to be affiliated.<sup>144</sup> These cases demonstrate the potentially devastating effects that may befall those who endure uninvited notoriety through no intentional actions of their own. The plaintiffs in both *Arrington* and *Jackson* had no connection to the articles to which their identities were affixed, other than a tangential link to the subjects of the articles. While the reputational injury to the individual is a sacrifice the law is willing to impose for the price of free speech, in some instances this principle is unsettling to a personal sense of privacy, anonymity, and control over public affiliation.

Indeed, the idea that one can encounter such a fate simply by virtue of being in the wrong place at the wrong time and appropriately fitting the desired visual accompaniment to a publication or other fixed expression that another individual wishes to create, has dangerous implications in this day of mass communication. The visual age has spawned an entire industry from the consumer demand for captured moments of actual human activity.<sup>145</sup> Although the modern cultural fascination with fame manifests itself both inwardly and outwardly, in that many members of society are not only obsessed with popular culture icons but themselves desire to experience the spotlight of public notoriety,<sup>146</sup> it is undeniable that many individuals shun the voyeuristic eye of the camera.

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140. *Id.* at 13.

141. *Id.*

142. *Id.*

143. *Arrington*, 434 N.E.2d at 1322-23.

144. *Jackson*, 574 F. Supp. at 11.

145. *See supra* note 11 and accompanying text.

146. Evidence to this proposition is provided to the ceaseless influx of individuals who not only volunteer but in many instances compete for the opportunity to appear on television reality programs and daytime panel shows.

For instance, it is possible to imagine a scenario in which an individual, a postadolescent, young-adult female could find a photograph of herself taken while vacationing on spring break published in connection with an article discussing the lucrative industry that has evolved from the mass marketing of amateur home movies depicting young college-age women in various stages of undress or engaged in sexually explicit activities.<sup>147</sup> Assume, for purposes of this illustration, that this is a cultural phenomenon in which she has never participated and from which she is otherwise entirely detached. Given the modicum of circumstances associating her to those individuals who are involved in the practices described in the article, (namely her age and her presence in the vacation atmosphere wherein these occurrences take place) her photograph would have a reasonable relationship to a newsworthy publication. That is, if this hypothetical exposé specifically discussed the trend amongst this particular demographic to which this girl belongs, to engage in such activities while on spring break, there would be a reasonable relationship between the girl and the article such that she could not maintain a claim under the right of privacy. As discussed in detail above, when there is an arguable newsworthy or public interest purpose involved with the use of the identity of an individual who is peripherally connected to the subject of the publication, freedom of speech will likely prevail.

In fact, at least one court has held that a young woman who was actually featured in one such video and the commercial advertising its sale, without authorization, could not assert a right of publicity claim. In *Lane v. Holdings, LLC*,<sup>148</sup> a young woman who was featured exposing herself in the video *Girls Gone Wild*<sup>149</sup> and in paid television commercials advertising the video<sup>150</sup> brought suit against the film makers and distributors alleging *inter alia* violation of her common law right to privacy, as well as her statutory right under Florida law against unauthorized publication of name and likeness.<sup>151</sup> The court granted summary judgment for the defendants on both claims, holding

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147. The model business upon which this hypothetical is based is the extensively advertised video series *Girls Gone Wild*. The subject of this collection of movies, sold via phone orders and advertised during late night commercials, is the candid sexually explicit behaviors of young college girls while vacationing, spontaneously filmed in the style of amateur home video. The girls are advertised as "real" in that they are not paid actresses, the implication being that their actions are a product of their own volition and not any pre-designed plot or script. These movies have gained substantial notoriety in pop culture, both for the significant success they have attained within their own market, and for the attention and commentary they have provoked.

148. 242 F. Supp. 2d 1205 (M.D. Fla. 2002).

149. See *supra* note 147.

150. *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205, 1210 (M.D. Fla. 2002).

151. FLA. STAT. ANN. § 540.08 (West 2003).

that "as a matter of law [the plaintiff's] image and likeness were not used to directly promote a product or service."<sup>152</sup> The court based its reasoning on the fact that *Girls Gone Wild* was an expressive work and that, while the girl's image and likeness were used to sell the work, they were never associated with a product or service unrelated to that work.<sup>153</sup> It is also significant that the district court determined that the young girl "voluntarily participated" in the acts she performed in the film and commercial,<sup>154</sup> despite the plaintiff's allegation that the defendants fraudulently misled her into participating.<sup>155</sup> Still, the uneasy distinction between what is sufficiently "commercial" to invoke the right of privacy and what constitutes a permissible non-commercial use is evident, particularly when the young girl's image is featured in an actual television "commercial."

In addition to the limited definition of "commercial" use in right of privacy cases, the other element of the fourth prong of invasion of privacy, "benefit to the defendant," is likewise narrowly construed. In granting weighty deference to "newsworthy" uses of an individual's identity, courts narrowly interpret the "commercial use" or "defendant's advantage"<sup>156</sup> element of the misappropriation tort to mean a direct benefit resulting from an invitation to make a commercial transaction.<sup>157</sup> Any revenue the publication generates as a whole is irrelevant in determining whether the use was commercial for the purpose of finding a violation of the right of privacy by misappropriation of identity. The value of the identity, as compliment to the underlying message, is not taken into account. Although there is a profit being made at some level, individuals who seek vindication of their right of privacy cannot affect recovery without a showing that the sole purpose of the alleged use was to sell a product.<sup>158</sup> While the rationale for the deference to free speech is valid,<sup>159</sup> the result is that those who publish and otherwise create anything of arguable public interest or newsworthy quality are allowed to use an individual's identity in connection with such a publication, without permission or compensation.

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152. *Lane*, 242 F. Supp.2d at 1213

153. *Id.*

154. *Id.*

155. *Id.* at 489.

156. *See* PROSSER, *supra* note 35, at 389.

157. *See supra* notes 60-69 and accompanying text.

158. *See* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) ("Profit motive alone does not make speech less protected.").

159. *But see* Kahn, *supra* note 16, at 258. Kahn argues that the inquiry does not necessarily need to involve an analysis of free speech; in dealing with misappropriation, newsworthy speech is upheld not because it constitutes an overriding free speech issue, but because, by definition, it is not the commercialization of the plaintiff's identity, which is the sole issue under this tort. *Id.*

### B. *Expansive Publicity Rights Triumph Over the First Amendment*

The competing interest preventing the unauthorized use of identity and the free dissemination of information is evaluated differently when claims are based on violations to the economic value of a persona implicated by the right of publicity than when evaluated under privacy claims. While the exception for “newsworthiness” still applies in right of publicity cases,<sup>160</sup> at times publicity claims have been successful in cases in which a substantial newsworthy or other free speech interest has been advanced. Specifically, works using celebrity personas that could reasonably be deemed “expressive” have been denied free speech protection when the associative value of celebrity image derives a commercial benefit.<sup>161</sup> There are various explanations for this trend in publicity cases.<sup>162</sup> A look at the judicial methods employed in determining whether a use of identity is sufficiently commercial to sustain a right of publicity cause of action compared to those employed in privacy claims will illuminate the implications of excluding private individuals from protection under the right of publicity and will introduce the correlation between this right and modern American culture.

#### 1. *Comedy III Productions, Inc. v. Saderup, Inc.*

As mentioned in the previous section, successors to the publicity rights of the late comedy trio, the Three Stooges, succeeded in a right of publicity claim for the unauthorized use of the Three Stooges’ images in *Comedy III Productions, Inc. v. Saderup, Inc.*<sup>163</sup> The *Comedy III* court employed the following two-pronged analysis to determine whether the defendant’s use of the late celebrities’ images on t-shirts violated their right of publicity: 1) if the use in question involves no significant transformative elements to the identity of the plaintiff; or 2) if the value of the work derives primarily from the fame of the plaintiff, the First Amendment interest will be defeated by the

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160. See *Ann-Margaret v. High Soc’y Magazine, Inc.*, 498 F. Supp. 401 (S.D.N.Y. 1980) (denying recovery to actress Ann-Margaret for invasion of her right of publicity for use of her image in a “newsworthy” publication); *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302 (9th Cir. 1992) (denying plaintiffs, a well-known musical group, their claim of commercial and common law misappropriation of identity for use of their name in two newspaper publications in promotion of a telephone poll).

161. See *supra* notes 163-181 and accompanying text.

162. See *Fletcher & Rubin, supra* note 118, at 1606 (arguing the failure of privacy and publicity claims stems from the inadequate confrontation of the First Amendment, and the unsound reasoning employed in determining a legal conclusion that these rights exist, but not a clear legal explanation for why they exist).

163. 21 P.3d 797 (Cal. 2001).



plaintiff's proprietary interest in his or her right of publicity.<sup>164</sup> Because the use of the image of the late Three Stooges on the t-shirts was not transformative and derived its value primarily from the fame of the celebrities,<sup>165</sup> the *Comedy III* court held that the defendant had violated the plaintiff's right of publicity. As such, the defendants violated the right of publicity even though the court expressly declared the character of the use as "expressive."<sup>166</sup>

According to the *Comedy III* court,

when artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.<sup>167</sup>

As such, expressive use of identity constitutes commercial speech, not entitled to First Amendment protection, if it is deemed nontransformative. This standard is significantly less stringent than the "solicitation for patronage" standard in claims of invasion of privacy. Each of the failed privacy claims discussed above involved a literal depiction of the aggrieved plaintiff. Whereas the burden is on the plaintiff in the right of privacy case to demonstrate that the identity is used in connection with a proposed transaction, in right of publicity cases, the burden is on the defendant to demonstrate that the expressive use of the identity is sufficiently transformative.

## 2. Estate of Elvis Presley v. Russen

The successors of Elvis Presley's publicity rights brought a successful right of publicity claim against the producer of a stage show featuring an Elvis impersonator in *Estate of Elvis Presley v. Russen*.<sup>168</sup> The court held that the defendant's performance lacked the requisite creativity to make the work transformative and the plaintiffs were therefore entitled to compensation for the unauthorized use of identity.<sup>169</sup> The court held that "although [the show] contains an informational and entertainment element, the show serves primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society."<sup>170</sup> The expressive work of the defendant, which certainly would have qualified for First Amendment pro-

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164. *Id.* at 801.

165. *Id.*

166. *Id.* at 802.

167. *Id.* at 809.

168. 513 F. Supp. 1339 (D.N.J. 1981).

169. *Id.* at 1359.

170. *Id.*

tection against a claim of invasion of privacy, did not withstand the judicial test applied to the right of publicity.

The notion that impersonation of a deceased entertainer who was and is undeniably one of the most revered performers in American history could be precluded without financial compensation to the successors of that individual's publicity rights is troubling on several levels. Not only does this result suffocate legitimate and significant artistic expression, it does so solely for the economic benefit and protection of persons whose only claim to the identity is derived from a testamentary transfer of economic interest. The protection of these interests seems less imperative than promoting important forms of social commentary and artistic expression such as parody. As Professor Michael Madow states, "[t]he traditional presumption in favor of free appropriability of intangibles rests in part on the widespread sense that progress in all spheres of human activity—science, business, art—depends on imitation, and thus requires that people be largely left free to 'reap' where others have 'sown.'"<sup>171</sup>

### 3. *White v. Samsung Electronics, Inc. and Wendt v. Host International, Inc.*

Two right of publicity cases mentioned earlier, which strike at the very chord of this tension between the right of publicity and the First Amendment, have attracted considerable attention and commentary for their controversial results. In these cases, courts extended protection under the right of publicity to electronic look-alikes. In *White v. Samsung Electronics, Inc.*,<sup>172</sup> the offending use involved an electronic robot clad in a blonde wig and turning over letters on a game board resembling that used in the popular game show, *Wheel of Fortune*.<sup>173</sup> The United States Court of Appeals for the Ninth Circuit held that this use violated Vanna White's common law right of publicity.<sup>174</sup> The court placed little value in the speech, denying the use protection as an expressive work of parody, holding: "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.'"<sup>175</sup>

In dissent, Judge Alex Kozinski argued that this expansive scope of the right of publicity and failure to accord protection under the First Amendment to this use of identity has dangerous implications for

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171. Madow, *supra* note 23, at 201.

172. 971 F.2d 1395 (9th Cir. 1992).

173. *Id.* at 1396.

174. *Id.* at 1399.

175. *Id.* at 1401.

both law and society.<sup>176</sup> He wrote: “[T]he effect of the majority’s holding on expressive conduct is difficult to estimate. The majority’s position seems to allow any famous person or entity to bring suit based on any commercial advertisement that depicts a character or role performed by the plaintiff.”<sup>177</sup> The dissenting opinion reflects a legitimate concern that broad interpretation of “commercial” exploitation of identity will have a damaging impact on the freedom of expression.

In *Wendt v. Host International, Inc.*,<sup>178</sup> a proprietor of a chain of airport bars, modeled after the set of the television series *Cheers*, featured animatronic figurines intended to resemble the characters “Norm” and “Cliff” from the popular television sitcom. As in *White*, the Ninth Circuit trivialized the expressive value of the speech and characterized the evocation of the actors’ identities as commercial exploitation.<sup>179</sup> Again, Judge Kozinski provided an ardent dissent, advocating the countervailing interest of free speech.<sup>180</sup> Judge Kozinski characterized the use as “expressive” and maintained that the overreach of the right of publicity in impinging on the First Amendment is an undesirable and dangerous application.<sup>181</sup>

Each of the cases discussed above demonstrates how an overbroad interpretation of the right of publicity can stifle legitimate and important forms of expression. Incorporation of pop culture into personal expression has been used as a form of social commentary throughout time. To allow individuals and entities to exert excessive control over the use of identity whenever a viable economic loss can be established has dangerous First Amendment implications and must be narrowly and consistently construed.

### C. *The Right of Publicity Plaintiff: Theory Versus Practice*

Given the different criterion for establishing a “commercial” use, private individuals asserting a claim against the unauthorized use of their identities for the defendant’s commercial purposes are at a significant disadvantage because they will have to establish an “exclusively commercial” use in order to succeed in their claims. First Amendment protection is more readily granted to “newsworthy” or

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176. *Id.* at 1402-08.

177. *Id.* at 1407.

178. 197 F.3d 1284 (9th Cir. 1999).

179. *Id.* at 1288.

180. *Id.* at 1284 (Kozinski, J., dissenting). A petition for rehearing en banc was denied by a panel of circuit judges.

181. *Id.* at 1288.

“public interest” related uses, and the private individual is unlikely to defeat the First Amendment interests under the right of privacy. However, the celebrity claiming a right of publicity violation need only show lack of transformative contribution and unjust enrichment. Privacy only protects from a personal injury and then only in limited instances in which the offending user has no viable constitutional argument. For the aggrieved individual, the right of publicity would seem to be the more attractive avenue of relief,<sup>182</sup> as it encompasses all aspects of the injury and has a somewhat lesser standard of establishing “commercial use” so long as unjust enrichment can be established.

Based on these distinctions, it would seem that the most promising option for private individuals seeking to recover for the unauthorized use of their identity would be to bring a cause of action under the right of publicity. Professor Thomas McCarthy affirms that “even for the non-celebrity whose identity is used without permission in an ad, it is usually preferable to use the right of publicity rather than [to assert] a privacy claim.”<sup>183</sup> Professor Nimmer specifically declined to “draw a line” between individuals who have achieved celebrity status and those who have not,<sup>184</sup> and most statutes do not preclude noncelebrities from protection under the right of publicity.<sup>185</sup> The inclusion of all individuals under the ambit of protection provided by the right of publicity has found much academic support. Professor Roberta Rosenthal Kwall, a proponent of the continuing growth and development of the right of publicity, advocates for the concept of a universal right of publicity plaintiff.<sup>186</sup>

The inequity lies in the fact that, just as celebrities are generally precluded from claiming invasion of privacy by misappropriation of identity, the right of publicity, in practice, is primarily *limited to* celebrities.<sup>187</sup> In practice, the nature of a right of publicity claim, as an

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182. Kwall, *supra* note 10, at 200 (“[N]o other law affords equal scope of protection against the unauthorized exploitation of the individual’s name and likeness.”).

183. See Kahn, *supra* note 16, at 244 (quoting Joseph McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 134 (1995)) (internal quotation marks omitted).

184. See Nimmer, *supra* note 21, at 217.

185. See J. Thomas McCarthy, *Public Personas and Private Property: The Commercialization of Human Identity*, 79 TRADEMARK REP. 681, 684 (1989) (labeling the right of publicity “the inherent right of every human being to control the commercial use of his or her identity”).

186. See Kwall, *supra* note 10, at 200-04.

187. See Arlene W. Langvardt, *The Troubling Implications of a Right of Publicity: Wheel Spun Out of Control*, 45 U. KAN. L. REV. 329, 339 n.61 (1997) (arguing that “this statutory right of action is supplemented by a common-law right of publicity that as a practical, if not legal, matter seems limited to celebrities”) (citations omitted); see Halpern, *supra* note 23, at 1200 n.3.; Eric

action against unjust enrichment, precludes private individuals from succeeding absent an economic benefit to an unauthorized user through use of the identity without compensation to the owner of the identity. As such, the right of publicity is “peculiarly celebrity based, arising only in the case of an individual who has attained some degree of notoriety or fame.”<sup>188</sup> Although private individuals have recovered on the theory of a right of publicity,<sup>189</sup> the overwhelming majority of right of publicity litigation involves celebrity plaintiffs.<sup>190</sup>

The unavoidable fact is that it is the commercial value of the celebrity plaintiff’s identity that gives rise to the cause of action.<sup>191</sup> Because average private individuals cannot readily demonstrate that the defendant’s use of their identity derived value from their fame, the individuals cannot recover. Although there is a presumption of commercial value once it is found that the defendant used the plaintiff’s identity for commercial purpose,<sup>192</sup> courts are reluctant to afford commercial value to the identities of noncelebrities.<sup>193</sup> The result is that unjust enrichment persists due to the absence of right of publicity claims brought by noncelebrities. As discussed in the preceding sec-

H. Reiter, *Personality and Patrimony: Comparative Perspectives on the Right to One’s Image*, 76 TUL. L. REV. 673, 718-19 (2002) (“[W]hile all individuals enjoy a right to privacy, and while everyone in theory is entitled to the protection of the patrimonial aspects of their personality, recourse is primarily via privacy for the anonymous, via patrimonial injury for the famous.”).

188. See Halpern, *supra* note 23, at 1200 n.3.

189. See, e.g., *Canessa v. J. I. Kislak*, 235 A.2d 62 (N.J. Super. Ct. Law Div. 1962). The plaintiffs recovered for the defendant real estate agent’s unauthorized use of a photograph of the plaintiffs’ family in an advertisement. The picture was the subject of a newspaper article on the plaintiffs, who were a large family unable to find a home to rent due to their numbers. After viewing the print, the defendants helped the family to buy a house. *Id.* at 64. Although the plaintiffs did not specifically invoke the right of publicity, it is clear that the claim was for the failure to compensate the family financially and not for the reprint of the photograph that they had purposefully participated in for the purpose of gaining exposure for their predicament.

190. See, e.g., Laurel Kallen, Note, *Invading the “Homes” of the Homeless: Is Existing Right of Privacy/Publicity Legislation Adequate?*, 19 CARDOZO ARTS & ENT. L.J. 405, 414 (noting that “non-celebrities file only a small number of right of publicity actions.”); Langvardt, *supra* note 172, at 339 (“[R]ight of publicity cases nearly always involve celebrity plaintiffs.”).

191. See Langvardt, *supra* note 187, at 339. Langvardt stated:

Of the possible reasons for this state of affairs, two stand out. First, many advertisers and other commercial users may prefer to invoke a celebrity’s image rather than that of a non-celebrity, due to the greater commercial “mileage” to be realized from association with a celebrity. Second, the celebrity plaintiff’s potential economic stakes are likely to be higher than those of the non-celebrity plaintiff, thanks to the greater commercial value of the celebrity’s name, likeness, or identity. Celebrities thus have greater opportunity and greater incentive to sue - and they act accordingly.

*Id.*

192. See McCARTHY, *supra* note 12, § 4:17.

193. See Kallen, *supra* note 190, at 414 n.62 (“[T]he operative assumption in right of publicity cases is that the commercial value of a non-celebrity’s identity would generally be significantly less than the commercial value of a celebrity’s identity.”) (citations omitted).

tion, it is exceedingly difficult to defeat First Amendment assertions in claiming a violation under the right of privacy in the face of the newsworthiness exception. Moreover, at least as a practical matter, the right of publicity is closed to private individuals. As such, the possibility of vindication for private individuals whose identity has been used without their permission is uncertain, and many times unavailable.

It is arguable that the exclusion of noncelebrity plaintiffs from right of publicity protection is not the only arguable deficiency in the hybrid of protection of identity created through privacy and publicity rights. That is, just as private individuals are often denied economic interest in their identity, celebrity plaintiffs are denied express protection for their personal emotional rights.<sup>194</sup> As discussed, courts have historically regarded celebrities' personal emotional interests in their privacy as a negligible legal concern. The emergence of the right of publicity was occasioned by the judicial determination that persons who have pursued fame should not be able to obtain legal recourse for every unintended or unwanted consequence that may result from that fame.<sup>195</sup> This does, however, raise the issue of those individuals whose notoriety is of an infamous nature. For example, consider the tornado of international press resulting in the commercial production of various commodities surrounding the sex scandal involving a former United States President and a well-known White House intern. Would it be fair to say that for at least some of those individuals, their fame was nothing more than the public spotlight they sought for themselves? It is the opinion of this author that a person does not waive a privacy interest by virtue of having attained fame, whether achieved or unintentionally begotten.

Still, the fact that the personal rights of celebrities are excluded from right of privacy protection is of little impact because these personal emotional interests are frequently subsumed under publicity rights, and it is often these personal interests, and not the desire for economic recovery, that motivates celebrity plaintiffs to bring claims under the right of publicity.<sup>196</sup> For instance, actor Cary Grant recovered for a personal harm under the right of publicity in *Grant v. Es-*

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194. See generally Kahn, *supra* note 16 (arguing for express recognition of the dignitary interest of celebrities within the right of publicity).

195. See *supra* notes 69-83 and accompanying text.

196. See Kahn, *supra* note 16, at 264 (“[C]ourts’ considerations of privacy-based identity harms are usually entangled with and largely subsumed by their analyses of the property-based rights of publicity.”); see also Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 50 (1994). (arguing that economic harms are typically far less damaging to celebrities than “non-monetizable” harms resulting from uses that they would never have condoned).

*quire, Inc.*<sup>197</sup> Although the actor's purpose in bringing suit was to vindicate an emotional harm rather than an economic loss, as he asserted that he did not want "anyone—himself included—to profit by the publicity value of his name and reputation,"<sup>198</sup> the court held that the harm was commercially based and that the actor could be made whole by the payment of damages.<sup>199</sup> Jacqueline Onassis sued for the use of a look-alike in advertising the Christian Dior clothing line.<sup>200</sup> Because Mrs. Onassis had never used her name or image in the promotion of a commercial product, her purpose was not recovery of lost economic profit,<sup>201</sup> evidenced by the fact that she sought only injunctive relief and not monetary damages. Similarly, heavyweight champion Mohammed Ali brought suit under the right of publicity for the appearance of a nude drawing of himself in a sexually explicit magazine.<sup>202</sup> It is reasonable to assume that Mr. Ali did not bring suit because of an economic harm suffered in not being paid for the use, but for the personal harm suffered through his association with a publication of this nature.

In a more recent decision, the United States Court of Appeals for the Sixth Circuit reversed summary judgment entered against renowned Rosa Parks, civil rights activist who sued the popular group OutKast under the common law right of publicity for using her name as the title for one of the group's hip hop songs.<sup>203</sup> Ms. Parks, revered for her influential role in the Montgomery bus boycott and the civil rights movement in the south, expressed her disapproval of the misogynistic and racial overtones of the song.<sup>204</sup> The *Parks* case demonstrates the intersection of the foundational principles of both the right of privacy and the right of publicity; Ms. Parks asserted her personal interest under her economically based right of publicity.<sup>205</sup>

197. 367 F. Supp. 876 (S.D.N.Y. 1973).

198. *Id.* at 880.

199. See Kahn, *supra* note 16, at 235-36.

200. *Onassis v. Christian Dior, Inc.*, 472 N.Y.S.2d 254 (Spec. Term. 1984).

201. *Id.* at 257.

202. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

203. *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003). OutKast released a song called "Rosa Parks" on its album "Aquemini." *Id.* at 442. The chorus of the popular song alluded to Ms. Parks' legacy for her historical refusal to give up her seat on a Montgomery, Alabama city bus: "Ah-ha, hush that fuss, everybody move to the back of the bus." *Id.* at 442.

204. *Parks*, 329 F.3d at 442. "The same sticker that contained the name *Rosa Parks* also contained a Parental Advisory warning of 'explicit content.'" *Id.*

205. The Sixth Circuit Court of Appeals remanded the case to the district court to make a determination as to whether or not the question of whether Ms. Parks' common law right of publicity was violated should be made by the trier of fact and not on summary judgment as a matter of law. Summary judgment on her defamation claim and both her tortious interference with a business relationship claims was upheld. *Id.* at 463. *Parks*, 309 F.3d at 461.

Each of these cases demonstrates the ability of celebrities, whose exclusion from protection under the right of privacy prompted the emergence of the right of publicity, to achieve economic recovery for the same personal interests that right of privacy courts determined public figures could not assert. In essence, celebrities, motivated by dignitary interests and a desire to vindicate the integrity of their identity, are able to effect this vindication by virtue of the economic value of their identity and the courts' desire to prevent unjust enrichment.<sup>206</sup> Indeed, the prevention of unjust enrichment is a noble legal pursuit. However, while the dignitary interests involved in the right of privacy are subsumed in celebrity right of publicity claims,<sup>207</sup> unjust enrichment interests are not subsumed under privacy claims. Even if they were, such claims are exceedingly difficult to sustain in a world of mass media and broad deference to the First Amendment. Personal interests are subsumed under publicity claims, allowing for redress of both economic and personal injury.<sup>208</sup> The scope of this right expands to protect the whole individual, as a marketable commodity and as an autonomous entity, in control of his or her own public depiction. The difficulty a private individual has in succeeding in an economically based claim brought under the right of publicity has led to disparate treatment of claims brought for essentially the same interest.

#### IV. IMPACT

The Supreme Court of California articulated the inherent conflict between individual privacy and freedom of speech, stating, "In a nation built upon the free dissemination of ideas, it is always difficult to declare that something may not be published."<sup>209</sup> Indeed, free speech interests provide a strong countervailing interest to the enforcement of the right of privacy.<sup>210</sup> While the unrestricted dissemination of

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206. See Kahn, *supra* note 16, at 214.

207. See Kahn, *supra* note 16, at 264.

208. *Id.* at 214.

209. See *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 42 (Cal. 1971). This case dealt with a claim dealing with the "false light" element of the invasion of privacy. The plaintiff in this case, whose picture connected with a hijacking incident that had occurred eleven years earlier was published in a newspaper, had stated a valid cause of action under the false light invasion of privacy tort. *Id.*

210. See generally FRED H. CATE, *PRIVACY IN PERSPECTIVE* (2001) (warning of the implications of broadly applicable privacy laws and the need to clearly tailor laws with proper concern for the obligations they impose and the duties they are designed to serve). The Supreme Court of California ordered the trial court to overrule its order granting defendant magazine's general demurrer without leave to amend, finding "the great general interest in an unfettered press may at times be outweighed by other great societal interests" and that a "jury could reasonably find that plaintiff's identity as a former hijacker was not newsworthy." *Id.* at 541.



information is undoubtedly one of the most sacred and narrowly circumscribed principles in American law, inevitably there are instances in which the public good involved in the release of the information is negligible, while the personal injury to the individual subject is severe. The hefty weight of the newsworthiness exception effectively precludes most claims of invasion of privacy by misappropriation of identity,<sup>211</sup> absent a showing of an exclusively commercial purpose, even though there may be an arguable commercial element in the use, or at least a negligible social value.<sup>212</sup>

If this susceptibility to unwanted publicity and notoriety is the cost of a society in which freedom of speech is held sacred, then it must be endured. However, it must be endured by all individuals and not alleviated when the individual can assert that, by virtue of his or her fame, any marginally commercial use of identity constitutes a recoverable economic loss for that individual. Part III discussed three primary claims of this Comment: 1) the average person faces severe difficulty in establishing that a less than blatantly commercial use of identity should result in recovery under the right of privacy; 2) the free speech interest is overridden more readily when a showing of unjust enrichment is achieved in the context of the right of publicity; and 3) the typical right of publicity plaintiffs are the celebrities, whose economic value in their own identities is presumed by nature of their fame. These contentions lay the basis for the impact of this Comment. The current state of the dichotomy between privacy and publicity enforces the strict, though essential, restrictions of the First Amendment against the average individual. Yet, famous persons recover for uses of identity that have significant noncommercial merit. This disparity not only threatens the social and cultural necessities of commentary and parody, it exacerbates the existing economic and cultural dominance of the famous individual in American culture.

#### A. *Cultural Significance of a "Wheel Spun Out of Control"*<sup>213</sup>

The right of publicity is the legal response to a culture of mass media commercialism and associative valuation of celebrity. There are differing theories on why the right of privacy developed to preclude

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211. See Theodore L. Glasser, *Resolving the Press-Privacy Conflict: Approaches to the "Newsworthiness" Defense*, in *PRIVACY AND PUBLICITY: READINGS FROM COMMUNICATIONS IN THE LAW 2*, at 17 (Theodore R. Kupferman ed., 1990) (In reality it is nearly impossible for an individual to demonstrate invasion of privacy when virtually everything published is considered "news" and therefore privileged.).

212. See WILLIAM ZELERMYER, *INVASION OF PRIVACY* 105 (1959) ("[P]ublic curiosity is not public interest.").

213. See Langvardt, *supra* note 190.

claims based on economic harm to celebrities. Professor Sheldon Halpern argues that celebrity itself was not a commodity at the time the right of privacy was created.<sup>214</sup> On the other hand, Professor Michael Madow argues that the commodification of celebrities has existed since the eighteenth century,<sup>215</sup> and that it is only society's valuation of this commodification that has given the economic right of publicity legal effect.

It has been suggested that the phenomenon of fame, as in the condition of being celebrated, is inherent in human interpersonal relations, an ancient centralizing device separating the leaders from the tribe.<sup>216</sup> The prominence of the right of publicity is undoubtedly correlative to the modern societal system of mass media commercialization,<sup>217</sup> and perhaps the modern fascination with celebrity. As Professor Kwall states, it is "not surprising that our obsession with fame and our reverence for celebrities have given rise to a unique doctrine designed to protect against unauthorized attempts to utilize famous personas."<sup>218</sup>

The emergence, development, and expansion of the right of publicity are directly attributable to the modern fascination with and commodification of celebrities. As this Comment argues, the right of publicity—particularly in its practical exclusion of private individuals unable to make a claim of economic harm—can lead to disparate treatment between famous and unknown individuals. Different treatment of famous and anonymous people, especially under the law, has dangerous implications to modern culture and the potential creation of *une nouvelle forme d'aristocratie* (a new form of aristocracy).<sup>219</sup>

This "aristocracy" populates every facet of daily life in American mass media culture. From the newsstand to the television to everyday public discourse, the American people are ceaselessly inundated with images of the rich and beautiful. The widespread acceptance by the general public of the societal role of the celebrity, including the immense compensation, the luxurious lifestyle, and the frequent exceptional treatment by various societal institutions that many celebrities

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214. See Halpern, *supra* note 23, at 1205.

215. See Madow, *supra* note 23, at 148. Madow explains that in 1774 Josiah Wedgwood created a series of medallions as well as many household objects featuring the faces of famous men of the time, such as Benjamin Franklin. *Id.*

216. See JAMES B. TWITCHELL, *ADULT USA: THE TRIUMPH OF ADVERTISING IN AMERICAN CULTURE* 131 (1996).

217. See Kahn, *supra* note 16, at 214 (stating that the emergence of the right of publicity "is perhaps to be expected in a world where seemingly everything has been turned into a saleable commodity").

218. See Kwall, *supra* note 8, at 2.

219. See Reiter, *supra* note 187, at 718 (citing Gregoire Loiseau, *Des droits patrimoniaux de la personnalite en droit francais*, 42 *MCGILL L.J.* 319, 327 (1997)).

enjoy, reflects a pervasive understanding in American culture that the famous are entitled to more than the average person.

Objections to the cultural reverence for fame and celebrity, although justifiable, do not alleviate the difficulties surrounding the tension between the right of publicity and the First Amendment. As Professor Halpern states, "in postulating the kind of society we might like—one in which fame does not have economic value apart from the activity that creates the notoriety . . . we should not blind ourselves to reality."<sup>220</sup> Given that "reality," it is the responsibility of the law to prevent overexpansion and abuse of the legal interest in the economic value of a persona that has been granted through the right of publicity.

### B. *Balancing the Scales*

The inequities between modern right of privacy law, the legal cause of the common person, and the modern right of publicity, the right of the celebrity, can be envisioned each as two weights balancing on a scale. While the rights of private individuals who assert privacy claims are drawn downward by the weight of the First Amendment, the right of publicity is less encumbered by this strain. Contributing to the elevated position of the right of publicity is the availability of the theory of unjust enrichment in countering the protection of the First Amendment, a legal theory often available only to those individuals who can demonstrate an economic value in their own persona. In order to balance the scale more evenly, the overly broad deference to the right of publicity must be narrowly and consistently construed when the use involved is only marginally commercial and significantly expressive. Additionally, the unjust enrichment theory would need to be applied to the use of the identity of the private unknown individual without consent for a negligible social and significantly commercial purpose.

#### 1. *Narrowing the Right of Publicity to Allow Expressive Use of Identity in Parody and Social Commentary*

In her criticism of the Ninth Circuit's decision in *White*,<sup>221</sup> Professor Arlene W. Langvardt terms the overexpansive right of publicity granted in this decision a "wheel spun out of control."<sup>222</sup> She maintains that an overly broad protection under the right of publicity "threatens freedom of expression by furnishing little acceptable notice

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220. See Halpern, *supra* note 23, at 1235.

221. 971 F.2d 1395 (9th Cir. 1992).

222. See generally Langvardt, *supra* note 187.

of what will or will not violate the celebrity's property right and by making parodists and others engaged in commentary especially vulnerable to liability."<sup>223</sup> The expansion of the right of publicity and the corollary reflection on modern culture demonstrate the need to tailor this right to the specific purposes for which it is meant to serve and to ensure protection for the average person under the same theory of unjust enrichment justifying recovery for famous individuals.

2. *Distributing the "Benefit to the Defendant" to the Injured Individual; Compensating Private Individuals*

Cultural commentator and author Neal Gabler writes, "while an entertainment-driven, celebrity-oriented society is not necessarily one that destroys all moral value as some would have it, it is one in which the standard of value is whether or not something can grab and hold the public's attention."<sup>224</sup> Because the selling power of the private individual's identity is not necessarily realized, unauthorized use does not create unjust enrichment. But this economic construction may not be applicable from the viewpoint of the nonfamous plaintiff. That is, if there is a financial benefit to the unauthorized user that can in some way be directly linked to use of the particular image, provided the use is significantly commercial and not entitled to the complete First Amendment protection of an expressive work, should an individual whose identity is appropriated be entitled to some economic contribution?

The concept of compensating individuals for use of identity, outside of a clearly delineated exception for newsworthy and expressive uses, is not impracticable. It can be understood as an extension of a modeling transaction in which an advertiser, or other party soliciting a commercial transaction, purchases the use of the desired persona. While this transaction will take the form of legal remedy, and therefore have more of the character of a *de facto* modeling contract, it will nonetheless provide some form of legal vindication for a violation of both the privacy and publicity rights. The private individual, whose identity may not have the readily identifiable value of that of a famous person, may claim violation of the right of publicity on the same unjust enrichment theory employed by celebrities because the defendant will have received "free some aspect of the plaintiff that would have a market value and for which he [or she] would normally pay."<sup>225</sup>

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223. *Id.* at 440.

224. See GABLER, *supra* note 8, at 8.

225. See Kalven, *supra* note 206, at 331.

Because the same theory of unjust enrichment applies to both celebrities whose economic value of identity is evident by virtue of their fame, and private individuals whose economic value can be assumed by virtue of the fact that unknown individuals are frequently paid for their contribution of identity, both should be entitled to recovery under the right of publicity. This notion of just compensation draws from the property and liability approach Professor Kwall advocates, which awards damages for publicity claims rather than any sort of injunctive relief, so as not to thwart the purposes of the First Amendment.<sup>226</sup> This right would effectively provide vindication of both personal and economic interests.<sup>227</sup>

## V. CONCLUSION

From its beginning, the parameters of the right of publicity were not expressly clear nor were its theoretical entanglements with the right of privacy precisely severed.<sup>228</sup> These deficiencies<sup>229</sup> have led to the confusion and disagreement that plagues the current state of the law governing the right of individuals against unauthorized use of their names and likenesses for commercial purposes. One of the foremost criticisms of the right of publicity has been the inexact nature of the scope of this right.<sup>230</sup> Still, the right of publicity undeniably exists and comparing it to the right of privacy is essential in understanding the reality of its applicability and impact. As the right of publicity remains clouded with confusion, reevaluation of the purposes for which it is invoked, the uses it addresses, and its relation to the right of privacy is in order.<sup>231</sup> The differing requirements of the personal right

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226. See generally Kwall, *supra* note 196.

227. For further support and detail, see McCARTHY's discussion of a "right of identity" concept which incorporates both publicity and privacy interests. See McCarthy, *supra* note 12, § 1:39.

228. See Kwall, *supra* note 10, at 254. In an analysis of the emerging right of publicity, Professor Kwall warns against the danger involved in failing to make a clear delineation between these two rights stating, "If the right of publicity is to function as an independent legal doctrine, its limitations must be defined without reference to the right of privacy." *Id.*

229. See generally Madow, *supra* note 23 (arguing against legal recognition of the right of publicity through criticism of its foundational legal and cultural principles as well as its application in case law).

230. See generally Langvardt, *supra* note 187 (arguing against the over-expansive statutory and common law interpretations of the right of publicity).

231. See Haemmerli, *supra* note 25, at 389. Haemmerli stated:

The timing is propitious for an overhaul of the right of publicity. Existing doctrine remains in a state of disarray that leaves room for wrongs without remedies, despite its characterization as a field of 'settled' law, with a 'self-evident' philosophical basis. Existing practice is equally confused, with fifty state regimes protecting differing aspects of identity, for varied terms, and with disparate remedies. As the right has become

against invasion of privacy and the economic harm of the right of publicity reflects a denial of rights to certain individuals who can neither assert a privacy right due to the public nature of their identities nor recover under the right of publicity absent a showing of economic harm.<sup>232</sup> However, this area of the law is in the process of defining itself and its scope. As Professor McCarthy states:

[T]he history of the right of publicity is hardly over. Like a statute emerging from the formless block of stone, it is still rough-hewn. Much work remains before we will have a legal right of polished contours. And like any legal right, it will never be "finished." It remains for each generation to adapt it to their own society and values.<sup>233</sup>

It is essential in this modern-day age of mass media that the lines drawn by the right of publicity are clearly delineated and evenhandedly distributed so as to balance the competing interests of personal control over the commercial use of one's image and the principle of free speech. The alternative course of action is to become a culture guilty not only of allowing an undeserved economic windfall for the rich and famous, but one that also denies the average person, asserting a similar claim, any recourse under the law.

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more important in economic terms, the need to reassess it, reformulate it, and legislate it at the federal level has become concomitantly more pressing.

*Id.* (citations omitted).

232. *Id.* at 233. Professor Kahn argues that, despite the prominence of the property-based analysis of appropriation applied to the right of publicity, they remain entwined with the identity-based personal interests of the integrity of the persona. *Id.*

233. See MCCARTHY, *supra* note 12, § 1:38.

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