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The Reification of Celebrity: Persona as Property

George M. Armstrong Jr.

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> A federal court jury today awarded blues singer Tom Waits $2.475 million Tuesday in his suit against Frito-Lay Inc. and its ad agency, finding that they illegally impersonated his voice for a radio jingle to advertise a new corn chip.
>
> UPI May 8, 1990

Litigation which concerns a celebrity always attracts the attention of the public. Recent decisions in which Bette Midler and Tom Waits vanquished defendants who imitated their craft for advertising purposes are examples.[1] The public's attention in such cases usually lights upon the amount of money at issue, the aggressive tactics of ad agencies, or the putative threat to advertisers' creative freedom. Newspaper and even academic commentary are typically most interested in the effect of these decisions on the advertising and entertainment industries. Rarely does the public read about the broader implications of these decisions, about the meaning of these cases in late twentieth century America.

Few readers of the popular press would learn that these cases are the culmination of one hundred years of legal evolution. Only two decades ago a celebrity had no cause of action against an advertiser who imitated her voice.[2] Until the 1970's any commercial value associated with celebrity was personal to the star and entered the public domain at death. As recently as the early 1950's celebrities could not assign the right to use their name and likeness.[3] At the beginning of this century the law denied relief even to the living person whose name or likeness was the object of illicit appropriation.[4]

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* Editor's Note: Professor Armstrong was in the process of completing this article prior to his death. Because he was unable to concur in any textual changes, it is presented here with only technical editing to preserve the author's intent.

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1. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); The case of Waits v. Frito-Lay, Inc. is unreported.

2. Sinatra v. Goodyear Tire and Rubber Co., 435 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S. 906, 91 S. Ct. 1376 (1971).

3. Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816, 74 S. Ct. 26 (1953) is usually considered the progenitor of the right to publicity. It is the first case to hold that the assignee of a right of persona might enjoin a trespasser.

4. Dockrell v. Dougall, 78 L.T.R. 840 (Q.B. 1898); Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).

Clearly the law affords more protection to the commercial value of celebrity status now than at any previous time. Celebrity persona has become a heritable, alienable "thing" from which the owner may arbitrarily exclude others. In other words, it has become property. The *Waits* and *Midler* decisions merely flesh out the content of the right of persona, adding the star's intangible "style" to the more specific attributes of name and likeness.

The right of persona has acquired the form of property incrementally over the course of this century. This article explores how and why this process occurred. By showing how celebrity persona has become property, I will lay out the gradual accretion of characteristics such as the right to exclude and alienate usually associated with property. My purpose is to remind my colleagues who teach in this area that property is always the fruit of evolution; but the right to exclude others from land, chattels and even inventions crystallized so long ago that we lose sight of the process and see only the product.

My explanation of why the law now recognizes property in persona is necessarily more conjectural. It involves the history or marketing and mass media, the evolution of technology and changing concepts of value. I suggest these and allied historical processes, developments which I shall call collectively "commodification," are always responsible for the creation of property. I anticipate the reply that analysis of this type is merely history and of no practical interest to the lawyer. In response I maintain that nothing is of more practical value to a student whose career may span half a century than an understanding of why the law changes.

What is Property?

If we leave aside Proudhon's incomparable dictum that "property is robbery,"[5] we see that authoritative definitions have significant differences which we may attribute to the customs and technology of the time. The Siete Partidas of Alfonso the Wise, framed in eleventh century Castile, define ownership as "the power which a man has over his own property to do with it, and in it whatever he desires to do, without violation of the law of God or those of the country."[6] Subsequent passages expand this definition to include the right to collect and enjoy fruits and the right to alienate. Alfonso's emphasis on the right of unfettered use is common to many other statements of the right of

5. P. Proudhoun, What is Property 38 (1902).
6. Las Siete Partidas, Part. III, Tit. XXVIII, Law I, (Scott translation 1931).

ownership.[7] It reflects the technology of an earlier age in which owners in fact had few options of use: planting, pasturage and building. Limitations on the use of property became commonplace only in this century as technology allowed owners to undertake increasingly obnoxious activities on their land.

Absent from Alfonso's definition and from most others prior to the twentieth century is any mention of the right to exclude, the characteristic which most modern writers claim is the hallmark of property. Morris Cohen, a recent theorist of the regulated economy, wrote that "the essence of private property is always the right to exclude others."[8] C.B. Macpherson also recognizes that the right to exclude is central to the modern concept of property.[9] Because Macpherson's political program urges the redefinition of property to encompass the right *not* to be excluded from forms of value which he describes as common goods, his observations on the right to exclude are particularly interesting. "From Plato to Bodin, theorists could talk about common property as well as private."[10] Modern writers, however, have lost sight of this tradition.

If legal theorists have substituted the right to exclude for the unfettered right of use as the defining characteristic of property, this development may be the consequence of evolution in the legal treatment of ownership itself. The growth of the regulatory state and its limitations of the right to use property are obvious to everyone as the New Deal approaches its fiftieth anniversary. What is less apparent, because it is historically removed, is the evolution of the right to exclude. The Siete Partidas did not mention this right because it hardly existed in the Middle Ages. A brief examination of Castillian society demonstrates that privately owned land was secondary in importance to the common property of towns and that the right to exclude was severely restricted even on individual land.

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7. Code Napoleon art. 544: "Property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes." (Hunter ed. 1824) Proudhoun wrote that property "expresses the right of absolute control over a thing by a free and intelligent being." P. Proudhoun, supra note 5, at 80.

8. Cohen, Property and Sovereignty, in C. Macpherson, Property 159 (1978). Compare the definition of ownership in the Napoleonic Code in the preceding note with the German Civil Code adopted a century later. Art. 903: The owner of a thing may, to the extent that it is not contrary to the law or the rights of third persons, deal with the thing as he pleases and exclude others from any interference. BGB art. 903 (Rothman 1975) French commentators have also begun to emphasize the right to exclude at the expense of the right of use. "[Ownership] is the right by virtue of which a thing is subject perpetually and exclusively to the acts and will of a person." 3 Planiol et Ripert, Traite pratique de droit civil francais 220 (2d ed. Picard 1952).

9. Id. at 202.

10. Id.

Municipal land of the towns included a variety of forms of common use. *Ejidos* were open for recreation and grazing, *montes* provided firewood, nuts, fruit and wild vegetables, and *prados*, the highest grade of land, offered rich pasture.[11] Towns also acquired prescriptive rights to *baldias*, land which the crown captured in the Christian reconquest of the Iberian peninsula.[12] Owing to occasional purchases and frequent encroachment, municipal land ownership grew in importance until the nineteenth century.

Some municipal property was set apart for individual cultivation. Styled *entradiza* because laborers acquired rights to this land by entering it, this form of tenure was quite fragile.[13] It also illustrates the medieval principle that people consolidate and maintain property rights by productive use. The duration of *entradiza* tenure was the life of the laborer and his spouse, but the passing of a year and a day without cultivation extinguished these rights. At the death of the last surviving spouse, tenure passed to the first person who entered the land.[14] Not surprisingly children often concealed the death of their parents, even denying them last rights, until they could take possession.

Privately owned land also was open to the community in many instances. Strangers might legally gather plants and nuts anywhere so long as they were the fruit of nature exclusively and not of husbandry.[15] Moreover, the owners' right to exclude from lands of private cultivation lasted only during the growing season.[16] From about September to May landless peasants enjoyed grazing rights on privately owned land throughout Castile. Animal deposits of manure were compensation for any inconvenience to the landowner.

Finally, the guild of itinerant drovers, the *Mesta*, possessed virtually unimpeded rights of passage for migratory sheep flocks.[17] Their biannual transit across the length of the peninsula was severely annoying to the cultivators whose crops the sheep destroyed. Because of the central importance of wool production to the economic program of monarchs of the old regime, the rights of migratory herders finally grew to the point where the drovers might traverse without charge any land on which

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11. D. Vassberg, Land and Society in Golden Age Castille, 26-40 (1986). See also Jerome Blum, The European Village as Community: Origins and Functions, 45 Agriculture History 157-158 (1971); 1 The Cambridge Economic History of Europe (Agrarian Life in the Middle Ages) (1966); C. Smith, Western Mediterranean Europe: A Historical Geography of Italy, Spain and Southern France since the Neolithic, 35-37, 89-91, 239-256 (1979).

12. D. Vassberg, supra note 11, at 6-10.

13. Id. at 41-42.

14. Id.

15. Id. at 55-56.

16. Id. at 13-18.

17. Id. at 79-83.

the herds had ever trespassed. Disputes between landowners and the *Mesta* were resolved by an official of the guild, causing many aggrieved cultivators to complain of the monarchs' partiality toward sheep owners.

Similar arrangements existed in England where common lands were open for public grazing. At least from the time of Henry VII owners in fee strove to enclose these commons for pasture or cultivation. The Tudor kings steadfastly opposed enclosure because of the unemployment and dislocation it caused. Their first efforts were indirect. Statutes of 1488 and 1489 required tenants to maintain all buildings necessary to keep the land in cultivation or the lord of the fee might enter and take one-half the profits until the buildings were repaired.[18] Enormous social pressure supported enclosure, however, for the people responsible for constructing the fences were usually men of society's governing class. Holdsworth observes that in the sixteenth century government was able to act against enclosure of pasture only when distraught laborers threatened the civil peace.[19]

A number of statutes of the sixteenth century required owners of the fee to provide some compensation to laborers who lost their rights in the common, but landowners ignored the laws. In 1624 the government repealed them all.[20] The result, according to Holdsworth, was an increase in the price of land. "The common field systems left little scope for the energies of an interprising man. It was otherwise under the new system under which compact farms were managed by one person."[21]

In the late seventeenth century landowners began to obtain private acts of Parliament authorizing the enclosure of commons upon little or no compensation for the people dispossessed. The reign of Queen Anne saw only two such statutes, but Parliament enacted sixteen under George I, 226 under George II and 3,360 during the years of George III.[22] Holdsworth observed that "new economic theorists were beginning to stress the absolute rights of the owners of property, and the economic advantage of allowing them the fullest power to develop it."[23] Blackstone is a transitional figure in this process. He explains that mankind once had only a transient attachment to land so that "no part of it was the permanent property of any man in particular;"[24] (he provides no dates) but "when mankind increased in number, craft and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very

18. 4 W. Holdsworth, History of English Law, 365 (1977).
19. Id. at 367.
20. Id. at 366.
21. Id. at 371.
22. 2 W. Holdsworth, History of English Law, 625 (1977).
23. Id. at 456-57.
24. 2 W. Blackstone, Commentary on the Laws of England, 3 (Reprint 1966).

substance of the thing to be used."[25] Elsewhere Blackstone writes of this "sole and despotic dominion which one man claims and exercises over the external things of this world, in total exclusion of any other individual in the universe."[26]

Perhaps Blackstone is so adamant because his doctrine is less dispassionate analysis and more advocacy for the enclosure process. Enclosure continued for another century. An act of 1845 allowed fencing of all remaining common land and termination of all public grazing rights;[27] but even in the late twentieth century the English public retains significant rights in privately owned land. Public footpaths of 108,000 miles crisscross private farms.[28] Self-appointed guardians of these paths are vigilant to prevent private interference with these rights. The Wall Street Journal observes that footpaths are the last "of many common privileges." Evidently Blackstone adhered to an ideology of exclusive rights which was somewhat ahead of its time.

Commodification of Value

In this section I examine the dialectical relationship of the ideology of exclusivity for land and other "things" and the growth of market exchange.

The legal doctrine of ownership as exclusive rights is both a consequence of and a stimulus to market exchange. The dialectical character of this relationship consists of the mutual reinforcement for one another which the ideology and the social process of exchange provide. Marx first recognized this process by which values acquire the legal characteristics necessary for fluid movement in the market. He described this process in *Capital* as the creation of commodities.

> It is only by being exchanged that the products of labour acquire, as values, one uniform social status, distinct from their varied forms of existence as objects of utility.[29]

Lukács[30] and Pashukanis[31] perceived the centrality of comodification in Marx's philosophy. We are indebted to Pashukanis in particular for applying this theory to the study of law.

Marx traces the origins of the commodity to the replacement of self-sufficient production and barter with sales as a means of supplying

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25. Id. at 4.
26. Id. at 2.
27. 13 W. Holdsworth, History of English Law, 353 (1977).
28. Wall Street Journal, May 7, 1990, at 1, col. 4.
29. K. Marx, Capital, reprinted in The Marx-Engels Reader, 321 (R. Tucker ed. 1978).
30. G. Lukács, History and Class Consciousness (1971).
31. E. Pashukanis, Law and Marxism (1989).

life's necessities. Although people have always been aware of the use-value of these items, the exchange of food, clothing, tools and other items through the intermediary money gave these items a new, apparently objective characteristic: exchange value.

> A commodity is therefore a mysterious thing, simply because in it the social character of men's labour appears to them as an objective character stamped upon the product of that labour; because the relation of the producers to the sum total of their own labour is presented to them as a social relation, existing not between themselves but between the products of their labour.[32]

Historical research reveals that this process has expanded over the centuries. The replacement of the natural economy by market exchange occurred nowhere overnight and proceeded at varying rates in different societies. Supply of necessities through the market did not crowd out subsistence production in most western societies until the nineteenth century. Thomas Jefferson observed the predominance of the natural economy as late as the time of the Revolution writing, "[w]e never had any interior trade of any importance . . . we have manufactured within our families the most necessary articles of clothing."[33]

Land was a static resource until about the same time. Many factors including mortmain, entail, strict settlement, family tradition, the absence of real estate tax, and the abundance of land on the frontier conspired to keep it out of commerce. So long as land remained a static resource, the elaborate net of community rights described earlier was no great hindrance to its use. When land became an object of commerce, however, these community rights diminished its exchange value because they engendered substantial uncertainty as to exactly what the purchaser was acquiring. As Pashukanis observed, "Feudal property's chief failing in the eyes of the bourgeois world lies not in its origin (plunder, violence), but in its inertia, the fact that it cannot form the object of a mutual guarantee by changing hands through alienation and acquisition."[34] Land could not become an object of commerce until the central legislatures of western Europe usurped from local customary law the authority to define who had access to property. The defect of custom from the standpoint of the bourgeoisie was not only the extent of community use, the fractured nature of ownership, but also the enormous variation in these rights from place to place.[35]

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32. K. Marx, supra note 29, at 320.
33. 16 T. Jefferson, The Papers of Thomas Jefferson 290 (J. Boyd ed. 1961).
34. E. Pashukanis, supra note 31, at 123.
35. Id. at 119.

The law relating to land acquired a new character—the right to exclude—as a consequence of purchasers' desire to establish with certainty, under uniform, strict rules enforced by courts, the exact content of their purchase.

> If then, development [of property] began from appropriation . . . this relation was transformed into a legal one as a result of needs created by circulation of goods, primarily that is, by buying and selling. . . . The establishment of permanent markets created the necessity for settling the question of right of disposal over commodities, and hence for property law.[36]

The commodification of value is a slow historical process. Earlier we saw that land in England acquired the characteristics which modern law associates with property over the course of centuries. For the purpose of our analysis, this process has two important attributes. First, the gradual replacement of the natural economy by market exchange encourages the legal system to endow ever more different forms of value with the characteristics of property. In a previous work I showed how inventions became property in our society during the nineteenth century.[37] Second, the expansion of commodification to include ever more forms of value fosters an ideology supportive of this process so that stable ownership, the right to exclude and to alienate, are no longer the characteristics of some forms of value, they are a social expectation for all forms of value.[38] Professor Powell offers support for this interpretation when he remarks, "a new opportunity for property rights arises whenever technological advances, or social changes, reveal a new scarcity."[39]

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36. Id. at 122. "[P]roperty ceases to be unstable, precarious, purely factual property which may at any moment be contested and have to be defended, weapon in hand. It is transformed into an absolute, fixed right which follows the object wherever chance may take it." Id. at 115. C.B. Macpherson writes, "As rights in land became more absolute, and parcels of land became freely marketable commodities, it became natural to think of the land itself as the property . . . . [The change was] that previously unsaleable rights in things were now saleable; or, to put it differently, that limited and not always saleable rights *in* things were being replaced by virtually unlimited and saleable rights *to* things." Macpherson, The Meaning of Property, in C. McPherson, Property 7 (1978).

37. See Armstrong, From the Fetishism of Commodities to the Market: The Rise and Decline of Property, 82 Northwestern Univ. L. Rev. 79 (1987).

38. "Just as the capitalist system continuously produces and reproduces itself economically on higher and higher levels, the structure of reification progressively sinks more deeply, more fatefully and more definitively into the conciousness of man." G. Lukács, supra note 30, at 93.

39. 1 R. Powell & P. Rohan, Powell on Real Property at 26. See also Radin, Justice and the Market Domain, in Nomos XXXI, Markets and Justice 167 (1989). ("Under universal commodification, all things desired or valuable . . . are goods or commodities.").

Csaba Varga, a student of Lukács', explains that reification, the transformation of value into things, integrates "an ever increasing portion of the natural-social environment of the law into the system of legal control."[40] As commodity production and exchange become increasingly important, the legal prerequisites for exchange "become the natural premises . . . of all social intercourse."[41] Pashukanis wrote that market exchange has even influenced ethical philosophy, that the liberal concept of the individual as autonomous, egoistical and an end in himself is a consequence of the notion that people are bearers of subjective rights and that the notion of subjective rights arose in the market.[42] "Only the continual reshuffling of values in the market creates the idea of a fixed bearer of such rights."[43]

The notion that we who live in capitalist societies are marinated in the market to the extent that our religion, friendship, concept of self and understanding of morality are deeply influenced by the means through which we acquire necessities is obviously provocative.[44] Several contemporary social theorists have used this notion as a point of departure for analyzing what we Americans value in an "intangible sense."[45] Following the publication of his seminal work in 1924, Pashukanis formed with several proteges an informal "commodity exchange school of law," the mission of which was confirmation of his theories by historical analysis.[46] Stalin's liquidation of Pashukanis in 1937 along with many other members of the legal elite cut short these efforts.

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40. C. Varga, The Place of Law in Lukács' World Concept 161 (1985). Professor Radin notes that universal commodification "assimilates personal attributes, relations, and desired states of affairs into the realm of objects. Universal commodification implies that all things can and should be separable from persons and exchanged through the free market, whenever some people are willing to sell and others are willing to buy." Radin, supra note 39.

41. E. Pashukanis, supra note 31, at 83.

42. Id. at 151. ("Man as a moral subject, that is a personality of equal worth, is indeed no more than a necessary condition for exchange according to the law of value.") ("At the beginning of the seventeenth century [the term] individual was first applied to human beings to denote a single person as opposed to society or the family, and not until Tocqueville's *Democracy in America* do we get the word individualism.") See also J. Appleby, Capitalism and a New Social Order 15 (1984).

43. E. Pashukanis, supra note 31, at 118.

44. G. Luk/gacs, supra note 30, at 93; E. Pashukanis, supra note 31, at 83; K. Marx, supra note 29, at 321.

45. Radin, supra note 39 at 167-68. See also reponses by Mack, Dominos and the Fear of Commodification; Lane, Market Choice and Human Choice; Narveson, The Justice of the Market: Comments on Grey and Radin, all in Nomos XXXI, Markets and Justice (1989).

46. E. Pashukanis, supra note 31, at 14-15; R. Sharlet, Pashukanis and the Commodity Exchange Theory of Law, 1924-1930 (unpublished Ph.D. dissertation); Z. Zile, Ideas and Forces in Soviet Legal History, 235-36 (1970).

In this article I propose to take up this torch and apply Pashukanis' theory to the creation of a modern form of property, the right of publicity. As an object of analysis the right of publicity is superior to land in several respects. The commodification of land was a fitful process, persisting several hundred years. In contrast, the right of publicity has developed entirely during this century. Second, the economic environment of the commodification of land encompasses the whole history of capitalism. The motivations of the significant actors in this process and even the consequences of their actions will remain speculative until they are carefully analyzed in a forum substantially larger than a traditional law review article. The right of publicity, on the other hand, is entirely the creature of modern judges who often express their understanding of the relation of law to the market quite articulately. Consequently these judicial opinions constitute a sort of debate on the propriety of commodifying the persona. Finally, the economic and social context of the development which we are examining: the use of professional models, technical advances in photography, lithography and sound reproduction, are most accessible to us although historians of advertising must still discover and analyze the social attitudes which accompanied these advances. For example, our understanding of the commodification of persona would be enhanced if we knew whether early twentieth century American society considered professional models to be prostitutes or respectable business people.

Early Thoughts on the Right of Persona

Although French scientists invented photography in the first third of the nineteenth century, the legal community did not turn its attention to the issue of caption and reproduction of a photographic image until much later. In 1869 the author of a brief note in the American Law Register reported that he had heard a case in Europe in which a woman of great beauty recovered damages for the reproduction of her image without consent. Lacking any official report of the case, the author was forced to speculate on its holding. "Special damage may have formed the basis of it; but it cannot be doubted, that had there been none, her right to control the market of her own beauty could not have been denied her by any court . . . ."[47] The author wonders "whether there was not a violation of a sort of natural copyright, possessed by every person of his or her own features . . . ."[48]

Had the author of the note obtained a report of the case, he might have discovered rather the true ground of the holding was a breach of

47. The Legal Relations of Photographs, 8 Amer. L. Reg. N.S. 1,8 (1869).
48. Id.

contract or violation of confidence, that is the reproduction and sale of a photograph which the defendant had taken at the plaintiff's request. One of the first reported English cases involved the reproduction in breach of confidence of a photograph taken with the plaintiff's consent.[49] In the course of oral argument Lord North asked plaintiff's counsel whether the person who made the photograph might sell it "if the negative likeness were taken on the sly." Counsel replied, "In that case there would be no contract or consideration to support a contract." And, consequently, there would be no legal wrong.

That English case and a handful of similar proceedings were the foundation of *The Right of Privacy*, the seminal article of Warren and Brandeis.[50] Although the holding in each of these cases ostensibly lay on breach of contract or trust, the authors maintained that invasion of privacy was the true basis of recovery.[51] They describe privacy as a "right of property."[52]

Warren and Brandeis were probably wrong about the actual ground of these English decisions.[53] Attorneys for the plaintiffs never claimed to rest their petitions on a right of privacy or property rights in one's features, but upon traditional grounds such as improper publication of photographs which the defendant held in trust.[54] Moreover, even if the true ground of these decisions were invasion of privacy, Warren and Brandeis were incorrect to describe this novel concept as a right of property. Recovery, they emphasize, is based on mental suffering, not on mere trespass.[55] Thus, if the right which they espouse existed, it was vindicated by tort, not property law.

The consensus of academic opinion opposed the recognition of a right of privacy regardless of whether tort or property was its point of departure. A student note in the Columbia Law Review rejected the notion of a cause of action in tort observing, "there are many impertinent and disagreeable things which one may suffer from another that do not amount to legal injuries such as courts may redress."[56] Moreover, the student emphatically denied the application of property law to this type

49. Pollard v. Photographic Co., 40 Ch. D. 345 (1888).

50. Warren and Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193 (1890).

51. Id. at 205.

52. Id. at 209.

53. Hadley, The Right of Privacy, 3 Northwestern L. Rev. 1 (1895).

54. In the most important of these cases, counsel for the Queen maintained, "The interference of this court is not asked for on grounds of decorum or good taste, but upon the general principle that this court will protect every person in the free and innocent use of his own property and will prevent anyone from interfering with that use to the injury of the owner." See Prince Albert v. Strange, 2 DeG. & Sm. 652 (1849) cited in Hadley, supra note 53.

55. Z. Zile, supra note 46, at 212-13.

56. Note, The Right of Privacy, 2 Col. L. Rev. 437, 439 (1902).

of injury. His analysis is quoted at length because it expresses so completely the sentiment of the times that the human likeness may not be a commodity.

> We may discard entirely the suggestion that a lady has anything in the nature of a property right in her form or features that is invaded by the circulation of her picture . . . A woman's beauty, next to her virtues, is her earthly crown, but it would be degradation to hedge it about by rules and principles applicable to land and chattels.[57]

Commentators on the other side of the Atlantic expressed the same view.[58]

A survey of case law from the turn of the century demonstrates that plaintiffs who objected to the use of their name or likeness for advertising purposes usually lay their claim on embarrassment, humiliation, emotional distress or discomfort. Some courts were unwilling to grant relief even in light of such injury; but the presence of evidence of actual harm in the pleadings and testimony indicate that plaintiffs were not claiming a right to exclude others arbitrarily from the use of their persona. Although there were exceptions, relief usually sounded in tort.

Several early cases denied relief altogether. In one instance parents sought damages for the sale of photographs of their child.[59] The court refused recovery, stating "the law does not take cognizance of, and will not afford compensation for, sentimental injury, independent of redress for a wrong involving physical injury to person or property." An English court denied relief on similar grounds upon facts which seem much more favorable to recovery. The plaintiff, a physician, alleged that defendant had used his name and a fictitious professional endorsement to advertise an elixir.[60] The doctor's claim for damages relied upon humiliation and embarrassment as well as the notion that the defendant's advertisement created the false impression that the plaintiff had done something which respectable professionals scrupulously avoid: sell his name. The court denied an injunction inasmuch as the advertisement did not injure the doctor's reputation or property.

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57. Id.

58. "We believe that most generally received opinion in the possession to be that the unwilling patient of a 'snapshotter' sustains no injury, nor are his rights violated even by an exhibition or sale of the photograph so taken." The Ubiquitous Photographer, The Solicitors' Journal and Weekly Reporter, 504, June 2, 1917.

59. Murray v. Gast Lithographic & Engraving Co., 8 Misc. Rep. 36, 28 N.Y.S. 271 (1894).

60. Dockrell v. Dougall, 78 L.T.R. 840 (Q.B. 1898) ("Dr. Dockrell says: Nothing has done his gout so much good.").

At about the same time the Supreme Court of Michigan rejected the doctrine of privacy in a proceeding which objected to the defendant's use of his name and photograph of a deceased politician to advertise cigars.[61] The court's reasoning indicates that the judge could not distinguish between the use of another's name for trade or advertising and the use of his name to christen an infant. "A disreputable person or criminal may select the name of the most exemplary for his child, or for his horse or dog or monkey. We have never heard this questioned. No reason occurs to us for limiting the right to apply a name, though borne by another person, to animate objects."[62]

The hypothesis of this article is that commodification of name and likeness had not advanced sufficiently at the turn of the century for judges to conceive of persona as a "thing." The defendant had not taken any tangible property of the plaintiff or deprived him of anything of value. Having no experience with modern advertising, the judges did not consider the use of another's name to be a commercial transaction, nor did they imagine that any of the plaintiffs had been deprived of the opportunity to market their personae. Such opportunities were practically nonexistent in those days.[63]

The most important of this series of cases arose in New York in 1902.[64] The defendant made and sold lithographs of the plaintiff's likeness as an advertisement for flour. The plaintiff's allegations clearly sound in tort, not property: her family and friends recognized her features. She was humiliated, suffered in body and mind and was confined to bed. There is no allegation that the plaintiff had been deprived of a commercial opportunity. (Indeed the young lady would probably have been appalled by such a suggestion.) Nor is there any hint that the defendant was unjustly enriched or had taken something free of charge for which advertisers usually pay. The court denied recovery, noting that "equity has no concern with the feelings of an individual."[65] The court distinguished each of the cases which Brandeis and Warren had cited in support of a right of privacy, finding that all concerned breach of trust or violation of a plaintiff's property right in particular photographs. The following year the New York legislature

61. Atkinson v. John E. Doherty & Co., 80 N.W. 285 (Mich. 1899). "[W]e are of the opinion that Col. John Atkinson would himself be remediless, were he alive . . . ."

62. Id.

63. One nineteenth century case opined that "a private individual has a right to be protected in the representation of his portrait in any form; [and] that this is a property as well as a personal right . . . ." The court denied recovery, holding that the plaintiff, a well-known man, had in effect dedicated his features to the public. Corliss v. E.W. Walker Co., 64 F. 280, 281-82 (Mass. 1894).

64. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).

65. Id. at 444.

enacted a law to prevent the unauthorized use of the name or picture of any person for the purpose of trade.[66]

In the ensuing years courts began to grant recovery for this type of conduct, but generally rested their holdings on tortious harm to the plaintiff. As one court said, "if the right of privacy exists and has been recognized by law, it must be a personal tort right."[67] The Supreme Court of Georgia located a tortious wrong simply in interference with the plaintiff's seclusion;[68] but most cases involved risk of more serious injury. When a commercial enterprise used Thomas Edison's name, likeness, and a forged certificate of authenticity to promote its product, a New Jersey court found a tortious wrong in a false statement which exposed the great inventor to the risk of pecuniary liability.[69] Similarly, the Supreme Court of Kansas sympathized with a young woman who had become the object of gossip after the defendant secretly obtained and used her photograph to advertise its dry goods store.[70] The young lady presented the testimony of her neighbors to show the adverse affect of the publicity on her reputation.

Although Thomas Edison and the Kansas ingenue obtained their judgments on the basis of financial or emotional injury, both cases contain a hint of recognition that one's persona may have commercial value. One source of embarrassment for the young lady was the widespread belief among her acquaintances "that she had for hire permitted her picture to be taken and used as a public advertisement."[71] The judges recognized the existence of a market for this commodity, but understood that it was not a market which ladies would enter. The New Jersey court also wondered whether Edison's name and likeness were not his property. Admitting that he could find no support in the cases for such a holding, the judge ruminated, "it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner . . . ."[72]

In 1909 the Kentucky Court of Appeals also recognized the beginnings of a market in individuals' names and affirmed that polite society did not participate in this commerce.[73] When Doan's Kidney pills pub-

66. § 50(1) N.Y. Civil Rights Laws, Ch. 132, p. 308 (1903).

67. Henry v. Cherry & Webb, 73 A. 97, 102 (R.I. 1909). The court found no basis for recovery in tort either.

68. Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905). "[W]e venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability. . . . " Id. at 81.

69. Edison v. Edison Polyform Mfg. Co., 67 A. 392 (N.J. Chan. 1907).

70. Kunz v. Allen, 172 P. 532 (Kans. 1918).

71. Id.

72. Supra note 69, at 394.

73. Foster-Milburn Co. v. Chinn, 120 S.W. 364 (Ky. App. 1909).

lished the plaintiff's likeness with an allegedly false endorsement, the victims sued for libel. As part of his evidence the plaintiff showed the existence of a scale of prices for endorsements of this sort, not because he sought quasi-contractual compensation, but because "this proof would tend to show that persons who knew of the custom of paying for such cards might conclude that the plaintiff had sold his signature."[74] The court determined that he might recover on any of three grounds: invasion of privacy, false endorsement, or public ridicule.

The first case to permit recovery on the plaintiff's right to compensation for the use of a facial likeness was decided two years later in Missouri.[75] This opinion was also the first to recognize the legitimacy of commercialization of the persona. The opinion deserves to be quoted at length to show the evolution of judicial reasoning.

> One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his own profit, and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?[76]

The Advertising Market

A brief excursion into the history of advertising demonstrates that pictorial and representational graphics and celebrity endorsements increased considerably in the period 1890 to 1930. Advertisers repeatedly pushed back the ethical frontiers of their trade, expanding public tolerance for conduct which had been scandalous not long before. In the process the advertising community created a legitimate market for items such as name and likeness which had previously been out of commerce. The rapid evolution of legal doctrine during this period demonstrates the growing acceptance of judges for the notion that the persona might be a commodity and the individual's right to exclude others from his name and likeness was well established by the second decade of this century. In later years the further expansion of this market encouraged judges to endow the persona with other characteristics of property: alienability and heritability.

Most newspapers did not employ pictorial advertising until the close of the nineteenth century.[77] Some of the first pictorials were billboards

74. Id. at 366.
75. Munden v. Harris, 134 S.W. 1076 (Mo. App. 1911).
76. Id. at 1078.
77. E. Turner, The Shocking History of Advertising! 196-97 (1953).

in Paris featuring the art of Toulouse-Lautrec. When this form of promotion reached Britain about 1887, critics greeted the phenomenon with cries of "degradation of art!" According to historians of advertising, artists regarded the possibility that their work might appear on billboards with distress.

> Yet what could they do, apart from choosing subjects which could conceivably be used to further the sales of soap? If there was a falling-off in the number of nudes at the Royal Academy of 1890, the reason must be that artists were apprehensive lest their visions of Aphrodite be posted up piecemeal on gable ends, before ribald mobs, with a legend "So Clean."[78]

Within the next decade the editorial standards of newspapers began to allow graphic advertising despite protests of "typographical impropriety."[79] An English critique moaned that "The *Times* itself is ready . . . to clothe advertisements in type which three years ago would have been considered fit only for street billboards."[80]

Advances in lithographic technology stimulated the use of pictorial advertising. Frederick Ives obtained at least seventy patents including those for reproducing three color-half tones.[81] The first color insert in a U.S. magazine—advertising Pears soap—appeared in 1896.[82]

Then came what was regarded as a flood of illustrations, the human character trademark being an early and effective use of the new aid.[83] Advertising copy began to feature pictures of real people *in lieu* of stereotyped artistic conceptions of ideal types. Merchants chose models to enliven their ads when advances in photo-electric engraving reduced the costs of such displays.[84] Entrepreneurs organized professional modeling agencies to take advantges of this trend. Beatrice Tonneson, a pioneer in the use of live models offered "beautiful and fascinating women, handsome men and pretty, bewitching children."[85] Contemporaries marveled at advertisements for the Chicago, Burlington and Quincy

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78. Id. at 153-54. In the 1880's advertisers in England began to purchase paintings by famous artists to illustrate their ads.

79. Id. at 196.

80. Id.

81. F. Presbrey, The History and Development of Advertising 386 (1929).

82. Id. at 358.

83. Id. at 356.

84. R. Hower, The History of an Advertising Agency: N.W. Ayer & Son at Work, 1869-1949, 303 (1949).

85. E. Turner, supra note 77, at 172.

Railroad in which Tonneson models filled well-appointed dining cars. Yet despite this explosion in the use of live models, the industry did not employ professional models to sell underwear until the 1920s.[86]

Of course, promoters continued to capture the photos of unwilling models as well. Newspaper accounts of the complaints of these unconsenting subjects generally adhere to the same pattern which the litigation revealed: in the early years the victims were embarrassed by the ads, later they claimed compensation for services. President Theodore Roosevelt objected to the city of Spokane's use of his portrait to promote the Lewis and Clark Trail in 1905. A representative of the chamber of commerce expressed the opinion that the city should comply "although there is no law compelling the recall of the booklet."[87] Even more illustrative is the "mental anguish" which a local beauty queen suffered when a picture she had submitted to the beauty contest later appeared in an advertisement for a patent medicine.[88] She "began to notice . . . that some of her friends . . . were looking at her with pitying faces . . . ."

The licensing on one's name and likeness for advertising purposes bore some stigma as late as the 1920s. The friends of John Philip Sousa "made sport" of the great composer when the manufacturer of a three-cent cigar adopted his likeness as its trademark.[89] "Many of Sousa's friends . . . saw the advertisement and believed the plaintiff had sold his name and picture for use in connection with the advertisement." Sousa was particularly incensed that his portrait graced a *cheap* cigar.

Sousa's reticence was not typical of inadvertant models in the 1920s. Young ladies who might have "taken to bed" in humiliation at the turn of the century at the sight of their face on a flour ad were now avidly negotiating these commercial transactions. One newspaper headline of the period proclaimed, "Brooklyn Girl Asks $25,000—Wanted Only $25 Originally."[90] The story related that the plaintiff, another beauty queen, had refused a five dollar fee for her likeness, "though she had been willing originally to accept $25 for her rights to the picture." At about the same time a demure eighteen year-old housewife recognized her own countenance kneading dough on a poster.[91] She sought damages of $50,000 for the use of her likeness without consent. The young lady pled only her right to compensation—no embarrassment or humiliation. Society no longer viewed these transactions as quasi-illicit.

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86. Id. at 225-26.
87. New York Times, July 26, 1905, at 1, col. 2.
88. New York Times, Aug. 21, 1907, at 7, col. 3.
89. New York Times, May 23, 1924, at 2, col. 4.
90. New York Times, Jan. 25, 1928, at 25, col. 6.
91. New York Times, Dec. 9, 1926, at 25, col. 6.

Enterprising people in business organized to take advantage of the opportunities created by these new social mores. A Chicago firm, Famous Names, Inc. claimed a stable of stage and screen stars willing to promote any product for a price.[92]

> With the star's endorsement . . . the advertiser may have a specially posed picture of the celebrity and the exclusive right to that name against all competitors.

The director of one such firm responded to suspicion that celebrities were insincerely selling their names, boasting, "No star endorses any product that he or she does not use. There is no misrepresentation."[93] An article on "The Testimonial Game" cast doubt on these claims, reporting that "the advertiser may specify the poses he desires and . . . the endorsement signed by the star can be of your own dictation."[94]

By 1930 skepticism about the authenticity of these endorsements became widespread, fueled by newspaper reports that non-smoking celebrities were endorsing cigarettes.[95] The Federal Trade Commission announced an investigation of the business of celebrity endorsements with particular attention on the athletic market. The FTC insisted that the merchants disclose the payment of compensation for endorsements.[96] In response manufacturers adopted a code of conduct stating that they would no longer claim that athletes whose names appeared on products had designed them and they would disclose the existence of any arrangement under which a team, league or player used their product for pay.[97]

One of the covenants in this code of conduct recognized that a firm may acquire "exclusive property rights or good will" in the name of an athlete. Members agreed not to interfere willfully in a contractual arrangement between a competitor and any athlete "where the effect of the interference would be to dissipate the good-will of the competitor in the use of the name." This covenant gave effect privately to a feature of persona which the law did not recognize until the 1950s: the right to assign exclusive rights to a celebrity's name. During the first half of this century a contract for the use of a celebrity's name merely bound the star not to sue. It was not an assignment affecting third parties. Legal recognition of effective assignment of celebrity persona was the next important step in the characterization of this form of property.

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92. New York Times, Nov. 9, 1926, at 15, col. 7.
93. New York Times, Nov. 10, 1926, at 20, col. 4.
94. *Id.*
95. E. Turner, supra note 77, at 241.
96. New York Times, Apr. 20, 1930, Sec. 2, at 7, col. 6.
97. New York Times, May 8, 1930, at 15, col. 2.

After 1930 the unwilling subjects of photographic advertisements rarely based their claim for damages on embarrassment.[98] Cases recognizing the commodification of persona are too common to discuss individually. A sample of the language in which judges described this right will illustrate the point. An Indiana tribunal agreed with the petition of an optician who alleged that he had "a property right in his personal likeness and its use by the appellant . . . made its future use to him entirely worthless for advertising purposes . . . ."[99] Another litigant, who had spent more than $1.5 million dollars to publicize his own likeness and customarily earned five thousand dollars for endorsements, brought suit against a carpet company for unauthorized use of his name.[100] The court agreed that the plaintiff's persona was "a valuable commercial commodity." Such use as the defendant had made of his likeness "is in effect a theft of a valuable property right . . . ."[101] A third panel held that the golfer Ben Hogan "has an enforceable property right in the commercial value of his name and photograph . . . ."[102]

Rounding Out the Right of Persona

In view of this impressive body of authority recognizing that the persona had become a form of property, astute observers might have

98. Eick v. Perk Dog Food Co., 106 N.E.2d 742 (Ill. App. 1952) is exceptional, perhaps because of the nature of the product.

99. Continental Optical Co. v. Reed, 86 N.E. 2d 306 (Ind. App. 1949).

100. Rosenberg v. Lee's Carpet & Furniture Warehouse Outlet, 363 N.Y.S.2d 231 (Sup. Ct. 1974).

101. Id. at 233.

102. Hogan v. A.S. Barnes & Co., Inc., 114 USPQ 314 (Pa. Ct. Comm. Pleas. 1957). "The unauthorized use of another's name and picture can no more be countenanced by the law then can the illegal appropriation for profit of any form of another's property." Spahn v. Julian Messner, Inc., 250 N.Y.S.2d 529 (S. Ct. N.Y. 1964).

Considering whether a celebrity who never endorsed products could recover damages from a magazine which used his name without permission, a New York court compared persona to land: "If the owner of a Blackacre decides for reasons of his own not to use the land but to keep it in reserve he is not precluded from prosecuting trespassers." Grant v. Esquire, 367 F. Supp. 876, 880 (S.D.N.Y. 1973). Noting that a name may acquire "very substantial value" a Massachussets court concluded that "rights of a pecuniary nature have been created which partake of the elements of property rights . . . ." Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358, 361 (D. Mass. 1934). Ettore v. Philco Television Broadcasting Corp.; 229 F.2d 481 (3d Cir.), cert. denied, 351 U.S. 926, 76 S. Ct. 783 (1956); O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941), cert. den., 315 U.S. 823, 62 S. Ct. 917 (1942); Sherman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401 (E.D. Pa. 1963); Chaplin v. National Broadcasting Co., 15 F.R.D. 134 (S.D.N.Y. 1953); Flake v. Greensboro News Co., 195 S.E. 55 (N.C. 1938); Canessa v. J.I. Kislak, Inc., 235 A.2d (Super. N.J. 1967); Treece, Commercial Exploitation of Names, Likeness and Personal Histories, 51 Tex. L. Rev. 637, 651 (1973); Prosser and Keeton, Torts 854 (5th ed. 1984). Gordon, Right of Property in Name, Likeness, Personality, and History, 55 Nw. U.L. Rev. 553 (1960); Comment, Transfer of the Right of Publicity: Dracula's Progeny and Privacy's Stepchild, 2 UCLA L. Rev. 1103 (1975).

forecast that this new legal animal would soon sprout the other modern characteristics of commodities: alienability and heritability. The only restraint on this evolutionary process after 1930 was the inappropriate analogy of persona to trademarks which, of course, are not vendible in gross.[103] The analogy is unfortunate because trademarks are not property but devices to identify goods with their manufacturer.[104] The persona performs no such function; it is merely an ornament in the advertisement.

One student author drew this conclusion as early as 1914. The litigation which was the basis of the student comment involved two companies, each of which claimed to hold an assignment of the right to use the likeness of an actress in posters.[105] The court held that the right of privacy is unassignable. The shrewd student author perceived the beginnings of a social development which his elders did not notice for another forty years: the distinction between privacy and publicity.

> Generally, one's interest that his name or picture not be published or broadcast is an interest of personality. But if the owner has treated it as of pecuniary value, or if by virtue of his profession or business it has become such, privacy ceases to be the dominant element, for there is now the distinct interest of substance that no one interfere with that name or picture to detract from its value.[106]

Values become property by entering the market as commodities. The actress reified her likeness, transformed it into a thing, by contractually transferring exclusive rights to use it. According to the hypothesis which Pashukanis proposed, once values become objects in commerce, the law should protect the purchaser by shielding the commodity from trespass. When finally the legal system did come around to this point of view, judges sometimes distinguished between celebrities who had dealt with their persona as a commodity and those who had not to determine whether the right of publicity survived the star's death.

Many subsequent cases which raised the issue of heritability actually concerned privacy, an interest in seclusion, rather than the commodity of celebrity persona. Courts properly held that parents had no standing to raise the right of privacy of their deceased children as a basis for

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103. Callman, Unfair Competition, Trademarks, and Monopolies § 78.1, at 418 (3d ed. 1969).

104. Id. § 65, at 1-2. The existence of a competitive relationship between the plaintiff and defendant is ordinarily a prerequisite to trademark infringement. Id. § 67, at 51.

105. Pekas Co. v. Leslie, 52 N.Y.L.J. 1864 (N.Y. S. Ct.).

106. Note, Possible Interest in One's Name or Picture, 28 Harv. L. Rev. 689, 690 (1914).

enjoining publication of their photos in news stories.[107] In other instances the refusal of the legal system to recognize a heritable right of publicity could be justified on the grounds that the deceased celebrities never dealt with their personae as objects of commerce.[108]

The most important of those cases which denied the ancillary characteristics of property to the right of publicity was decided in 1935.[109] The opinion is instructive because the author articulates ethical objections to the commodification of persona, objections similar to those which might be offered today to oppose commercialization of surrogate motherhood, fetal tissue or other values which are now out of commerce.

> A famous batsman . . . might have difficulty in keeping his name and likeness from respectful use by others. But if they be his property in a sense, they are not vendible in gross so as to pass from purchaser to purchaser unconnected with any trade or business. Fame is not merchandise. It would help neither sportsmanship nor business to uphold the sale of a famous name to the highest bidder as property.[110]

But the ideology of the market encourages the belief that aspects of ourselves once considered entirely personal and out of commerce on grounds which law professors like to call "policy" may become objects of exchange. Once the legal system has recognized that a value previously out of commerce has become property, academic commentators often castigate the old jurisprudence as "hidebound," "impractical." These commentators fail to recognize the influence of the market in molding

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107. Abernathy v. Thornton, 83 So. 2d 235 (Ala. 1955); Milner v. Red River Valley Pub. Co., 249 S.W.2d 227 (Tx. App. 1952). Schuyler v. Curtis, 42 N.E. 22 (N.Y. 1895) held that the heirs of a distinguished philanthropist had no standing to challenge creation of a statute in her honor. Maritote v. Desilu Productions, Inc., 230 F. Supp. 721 (N.D. Ill. 1964), aff'd 345 F.2d 418 (7th Cir.), cert. den., 382 U.S. 883, 86 S. Ct. 176 (1965) dealt with a movie about the late Al Capone. Literary and cinemagraphic biography are usually outside the right of privacy on first amendment grounds. See also, Donohue v. Warner Bros. Pictures Distributing Corp., 272 P.2d 177 (Utah, 1954).

108. Guglielmi v. Spelling-Goldberg Productions, 603 P.2d 454 (Ca. 1979); Lugosi v. Universal Pictures, 603 P.2d 425 (Ca. 1979) (a dissent by three members of the court argued that persona should have all attributes of property.). Schumann v. Loew's Inc., 135 N.Y.S.2d 361 (S. Ct. 1954). The *Lugosi* case implies that the right of publicity might have been heritable had the actor dealt with it as a commodity in life.

109. Hanna Mfg. Co. v. Hillerich & Brodsky Co., 78 F.2d 763 (5th Cir.), cert. den., 296 U.S. 645, 56 S. Ct. 248 (1935). See adverse comments, Note, Trade-Marks and Trade Names-Right of Privacy-Action by Assignee of Baseball Player's Name Against Use by Competing Ball Manufacturer, 36 Col. L. Rev. 502 (1936); Note, Unfair Competition-Rights Under Contract Giving Exclusive Advertising Use of Famous Name, 49 Harv. L. Rev. 496 (1936).

110. 78 F.2d at 766.

their own ideas. They praise the new jurisprudence as "intuitive," "down-to-earth," unconstrained by "morality,"[111] without recognizing that the faculty of "common sense" which renders these holdings valid is nothing more than the dominant ideology of the day. In the process of shaping our notions of "common sense" the market also modifies our concept of morality.

The case which first articulated this "down-to-earth" notion that the right of persona was assignable came from the Second Circuit in 1953.[112] Like the opinion which held that "fame is not merchandise," this matter also involved professional athletes. Absent from the opinion is any discussion of the moral impropriety of commercialization. An altogether different perception forms the court's opinion—that many celebrities "would feel sorely deprived if they could no longer receive money for authorizing advertisements . . . ."[113]

Subsequent courts recognized the "purely commercial nature" of the right of publicity,[114] and later cases which took up these issues omitted any consideration of the ethical problems of commodification.[115] The logic inherent in characterizing this form of value as "property" led judges to hold that the right of persona was also heritable. As one judge candidly remarked, "There appears to be no logical reason to terminate this right upon death of the person protected. It is for this reason, presumably, that this publicity right has been deemed a 'property right.'"[116] One federal district judge revealed how far the process of reification may influence our sense of reality when he proclaimed that Elvis Presley's persona had "attained a concrete form" because the entertainer marketed it during life.[117]

The culmination of this line of jurisprudence protected the persona of Rev. Martin Luther King from trespass although the civil rights leader

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111. S. Halpern, The Law of Defamation, Privacy, Publicity and "Moral Rights" 515 (1988).

112. Haelen Laboratories v. Topps Chewing Gum, 202 F.2d 866 (2d Cir.), cert. den., 346 U.S. 816, 74 S. Ct. 26 (1953).

113. Id. at 868.

114. Price v. Hal Roach Studios, 400 F. Supp. 836, 844 (S.D.N.Y. 1975).

115. Factors, Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278 (2d Cir. 1981), cert. den., 456 U.S. 927, 102 S. Ct. 1973 (1982); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir.), cert. den., 440 U.S. 906, 99 S. Ct. 1215 (1978); Factors Etc., Inc. v. Pro Arts, Inc., 541 F. Supp. 231 (S.D.N.Y. 1982); Factors Etc., Inc. v. Pro Arts, Inc., 496 F. Supp. 1090 (S.D.N.Y. 1980); State ex rel. Elvis Presley Int'l Memorial Found. v. Crowell, 733 S.W.2d 89 (Tenn. App. 1987); Commerce Union Bank v. Coors, 7 Med. L. Rep. 224 (Tenn. Chan. Ct. 1981).

116. *Price*, 400 F. Supp. at 843. "A *logical extension* of the concept that misappropriation of one's name or public personality is a compensable trespass to property has been the recognition of the so-called 'right of publicity.'" Uhlaender v. Henricksen, 316 F. Supp. 1277, 1281 (D. Minn. 1970) (emphasis added).

117. Estate of Presley v. Russen, 513 F. Supp. 1339, 1355 (D.N.J. 1981).

had never commercialized his name or likeness in life.[118] The persona is property, the court said, irrespective of whether its owner treats it as a commodity. In its reasoning the court turned the ethical obligations to commercialization of one's persona on their head. Whereas judges a half century ago had objected to the deleterious effect of merchandizing on society,[119] this panel ruled that denying the right of publicity to one who did not commercialize his name during life would place "a premium on exploitation."[120] The persona of the martyred civil rights leader should be entitled to the same protection as that of a professional model.[121]

The Content of Persona

Characterization of a value as property does not solve the question of content of this right. For example, societies which permit private ownership of land have reached diverse conclusions on the proprietor's right to subsurface minerals[122] and riparian claims.[123] Ownership of the soil may omit these rights from its content without being for that reason any less property. Once the legal system has identified a value as property, the logic inherent in the classification encourages expansion of the right. In the previous section I showed how this expansion occurred vertically to endow the persona with heritability and alienability. The legal system has also expanded the right of publicity horizontally to include manifestations of one's personality other than name and likeness.

Two considerations drive this expansion. The first is commercialization of other aspects of persona. The saturation of the airwaves with celebrity performances increases public awareness of the dramatic style, mannerisms, intonation or voice of a star. Public recognition of these additional features of the persona permits advertisers to imitate these traits, to create the impression that the star is performing and to achieve the same or greater promotional benefit than they would obtain by using the celebrity's name or likeness. Moreover, judges recognize that celebrities almost invariably receive compensation for performing in commercials. Bargaining for performance rights creates a commodity of the

118. Martin Luther King, Jr., Center for Social Change Inc. v. American Heritage Products, Inc. 296 S.E.2d 697 (Ga. 1982).

119. See cases cited supra note 109.

120. 296 S.E. 2d at 705-06.

121. Id. at 700.

122. La. Civ. Code art. 490 states: "Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it." La. Civ. Code art. 490(1)(1990). Political Constitution of Mexico (1917) art. 27 provides that the nation owns all mineral deposits. Constitucion Politica Mexicana art. 27 (1969).

123. 5A, R. Powell & P. Rohan, Powell on Real Property, P 708[2][a] and [b].

elements of the performance. One who imitates the celebrity's identifiable performance style is trespassing upon that commodity.

> Why did defendants ask Midler to sing if her voice was not of value to them? Why did they studiously acquire the services of a sound-alike and instruct her to imitate Midler if Midler's voice was not of value to them? What they sought was an attribute of Midler's identity. Its value was what the market would have paid Midler to have sung the commercial in person.[124]

The second factor which encourages judges to expand the content of persona is their aversion to creating arbitrary distinctions. Elements of a celebrity's performance style,[125] a star's sobriquet[126] or mannerisms[127] are manifestations of a star's individuality as surely as their name and likeness. Consistency impels judges to include these attributes within the protected sphere. The only distinction which the courts have comfortably drawn to date is a line separating a celebrity's personal traits from his personal possessions. Although fans of a race-car driver might identify him by his automobile, the color, contour and decoration of his vehicle are not a manifestation of his talent.[128]

In contrast to those factors which encourage the expansion of the content of the right of persona, two considerations limit its development. The first is the familiar situation in which rights of property owners are limited by important competing claims. In some jurisdictions the rights of a shopping center to exclude others are circumscribed by rights of free speech.[129] The rights of a woman to obtain an abortion are limited after a certain point in the pregnancy by the rights of the unborn

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124. Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

125. Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962) protecting Bert Lahr's "creative talent, voice, vocal sounds and vocal comic delivery." But see Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973) denying protection to Shirley Booth's "timing, inflection, tone, or general performing style." See also Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 97 S. Ct. 2849 (1977) involving appropriation of the celebrity's performance itself.

126. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 836 (6th Cir. 1983). "[A]ppellee had appropriated Carson's identity" even though it did not use his name. Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129 (Wisc. 1979) protecting the nickname "crazy legs."

127. Lombardo v. Doyle, Dane & Bernbach, Inc., 396 N.Y.S.2d 661, 664 (App. Div. 2d Dept. 1977). "Guy Lombardo has invested 40 years in developing his public personality as Mr. New Year's Eve, an identity that has some marketable status." Groucho Marx Productions, Inc. v. Day and Night Company, Inc., 523 F. Supp. 485 (S.D.N.Y. 1981).

128. Bronson v. Fawcett Publications, 124 F. Supp. 429 (E.D. Ill. 1954).

129. See Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S. Ct. 2219 (1972); Hudgens v. NLRB, 424 U.S. 507, 96 S. Ct. 1029 (1976).

child.[130] In the case which we are considering the most important countervailing consideration is the first amendment. Courts long ago recognized that a celebrity's right of publicity does not preclude others from incorporating a person's name, features or biography in a literary work,[131] motion picture,[132] news or entertainment story.[133] Only use of the individual's identity in advertising infringes on the persona.

The other factor which may limit the expansion of protected celebrity traits is the private property rights of others who contribute to the performance. Usually copyright law protects these rights. Bela Lugosi's performance of Dracula is part of his persona only to the extent that a judge can disentangle his contribution to the role from those of Bram Stoker and the author of the screenplay.[134] In two cases courts have denied relief to celebrities whose performances were imitated on account of the contribution of authors to the stars' rendition.[135] A star has protected rights in a performance only to the extent that they add a substantial identifiable element to what existed before. The timing, inflection, tone and other distinctive characteristics of the performance must be the fruit of the celebrity's interpretive talents, not the product of the author's stage directions.

> O body swayed to music, or brightening glance,
> How can we know the dancer from the dance?[136]

Reification of the right of publicity has proceeded just as Pashukanis might have predicted: an interest protected by tort law became a commodity as it entered commerce, guarded first from trespass, then endowed with alienability and heritability. By hypothesis commodification should also explain how other forms of value have or will become property. Inventions and writings have become things in the relatively recent past. Many public officers were once private property—heritable and alienable—until modern times. Trade secrets were well on their way to becoming property until the Supreme Court ruled that states might not

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130. Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973).

131. Kline v. Robert M. McBride & Co., 11 N.Y.S.2d 674 (S. Ct. 1939).

132. Rogers v. Grimaldi, 695 F. Supp. 112 (S.D.N.Y. 1988).

133. Chaplin v. National Broadcasting Co., 15 F.R.D. 134 (S.D.N.Y. 1953).

134. Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Ca. 1979) (concurring opinion). See also Note, Lugosi v. Universal Pictures: Descent of the Right of Publicity, 29 Hastings L. Rev. 751 (1978).

135. Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711 (9th Cir. 1970), cert. den., 402 U.S. 906, 91 S. Ct. 1376 (1971); Booth v. Colgate-Palmolive Company, 362 F. Supp. 343 (S.D.N.Y. 1973).

136. W. Yeats, Among School Children, at. 8, lines 7-8.

protect them from trespass.[137] Surrogate motherhood may be in the process of commodification now. This essay is an invitation to others who may teach or write on these subjects to dispute or support the validity of the claims of the commodity exchange theory.[138]

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137. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 84 S. Ct. 704 (1964).
138. Lombardo v. Doy (cite unavailable).